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Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies

Bradford Mank
University of Cincinnati College of Law, brad.mank@uc.edu

ARTICLES

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BY BRADFORD C. MANK*

INTRODUCTION

Since President Reagan appointed him to the Supreme Court in 1986, Justice Antonin Scalia has led a revival of textualist statutory interpretation on the Court. Textualist judges often use traditional "canons" of statutory construction when interpreting a statute's text. While canons of construction can be useful in statutory interpretation, textualist judges selectively prefer clear-statement rules that favor states' rights and private economic interests, and usually narrow a statute's meaning. Clear-statement rules generally weaken legislative authority by ignoring a statute's probable purpose unless Congress makes a very clear statement in the text of its intent – for example, that it seeks to preempt state legislation.

On the other hand, textualist judges are less likely to invoke canons that promote at least some types of individual rights or, surprisingly, the interpretations of executive agencies. In part, this may be due to political bias on the part of many textualist judges. In addition, textualism as a methodology rejects indications of intent or purpose often found in legislative history Furthermore, textualist judges appear less likely to acknowledge that a statute is ambiguous and that it is appropriate to consider canons or agency interpretations that broaden statutory meaning.

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* Professor of Law, University of Cincinnati. B.A. 1983, Harvard University; J.D. 1987, Yale Law School. I wish to thank Professor Philip Frickey for his comments on an earlier draft. All errors or omissions are my responsibility

Professor Sunstein has proposed the most sophisticated modern approach to using canons, which he calls "interpretive principles," to address problems of statutory interpretation.[1] His model, however, offers only limited aid in how to choose among conflicting canons. Furthermore, his principles provide only a modest amount of guidance as to how broadly or narrowly to apply a canon in a given case. It probably is not possible to construct a model that answers all of these questions in every case.

This Article demonstrates that textualist judges, most notably Justices Scalia, Thomas, and, to a lesser extent, Kennedy, have applied some canons too aggressively, and slighted others. Textualist judges have overused clear-statement rules that narrow statutory meaning, especially as a means to promote federalism and states' rights. On the other hand, textualists have neglected canons that promote individual liberty or executive authority Because canons must be applied on a case-by-case basis and different canons can conflict, it is impossible to formulate one rule for how they should be applied. Nevertheless, the common textualist approach of selectively favoring some canons at the expense of others is inappropriate and courts need to strike a new balance in how they use canons.

Part I discusses the textualist approach to statutory interpretation and its critics. Part II examines the traditional "canons" of statutory construction and how modern textualist judges have approached their use. Part III shows that textualist judges often use clear-statement rules to narrow a statute's scope, especially to promote states' rights or private economic interests. Part IV suggests that textualist judges are often less vigorous about promoting canons that favor certain kinds of individual constitutional rights. Part V demonstrates that, contrary to the initial expectations of many commentators, textualist judges appear less likely to defer to executive agency interpretations of statutes. Part VI examines Professor Sunstein's interpretive principles, including the difficult questions of how broadly or narrowly to apply a canon and how to balance conflicting canons. This Article concludes that courts should rein in their use of clear-statement rules, but expand their use of canons that favor individual liberties or executive deference.

I. STATUTORY INTERPRETATION

There are three major or "foundationalist" theories of statutory interpretation: (1) intentionalism; (2) purposivism; and (3) textualism.[2]

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[1] *See generally* Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV L. REV 405, 462-505 (1989) [hereinafter Sunstein, *Interpreting Statutes*] (proposing interpretive principles for the regulatory state).

[2] *See* William N. Eskridge, Jr. & Philip P Frickey, *Statutory Interpretation As Practical Reasoning*, 42 STAN. L. REV 321, 324-25 (1990) [hereinafter Eskridge

While there are differences between the first two approaches, this Article will refer to both intentionalism and purposivism as nontextualist interpretation, and will treat textualism as a method largely separate from the other two theories. Part I will emphasize how textualist interpretation differs from nontextualist approaches.

A. Nontextualist Interpretation

Intentionalists traditionally examine both a statute's text and legislative history to determine the original intent of the enacting legislature.[3] By contrast, purposivism goes beyond the legislature's original intent to estimate the statute's spirit or purpose, because it may be difficult to determine original intent or because a court must apply a statute to circumstances that the enacting legislature did not foresee.[4]

& Frickey, *Statutory Interpretation*] (arguing the three major theories of statutory interpretation are "foundationalist" because "each seeks an objective ground ('foundation') that will reliably guide the interpretations of all statutes in all situations."); *see also* Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV 199, 211 n.46 (1996) (citing numerous articles on statutory construction); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 13-47 (1994) (discussing weaknesses of intentionalism, purposivism and textualism).

[3] *See* ESKRIDGE, *supra* note 2, at 14-25 (describing and criticizing intentionalism); John P Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 233, 298-99 (1990); Eskridge & Frickey, *Statutory Interpretation*, *supra* note 2, at 327; Watson, *supra* note 2, at 211-12. Articles by leading intentionalists include Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV 423, 424 (1988) ("In our view, public choice theory is consistent with a flexible, pragmatic approach to statutory construction, in which legislative intent plays an important role."); Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV 827 (1988); Kenneth Starr, *Of Forests and Trees: Structuralism in the Interpretation of Statutes*, 56 GEO. WASH. L. REV 703 (1988); Dwyer, *supra*, at 298 n.267 (listing Farber & Frickey, Posner, and Starr as leading intentionalist scholars).

[4] *See* ESKRIDGE, *supra* note 2, at 25-34 (describing and criticizing purposivism); Watson, *supra* note 2, at 212, 214-15; *see also* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1378-79 (William N. Eskridge, Jr. & Philip P Frickey eds., 1994) (the classic formulation of a purposivist approach to statutory interpretation). An example of purposivism is the conclusion by Massachusetts Supreme Judicial Court Chief Justice Oliver Wendell Holmes, Jr. that a statute requiring "written votes"

There are significant differences among modern intentionalists and purposivists regarding to what extent they would allow judges to reconstruct congressional intent or purpose when a statute's meaning is ambiguous or it is silent about a particular issue. If there are ambiguities or a "gap" in a statute, many purposivists try to construe the statute in light of the assumption that the legislature was acting for the public good rather than for some narrow interest group.[5] A possible problem with a broad purposivist approach is that the interpreter may be too likely to interject her own biases in ascertaining the intentions or purposes of Congress.

More recently, some scholars have proposed going beyond intentionalism or purposivism, especially in cases in which the enacting legislator did not anticipate new or changing circumstances.[6] Some proponents of "dynamic" statutory interpretation urge judges to reformulate statutes, especially those concerned with civil rights, in light of "public values."[7] Other scholars have proposed various modified versions of intentionalism or purposivism that emphasize the need for statutory interpreters to apply a "practical reason" that appropriately fits general or ambiguous language to specific contexts[8] or takes into account "how

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allowed the use of voting machines that used no paper at all because the general purpose of the statute was to prevent oral or hand voting. *See In re* House Bill No. 1,291, 60 N.E. 129 (Mass. 1901); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 267 (1990) [hereinafter POSNER, JURISPRUDENCE].

[5] *See* HART & SACKS, *supra* note 4, at 1378 (referring to "reasonable [legislators] pursuing reasonable purposes reasonably"); Philip P Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV L. REV 381, 407 (1993); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV 223 (1986) (stating that courts, in interpreting statutes, should not enforce "hidden-implicit" bargains favoring special interest groups, but rather should treat statutes as having a public meaning); Watson, *supra* note 2, at 212, 215. *But see* POSNER, JURISPRUDENCE, *supra* note 4, at 276-78 (arguing it is difficult for courts to know whether a legislature's purpose in enacting a statute was to serve the public interest or effect a compromise among interest groups).

[6] *See infra* notes 7-9 and accompanying text.

[7] *See* ESKRIDGE, *supra* note 2, at 148-51, Dwyer, *supra* note 3, at 299 n.273; *see generally* William Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV 1007 (1989) [hereinafter Eskridge, *Public Values*].

[8] *See* Eskridge & Frickey, *Statutory Interpretation*, *supra* note 2, at 322 n.3 ("By 'practical reason,' we mean an approach that eschews objectivist theories in favor of a mixture of inductive and deductive reasoning (similar to the practice of the common law), seeking contextual justification for the best legal answer among the potential alternatives."); Farber & Frickey, *supra* note 3, at 469 (proposing a

statutory interpretation will improve or impair the performance of governmental institutions."[9]

B. *Textualism*

1. *Premises of Textualism*

During the nineteenth century, courts abandoned their earlier emphasis on equity and statutory purpose, making legislative intent the primary focus of statutory interpretation.[10] Because it was often difficult to determine the actual intent of the enacting legislature, both English and American courts began to focus on the literal language, or, in other words, the "plain meaning" of the statutory text.[11] Justice Holmes was an early advocate of a textualist approach to statutory interpretation, arguing that courts should be concerned only with what Congress said, and not what it meant.[12] In

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"practical reasoning" approach to understanding legislative intent that would allow judges "as many tools as possible to help them in the difficult task of applying statutes"); Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 557-59 (1992) (criticizing formalist approaches to statutory interpretation, including textualism, and arguing in favor of a practical approach or Llewellyn's "situation sense," which involves "the ability to classify a situation in the most useful and appropriate manner," thus allowing one to examine a problem of statutory interpretation in light of statutory context or purpose, *id.* at 557).

[9] *See* Sunstein, *Interpreting Statutes*, *supra* note 1, at 466; *see generally* CASS SUNSTEIN, AFTER THE RIGHTS REVOLUTION 113-17 (1990) [hereinafter SUNSTEIN, AFTER THE RIGHTS].

[10] *See* Robert J. Martineau, *Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 GEO. WASH. L. REV 1, 6-7 (1993).

[11] *See* Bradley C. Karkkainen, *"Plain Meaning" Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV J.L. & PUB. POL'Y 401, 433 (1994); Martineau, *supra* note 10, at 7

[12] *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 41, 44 (1963); Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV L. REV 417, 419 (1899). On occasion, however, Justice Holmes went beyond his textualist theory to look at a statute's purpose. *See, e.g.*, *In re* House Bill No. 1,291, 60 N.E. 129, 130 (Mass. 1901) (holding that a statute requiring "written votes" allowed the use of voting machines that used no paper at all because the general purpose of the statute was to prevent oral or hand voting); POSNER, JURISPRUDENCE, *supra* note 4, at 267 (noting that Holmes' suggested method of statutory interpretation was whether it followed "the understanding of the normal English speaker").

United States v. Missouri Pacific Railroad Co.,[13] a 1929 case, the Supreme Court strongly endorsed the "plain meaning" rule: "[W]here the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended."[14]

Just eleven years later, however, President Roosevelt's appointment of several justices favorable to his New Deal led the Court in *United States v. American Trucking Ass'ns*[15] to essentially repudiate the plain meaning approach. It endorsed the consideration of legislative history and other nontextual sources in determining congressional intent even if a statute's text appeared to have a clear meaning: "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'"[16] By the early 1980s, the Court consulted legislative history in almost all its statutory cases, permitting Judge Patricia Wald to posit that "although the Court still refers to the 'plain meaning' rule, the rule has been effectively laid to rest."[17]

Since Justice Scalia joined the Supreme Court in 1986, however, his opposition to the use of legislative history and espousal of textualism has had a important impact on the Court.[18] He has had some success in convincing Justice Anthony Kennedy, who became a member of the Court in 1987, to favor a textualist approach to interpretation, although Justice Kennedy's approach has become less predictable in recent years,[19] and even

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[13] United States v Missouri Pac. R.R. Co., 278 U.S. 269 (1929).

[14] *Id.* at 278.

[15] United States v American Trucking Ass'ns, 310 U.S. 534 (1940).

[16] *Id.* at 543-44 (quoting, respectively, Boston Sand & Gravel Co. v United States, 278 U.S. 41, 48 (1928), and Commissioner v New York Trust Co., 292 U.S. 455, 465 (1934) (using the phrase "superficial inspection")).

[17] Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV 195, 195 (1983).

[18] *See* INS v Cardoza-Fonesca, 480 U.S. 421, 452 (1987) (Scalia, J., concurring) (advocating textualist approach to statutory interpretation); Gregory E. Maggs, *Reconciling Textualism and the* Chevron *Doctrine: In Defense of Justice Scalia*, 28 CONN. L. REV. 393, 397-98 (1996); *infra* notes 21-25 and accompanying text.

[19] *See, e.g.*, Public Citizen v Department of Justice, 491 U.S. 440, 472-77 (1989) (Kennedy, J., concurring). While initially he was Justice Scalia's closest ally on the Court, Justice Kennedy has in recent years been willing on some occasions to join opinions relying upon legislative history *See, e.g.*, Wisconsin Public Intervenor v Mortier, 501 U.S. 597, 610 n.4 (1991); Farber, *supra* note 8, at 546

greater success with Justice Thomas, who was appointed in 1991.[20] Numerous commentators have discussed the rise during the late 1980s and 1990s of what Professor Eskridge has termed a "new textualist" movement on the Court.[21] Largely because of Justice Scalia's influence, only a few of the Court's decisions during the early 1990s reviewed legislative history, and no majority opinion relied upon legislative history as a determinative factor.[22] Nevertheless, a majority of the Supreme Court has remained open to nontextualist interpretation, and Justice Scalia often files a concurring opinion if the majority includes an analysis of a statute's legislative history.[23] One commentator recently suggested that the Court is moving away from Justice Scalia's approach to textualism and that even Scalia himself has modified his textualist approach to look at a broader range of meaning of statutory language.[24] However, even that commentator concedes that Scalia's textualist approach continues to have a major influence on the rest of the Court.[25]

Textualists believe that interpreters should not focus on the highly subjective issue of the intentions of the enacting legislators, but instead should assess what the ordinary reader of a statute would have understood the words to mean at the time of enactment to ascertain a statute's "plain"

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n.76.

[20] *See* Thomas W Merrill, Essay, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351 (1994) [hereinafter Merrill, *Textualism*] (stating that Justice Thomas appears to share Justice Scalia's views about textualist interpretation); *infra* notes 176-84, 197-207, 242-48, 283-87 and accompanying text.

[21] *See* ESKRIDGE, *supra* note 2, at 120 (contrasting "Kennedy's lenient textualism" with "Scalia's dogmatic textualism"), *id.* at 226-34 (discussing and criticizing Scalia's "new textualism"); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV 621 (1990) [hereinafter Eskridge, *New Textualism*] (describing Justice Scalia's approach to statutory interpretation as the "new textualism"); Martineau, *supra* note 10, at 12; Thomas W Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 990-91 (1992) [hereinafter Merrill, *Judicial Deference*].

[22] *See* Maggs, *supra* note 18, at 398.

[23] *See* Karkkainen, *supra* note 11, at 401 ("Only Justices Anthony Kennedy and Clarence Thomas can be called adherents of Justice Scalia's plain meaning approach."); Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV 235, 263-64 (Supreme Court has continued in a limited way to use legislative history despite Justice Scalia's criticisms).

[24] *See* Solan, *supra* note 23, at 240, 269.

[25] *See id.* at 283; *see also infra* notes 197-207, 209-12, 231, 250-56, 322-26 and accompanying text.

meaning.[26] Textualists generally oppose both intentionalist and purposivist theories of statutory construction as giving the judiciary too great a role in deciding the meaning of a statute,[27] and argue that a statute's text alone provides the best evidence for interpretation.[28] Compared to traditional textualists, however, a new textualist such as Justice Scalia "examines not only the specific statutory language which is the subject of litigation, but the entire statute as reflected by other legislation enacted by the same legislature,"[29] and confirms that textual reading of the entire statute by "examination of the structure of the statute, interpretations given similar statutory provisions, and canons of statutory construction."[30] In *Green v. Bock Laundry Machine Co.*,[31] Justice Scalia's concurring opinion argued:

> The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and

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[26] *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring) (arguing judges should seek statutory meaning "most in accord with context and ordinary usage"); Merrill, *Textualism*, *supra* note 20, at 352 (stating new textualists seek an objective method to determine how an ordinary reader of a statute would have understood its words at the time of its enactment); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV 749, 750 (1995); *infra* notes 36, 45-50 and accompanying text.

[27] *See* Maggs, *supra* note 18, at 396-97; Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV 1175, 1176 (1989). *But see* ESKRIDGE, *supra* note 2, at 232-33 (criticizing Scalia's argument that textualism imposes more reliable restraints on judicial discretion).

[28] *See* SUNSTEIN, AFTER THE RIGHTS, *supra* note 9, at 113 (describing textualist view that "the statutory language is the only legitimate basis for interpretation"). *But see id.* at 113-17 (criticizing textualist statutory interpretation); ESKRIDGE, *supra* note 2, at 34-47, 230-34 (describing and criticizing textualism); Dwyer, *supra* note 3, at 298-99; Eskridge & Frickey, *Statutory Interpretation*, *supra* note 2, at 327; Watson, *supra* note 2, at 212-13.

[29] Robert J. Araujo, *The Use of Legislative History in Statutory Interpretation: A Look at* Regents v. Bakke, 16 SETON HALL LEGIS. J. 57, 73 (1992); *see* Eskridge, *New Textualism*, *supra* note 21, at 661-62 (citing Kungys v United States, 485 U.S. 759, 770 (1988), and United States v Fausto, 484 U.S. 439, 449-51 (1988)); Martineau, *supra* note 10, at 12.

[30] Eskridge, *New Textualism*, *supra* note 21, at 623-24; *see also* Martineau, *supra* note 10, at 12.

[31] Green v Bock Laundry Mach. Co., 490 U.S. 504 (1989).

> thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated - a compatibility which, by a benign fiction, we assume Congress always has in mind.[32]

Probably the most obvious difference between modern textualism and other schools of statutory interpretation is that textualists commonly oppose the use of legislative history when judges interpret statutory text.[33] Especially if a statute's text has a clear or "plain" meaning, textualists believe that it is unnecessary or improper for judges to examine either its legislative history or the legislature's implicit purposes in enacting the measure.[34] Textualists and other critics of legislative history often argue that its usefulness is overrated because it frequently is more confusing than the text.[35] Moreover, textualists frequently worry that judges will selectively use legislative history to support their own policy preferences.[36]

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[32] *Id.* at 528 (Scalia, J., concurring).

[33] *See* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV 845, 861-69 (1992) (discussing five reasons textualists refuse to consider legislative history); Maggs, *supra* note 18, at 397; Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist? · Why Pragmatic Agency Decisionmaking is Better Than Judicial Literalism*, 53 WASH. & LEE L. REV 1231, 1268-71 (1996); John F Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV 673, 673, 684-90 (1997) [hereinafter Manning, *Textualism as a Nondelegation Doctrine*]; Arthur Stock, Note, *Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses*, 1990 DUKE L.J. 160 (criticizing Justice Scalia for not considering legislative history).

[34] *See* INS v. Cardoza-Fonesca, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring) (arguing that if statutory text has a "plain meaning" it is unnecessary to examine a statute's legislative history); Karkkainen, *supra* note 11, at 433-39 (arguing Justice Scalia frequently uses "plain meaning" to exclude the use of legislative history); Watson, *supra* note 2, at 213 n.53 (same).

[35] *See* Breyer, *supra* note 33, at 861-62; Martineau, *supra* note 10, at 14.

[36] *See* Wisconsin Pub. Intervenor v Mortier, 501 U.S. 597, 617 (1991) (Scalia, J., concurring) ("We use [committee reports] when it is convenient, and ignore them when it is not"); Thompson v. Thompson, 484 U.S. 174, 192 (1988) (Scalia, J., concurring) (arguing it is "dangerous to assume that, even with the utmost self-discipline, judges can prevent the implications they see from mirroring the policies they favor" when relying on legislative history); Karkkainen, *supra* note 11, at 423-24. *But see* Breyer, *supra* note 33, at 862 (arguing legislative history can be misused, but still has utility and should be considered).

Additionally, textualists often argue that it is improper for judges to consider legislative history because such material fails the "presentment" requirement of the Constitution, under which only a bill that both houses of Congress have enacted and the President has signed (or that has been enacted by Congress despite the President's veto) has legal authority [37] A related argument is that legislative history is less accessible than statutory texts to the general public, and, therefore, judges should not consider such material.[38] Furthermore, because only a committee comprised of a few members of Congress or unelected staff employees typically produces such material, committee reports or remarks by legislators in the congressional record may not reflect the intent of Congress as a whole.[39] Textualists sometimes argue that the whole concept of "intent" is meaningless when considering a large legislative body, and, accordingly, that judges should examine only the texts that legislatures actually enact rather than misguidedly search for a chimerical legislative "intent" that cannot exist among

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[37] Justice Scalia believes that the constitutionally mandated role of federal courts is to interpret the actual statutory text approved by both chambers of the House and presented to the president, and, therefore, that courts should not consider legislative history written by committees or individual members of Congress. *See, e.g.*, West Virginia Univ Hosps., Inc. v Casey, 499 U.S. 83, 98-99 (1991); *Thompson*, 484 U.S. at 192 (Scalia, J., concurring); Maggs, *supra* note 18, at 396; Muriel Morisey Spence, *The Sleeping Giant: Textualism as Power Struggle*, 67 S. CAL. L. REV 585, 586 (1994); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV 1295, 1300-01 (1990) (discussing textualist argument that Presentment Clause of Constitution requires judges to look at only statutory text). *Cf.* INS v Chadha, 462 U.S. 919, 925-32 (1983) (one-house legislative veto violates requirements of bicameralism and presentment set forth in Article I). *But see* ESKRIDGE, *supra* note 2, at 230-32 (criticizing Scalia's bicameralism and presentment arguments).

[38] *See, e.g.*, United States v. Public Utils. Comm'n, 345 U.S. 295, 319-21 (1953) (Jackson, J., concurring) (expressing concern about the use of legislative history because it is not widely available); Kenneth W Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 377 [hereinafter Starr, *Observations*] (arguing that it is "vastly hard[ ] and impracticable" to search all aspects of the legislative history that relate to potential problems in a controversy). *But see* Breyer, *supra* note 33, at 869 (arguing judges should consider legislative history because citizens can obtain legislative history); Martineau, *supra* note 10, at 15.

[39] *See* Mank, *supra* note 33, at 1268-71, Manning, *Textualism as a Nondelegation Doctrine*, *supra* note 33, at 684-90.

hundreds of legislators.[40] Justice Scalia has expressed the textualist canon as follows: "Judges interpret laws rather than reconstruct legislators' intentions."[41] Textualists also argue that the widespread use of legislative history only dates from the 1890s, that other countries interpret statutes without resorting to legislative history, and, accordingly, that it simply is not needed as a means to interpret statutes.[42] Nevertheless, while Justice Scalia's academic writings consistently take the position that it is improper for judges to consider legislative history, he has been willing at times to consider such material in his judicial opinions in order to corroborate the intent disclosed by textual analysis of a statute[43] and conveniently reach a result similar to the result he would reach through pure textualism.[44]

Textualists are usually less policy-oriented than most proponents of purposivism, modified intentionalism, or dynamic statutory interpretation, but Justice Scalia recognizes that judges can take into account policy considerations as long as they do so in a way that gives primacy to a statute's text.[45] Adherence to the statutory text must be the norm in a democratic society, and, therefore, if a text mandates an unpopular result it is up to Congress, rather than unelected judges or bureaucrats, to make a new policy choice.[46] As a practical matter, it is difficult for either courts or agencies to formulate a test of when circumstances have changed

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[40] *See* Mank, *supra* note 33, at 1268-71, Manning, *Textualism as a Nondelegation Doctrine*, *supra* note 33, at 684-90.

[41] INS v Cardoza-Fonseca, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring).

[42] *See* Starr, *Observations*, *supra* note 38, at 374. *But see* Breyer, *supra* note 33, at 867-68 (arguing judges should consider legislative history because statutes are both more numerous and complex than in the past); Martineau, *supra* note 10, at 15.

[43] *See* Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687, 714-16 (1995) (Scalia, J., dissenting) (arguing legislative history confirms his reading of "ordinary" meaning of "take" and "harm"); Karen P Sheldon, *"It's Not My Job to Care" Understanding Justice Scalia's Method of Statutory Interpretation Through* Sweet Home *and* Chevron, 24 B.C. ENVTL. AFF L. REV 487, 503 (1997).

[44] *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989); Carlos E. Gonzalez, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV 585, 604 n.66 (1996).

[45] *See infra* text accompanying notes 49, 54.

[46] *See* Dwyer, *supra* note 3, at 285; Carolyn McNiven, Comment, *Using Severability Clauses to Solve the Attainment Dilemma in Environmental Statutes*, 80 CAL. L. REV 1255, 1302 (1992).

sufficiently or a statute's goals are too impractical monetarily to enforce.[47] Once a court or agency is cut loose from the text of a statute, it may be difficult for it to decide how to reformulate congressional policy.[48] Some textualists, including Justice Scalia, may refuse to enforce a text's commands if doing so would produce "absurd" results,[49] but they would be less likely than purposivists to substitute alternative language for flawed statutory language because only Congress may enact corrective legislation.[50]

Most textualists acknowledge that statutory texts are not always clear, and use certain standard extrinsic aids to interpretation, including the statute's structure,[51] prior judicial opinions,[52] established judicial "canons" of statutory construction,[53] administrative norms underlying the statute's implementation,[54] comparisons with the accepted interpretations of comparable statutory provisions,[55] and the dictionary meanings most

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[47] *See* Dwyer, *supra* note 3, at 285.

[48] *See id.*

[49] *See* K Mart Corp. v Cartier, Inc., 486 U.S. 281, 324 n.2 (1988) (Scalia, J., concurring in part and dissenting in part) ("[I]t is a venerable principle that a law will not be interpreted to produce absurd results."); ESKRIDGE, *supra* note 2, at 134 ("[B]y allowing an 'absurd result' exception to his dogmatic textualism, Scalia allowed for just as much indeterminacy, and just as much room for judicial play, as he accused Brennan of creating with his context-dependent approach to statutory meaning."); *infra* notes 65-66 and accompanying text.

[50] *See* McNiven, *supra* note 46, at 1302.

[51] *See* Smith v United States, 508 U.S. 223, 241 (1993) (Scalia, J., dissenting) ("It is a 'fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.' ") (quoting Deal v United States, 508 U.S. 129, 132 (1993)); Green v Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring) (arguing judges should glean statutory meaning from the interpretation "(1) most in accord with context and ordinary usage and (2) most compatible with the surrounding body of law into which the provision must be integrated. "); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV J.L. & PUB. POL'Y 61, 61 (1994); Merrill, *Textualism*, *supra* note 20, at 352; Spence, *supra* note 37, at 586.

[52] *See* Manning, *Textualism as a Nondelegation Doctrine*, *supra* note 33, at 673, 702-05; *supra* note 30 and accompanying text; *infra* note 485 and accompanying text..

[53] *See* Maggs, *supra* note 18, at 396; Spence, *supra* note 37, at 586; *infra* notes 105-21, 139-51, 158, 211, 250-56, 258, 302, 487-90 and accompanying text.

[54] *See* Spence, *supra* note 37, at 586; *infra* notes 404-05, 483-84 and accompanying text.

[55] *See* Spence, *supra* note 37, at 586.

congruous with ordinary English usage and applicable law [56] Textualists use external sources to find the meaning most consistent with the "ordinary" usage of language contemporaneous with the enactment of the statute.[57] In *Chisom v. Roemer*,[58] Justice Scalia stated that judges should "first, find the ordinary meaning of the language in its textual context; and, second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary applies."[59]

Even if one agrees that finding the "ordinary meaning" of a text should be the primary focus of statutory interpretation, there is still the question of what to do if Congress is careless or unclear in how it uses language. While Scalia recognizes that Congress does not always write clear statutes and that the "plain meaning" of a text is not necessarily always what Congress intended, he contends that a textualist approach to statutory construction, including the adoption of clear interpretive rules, will lead Congress to be more diligent and precise in drafting them so that the average English speaker can understand their meaning.[60]

2. *Criticisms of Textualism*

Even critics of textualism acknowledge "that the statutory text is the most authoritative interpretive criterion."[61] To some extent, the revival of textualism during the 1980s was a healthy reaction to the misuse by many judges of legislative history [62]

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[56] *See id.*

[57] *See* Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 S. CT. REV 231, 250 (explaining that plain meaning approach enables the author to "converse with an English speaker with whom [he has] nothing in common but [their] shared language").

[58] Chisom v. Roemer, 501 U.S. 380 (1991).

[59] *Id.* at 404 (Scalia, J., dissenting).

[60] *See, e.g.*, Finley v United States, 490 U.S. 545, 556 (1989); *see also* Schauer, *supra* note 57, at 250 (noting that the plain meaning approach enables the author to "converse with an English speaker with whom [he has] nothing in common but [their] shared language."). *But see* ESKRIDGE, *supra* note 2, at 233-34 (criticizing Scalia's "democracy enhancing" argument).

[61] Eskridge & Frickey, *Statutory Interpretation*, *supra* note 2, at 354; *see also* Frickey, *supra* note 5, at 408 n.119 (observing that while many judges are not textualists, all judges are "presumptive textualists" who "follow relatively clear statutory language absent some strong reason to deviate from it"); Watson, *supra* note 2, at 243 n.191.

[62] *See* ACLU v. Federal Communications Comm'n, 823 F.2d 1554, 1583 (D.C. Cir. 1987) (Starr, J., dissenting) ("We in the judiciary have become shamelessly

Nevertheless, numerous commentators have attacked the textualist approach to statutory construction. While a textualist approach is supposed to increase courts' fidelity to congressional intent, textualist statutory interpretation may actually decrease legislative power by reading the "plain language" of a statute too narrowly or broadly in a way that thwarts the intent of most members of Congress.[63] In many cases, because words or combinations of words have multiple meanings, an examination of a statute's text in light of dictionary definitions or "ordinary" English usage does not yield a single meaning, but instead raises numerous questions that cannot be resolved without consulting some external source.[64] Because dictionaries often include many possible definitions of a word, textualism often is overinclusive, yielding a definition that may prohibit or include

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profligate and unthinking in our use of legislative history "); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV 749, 751 (1995) (stating revival of textualism during 1980s was to some extent a healthy development counteracting improper use of legislative history); Wald, *supra* note 17, at 197, 214 (discussing ability of judges to use selective portions of legislative history); *see also* Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294 (1982) (presenting statistical study showing Supreme Court increasingly used legislative history from 1938 to 1979, and that the increase in usage was especially rapid after 1970).

[63] *See, e.g.*, West Virginia Univ. Hosps., Inc. v Casey, 499 U.S. 83, 102 (1991) (Marshall, J., dissenting) ("[T]he Court uses the implements of literalism to wound, rather than to minister to, congressional intent "); *id.* at 112-16 (Stevens, J., dissenting) (arguing that Congress is more likely to override textualist interpretations of statutes and that majority's textualist interpretation is less constant to Congress' intent than dissent's less verbatim reading); Michael Herz, *Judicial Textualism Meets Congressional Micromanagement: A Potential Collision in Clean Air Act Interpretation*, 16 HARV ENVTL. L. REV 175, 204 (1992); Spence, *supra* note 37, at 588; *see generally* Stock, *supra* note 33.

[64] *See* ESKRIDGE, *supra* note 2, at 38-47 (criticizing textualist approaches to statutory interpretation on ground that in difficult cases there are always textual ambiguities); Stephen F. Ross, *The Limited Relevance of Plain Meaning*, 73 WASH. U. L.Q. 1057, 1064-65 (1995) (stating English language alone cannot supply definitive meaning); *see also* LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES 113-17 (1993) (showing how ineptly judges use statutory language to define the meaning of a statute and criticizing Justice Scalia in particular); Clark D. Cunningham et. al, *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561 (1994) (stating words often have multiple meanings and therefore attempts to define a single "plain language" interpretation are flawed).

practices that a reasonable legislature did not have in mind; for instance, a state statute prohibiting vehicles in public parks surely did not intend to exclude a monument consisting of vehicles from past wars.[65] Less frequently, a literal textual reading is underinclusive; for example, does a statute applying to the theft of motor vehicles apply to stealing an airplane on the ground if the statute only lists motorized vehicles that cannot fly?[66] In addition, textualism by itself does not answer the question of what a court should do if there is a gap in a statute or Congress has implicitly or explicitly delegated lawmaking power to courts or agencies.[67] Furthermore, changes in social circumstances may make it impractical or unwise to implement a statute precisely as it is written.[68]

Additionally, while textualists normally refuse to consider legislative history, except perhaps to confirm their reading of a text, they often inconsistently consult a number of other extrinsic sources, including dictionaries, prior judicial opinions, and canons of construction, that fail the presentment test.[69] Accordingly, many commentators argue that if judges are allowed to consult some extrinsic sources, they should be able to examine all extrinsic sources, including legislative history, as a means to reconstruct Congress's intent in enacting a statutory provision, particularly where the textual terms are ambiguous.[70]

In his dissenting opinion in *West Virginia University Hospital, Inc. v. Casey*,[71] Justice Stevens argued that textualist statutory interpretations cause significant practical problems because Congress is much more likely to override the Court's statutory interpretations if it ignores a statute's legislative history.[72] While Congress overrides only a small number of

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[65] *See* Sunstein, *Interpreting Statutes*, *supra* note 1, at 419-20.

[66] *See* McBoyle v. United States, 283 U.S. 25 (1931) (holding that National Motor Vehicle Theft Act did not apply to airplanes); Sunstein, *Interpreting Statutes*, *supra* note 1, at 420-21.

[67] Sunstein, *Interpreting Statutes*, *supra* note 1, at 421-22.

[68] *See* ESKRIDGE, *supra* note 2, at 125-28 (using a hypothetical involving a directive to "fetch five pounds of soup meat every Monday" to illustrate need to consider changed circumstances); Sunstein, *Interpreting Statutes*, *supra* note 1, at 422-23.

[69] *See* Manning, *Textualism as a Nondelegation Doctrine*, *supra* note 33, at 673, 702-05; *supra* note 37 and accompanying text.

[70] *See* Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, 386; Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV 277, 309 (1990).

[71] West Virginia Univ. Hosp., Inc. v Casey, 499 U.S. 83 (1991).

[72] *See id.* at 112-16 (Stevens, J., dissenting).

judicial decisions each year, there is some empirical evidence to support Stevens's view that textualist decisions by the Supreme Court are disproportionately rejected.[73] Indeed, just eight months after Justice Scalia wrote his *West Virginia University Hospital* decision, Congress enacted legislation overriding the case by allowing courts to award expert fees in civil rights cases.[74]

II. STATUTORY CANONS

Courts have long used canons of construction to interpret statutes. Justice Scalia and other "new" textualists, however, arguably use the canons somewhat differently from nontextualist judges. Textualists use grammatical, structural, and "clear statement"[75] canons of construction primarily to narrow statutory meaning.[76]

A. Traditional Canons of Statutory Construction

Since at least the sixteenth century, Anglo-American judges have used canons of statutory construction as guides to interpreting the meaning of statutes.[77] In 1584, *Heydon's Case*[78] established four principles for deter-

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[73] *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretations*, 101 YALE L.J. 331, app. I at 424-41, app. III at 450-55 (finding relatively strong evidence that Congress is more likely to override textualist Supreme Court decisions by amending or enacting new legislation); Diane L. Hughes, *Justice Stevens's Method of Statutory Interpretation: A Well-Tailored Means for Facilitating Environmental Regulation*, 19 HARV. ENVTL. L. REV 493, 497, 539-50 (1995) (arguing "Congress is less likely to override federal court decisions involving statutory interpretation when such decisions are based on substantive consideration of legislative history and policy"); Mank, *supra* note 33, at 1273-74 (reviewing "some empirical studies [that] suggest Congress is more likely to override textualist judicial interpretations of statutes than ones that consider the relevant legislative history"); Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP L. REV 425, 451 (1992) (finding that empirical data on statutory overrulings of Supreme Court decisions "lends some mild support to the view expressed by Justice Stevens that textual decisions by the Court are often overturned by Congress").

[74] *See* Civil Rights Act of 1991, § 113(b), Pub. L. No. 102-166, 105 Stat. 1071, 1079; Solan, *supra* note 23, at 247

[75] Martineau, *supra* note 10, at 13.

[76] *See id.*, *infra* notes 139-41 and accompanying text.

[77] *See* Martineau, *supra* note 10, at 6-9

[78] Heydon's Case, 76 Eng. Rep. 637 (K.B. 1584).

mining a statute's purpose.[79] In his Commentaries, Blackstone listed ten canons of statutory construction, including a canon that emphasized the need for judges to consider "equity" if a statute was ambiguous and another that urged equitable construction of remedial statutes.[80]

In *Varity Corp. v. Howe*,[81] the Supreme Court gave the following definition: "Canons of construction are simply 'rules of thumb' which will sometimes 'help courts determine the meaning of legislation.' To apply a canon properly one must understand its rationale."[82] In other words, canons "are just aids to meaning, not ironclad rules."[83]

Another important question is, what constitutes a canon?[84] One answer is that a canon is an interpretive principle that judges have customarily used. Ultimately, judges decide what is a canon. Judges sometimes create entirely new canons and apply them to pending cases.[85]

1. *Types of Canons*

There are three main types of canons or interpretive principles: first, syntactic principles, sometimes also referred to as grammatical or structural canons, that use basic rules about language or logic to discern a particular statute's meaning; second, Congress may establish implicit or explicit interpretive principles about how courts should interpret a statute or statutes; and, third, courts may employ broader substantive principles, including constitutional mandates, to override even apparent legislative intent.[86] Addressing the first principle, courts use a number of different

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[79] *See id.* at 638; Martineau, *supra* note 10, at 6.

[80] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES 87-92 (1766); Martineau, *supra* note 10, at 7-9.

[81] Varity Corp. v. Howe, 116 S. Ct. 1065 (1996).

[82] *Id.* at 1077 (quoting Connecticut Nat'l Bank v Germain, 503 U.S. 249, 253 (1992)).

[83] WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC MEANING 638 (2d ed. 1995).

[84] *See* Philip P. Frickey, *Faithful Interpretation*, 73 WASH. U. L.Q. 1085, 1090-91 n.20 (1995).

[85] *See id.*

[86] *See* Cass R. Sunstein, *Law and Administration after* Chevron, 90 COLUM. L. REV 2071, 2106-07 (1990) [hereinafter Sunstein, *Law and Administration*]. *But see* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV 921, 925 (1992) ("I find far less warrant than [some modern proponents of canons] do for dividing the canons into such categories as 'linguistic'

syntactic principles, including rules about the "ordinary" meaning of a word;[87] the canon that a specific provision usually trumps a conflicting general term;[88] and the *ejusdem generis* principle that when general words follow a particular enumeration, a court will usually limit the general words to a meaning consistent with the particular enumeration.[89] Next, Congress has explicitly provided courts with both general and more specific rules about statutory interpretation in the United States Code.[90] There also are implicit interpretive principles that appear to reflect what one imagines any reasonable legislature would prefer.[91] These include the rule that courts should prefer a construction that renders a statute valid rather than invalid,[92] and the principle that Congress intends that courts narrowly construe appropriation statutes.[93] Finally, courts may interpret a statute in light of broad and often controversial concepts about the allocation of authority among different governmental branches or entities, such as federal preemption of state laws and executive conduct of foreign policy [94]

2. *Criticisms of Statutory Canons*

In 1930, Max Radin assailed the canons as "in direct contradiction to the habits of speech of most persons,"[95] and in 1942 he recommended the purposive approach to statutory construction.[96] In 1950, Karl Llewellyn wrote a classic article criticizing the use of canons to interpret statutes: "[T]here are two opposing canons on almost every point. An arranged selection is appended. Every lawyer must be familiar with them all: they

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and 'substantive'; in my view, there is more to unify than to divide the canons that are likely to make a difference in statutory interpretation.").

[87] *See supra* notes 56-60 and accompanying text.

[88] *See, e.g.*, Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 734 (1989).

[89] *See, e.g.*, Hughey v. United States, 495 U.S. 411, 419 (1990); Breininger v Sheet Metal Workers Int'l Ass'n Local Union No. 6, 493 U.S. 67, 91-92 (1989). *But see* United States v Powell, 423 U.S. 87, 90-91 (1975) (rejecting *ejusdem generis* principle when it would lead to interpretation that conflicts with clear congressional intent).

[90] *See* 1 U.S.C. §§ 1-6 (1994); R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 262-81 (1975) (discussing examples).

[91] *See* Sunstein, *Law and Administration*, *supra* note 86, at 2107

[92] *See* Communications Workers v. Beck, 487 U.S. 735, 762 (1988).

[93] *See* Tennessee Valley Auth. v Hill, 437 U.S. 153, 190-91 (1978).

[94] *See* Sunstein, *Law and Administration*, *supra* note 86, at 2107

[95] Max Radin, *Statutory Interpretation*, 43 HARV L. REV 863, 873 (1930).

[96] Max Radin, *A Short Way with Statutes*, 56 HARV L. REV 388, 409 (1942).

are still needed tools of argument."[97] He appended a list of fifty-six canons in two columns, including twenty-eight "Thrust" canons in the left-hand column, and twenty-eight corresponding "Parry" canons in the right-hand column.[98]

Both Radin's and Llewellyn's criticism of the canons must be understood in light of their general intellectual outlook. Both were leading and brilliant members of a loosely defined group of scholars and judges called "legal realists" that developed during the 1920s and 1930s.[99] While the legal realists actually represented a wide range of views, they were generally united by a common view that previous judges and scholars had overemphasized the use of formal logic to explain legal decisionmaking. The realists maintained that the canons were deceptive because they suggested judges could decide difficult issues of statutory interpretation by using mechanical rules rather than a sensible examination of the statutory framework and legislative goals.[100] Furthermore, Llewellyn and other realists maintained that judges often used the canons as post hoc rationalizations disguising the true reasons for their decisions.[101]

During the 1950s and 1960s, Professors Henry Hart and Albert Sacks, leaders of the influential "legal process" approach at Harvard Law School, criticized legal realism in general for overstating the indeterminacy of law, and defended the use of statutory canons.[102] Many other modern commentators, most notably Judge Posner, however, have followed Radin's and

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[97] 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); *see also* Jefferson B. Fordham & J. Russell Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 VAND. L. REV 438 (1950) (criticizing traditional canons of statutory construction).

[98] Llewellyn, *supra* note 97, at 401-06.

[99] *See generally* LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960, 3-44 (1986) (discussing legal realist movement during 1920s through 1950s, including roles of Karl Llewellyn and Max Radin).

[100] *See* Richard Posner, *Statutory Interpretation -In the Classroom and in the Courtroom*, 50 U. CHI. L. REV 800, 805-06 (1983); Sunstein, *Interpreting Statutes*, *supra* note 1, at 451-52.

[101] *See* Sunstein, *Interpreting Statutes*, *supra* note 1, at 451.

[102] *See* HART & SACKS, *supra* note 4, at 1191, Sunstein, *Interpreting Statutes*, *supra* note 1, at 452 n.164; *see generally* William N. Eskridge & Phillip P. Frickey, *Introduction* to HART & SACKS, *supra* note 4, at li (discussing Hart and Sacks' defense of legal reasoning against the criticisms of legal realism).

Llewellyn's critical approach to the canons.[103] As a result, the canons never have enjoyed the same stature since Llewellyn's attack.[104]

3. *Justice Scalia's Defense of the Canons*

In his recent book, *A Matter of Interpretation*,[105] Justice Scalia defends the use of canons of construction against Karl Llewellyn's criticisms.[106] Scalia argues that there really are not two widely used opposing canons on "'almost every point.'"[107] For instance, Llewellyn cited as his first canon, "A statute cannot go beyond its text,"[108] and then as the opposing canon: "To effect its purpose a statute may be implemented beyond its text."[109] While judges commonly employ the former canon, Scalia argues that Llewellyn provides no authority for the use of the latter, opposing canon and that it is not a generally accepted canon.[110] Scalia does concede, however, that "some willful judges"[111] have used the canon, including the Supreme Court in its important *Holy Trinity*[112] case.[113] He maintains, nevertheless, that even if some judges have used the latter canon, it is the sort of bad canon judges should throw out.[114] Additionally, he contends that he has never heard of Llewellyn's Parry No. 8: "'Courts have the power to inquire into real – as distinct from ostensible – purpose.'"[115]

Furthermore, Justice Scalia argues that most of Llewellyn's "Parries" do not contradict the corresponding canon, but simply demonstrate that it is "not absolute."[116] For instance, Scalia cites Llewellyn's Thrust No. 13, "'Words and phrases which have received judicial construction before enactment are to be understood according to that construction,'"[117] and

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[103] *See* Eskridge, *New Textualism*, *supra* note 21, at 663; Posner, *supra* note 100, at 805-17; Sunstein, *Interpreting Statutes*, *supra* note 1, at 452.

[104] *See* Posner, *supra* note 100, at 805-17; Sunstein, *Interpreting Statutes*, *supra* note 1, at 452.

[105] ANTONIN SCALIA, A MATTER OF INTERPRETATION 26-27 (1997).

[106] *See id.*

[107] *Id.* (quoting Llewellyn, *supra* note 97, at 401).

[108] Llewellyn, *supra* note 97, at 401.

[109] *Id.*

[110] *See* SCALIA, *supra* note 105, at 26.

[111] *Id.*

[112] Church of the Holy Trinity v United States, 143 U.S. 457 (1892).

[113] *See* SCALIA, *supra* note 105, at 26-27

[114] *See id.* at 27

[115] *Id.* (quoting Llewellyn, *supra* note 97, at 402).

[116] *Id.* at 27

[117] *Id.* (quoting Llewellyn, *supra* note 97, at 403).

Llewellyn's Parry: " 'Not if the statute clearly requires them to have a different meaning.' "[118]

Scalia contends that canons are "simply *one indication* of meaning,"[119] and, accordingly, it is perfectly natural for a canon to yield to contrary interpretations of meaning, including other canons.[120] Recognizing that canons cannot provide an absolute guide to statutory meaning, Scalia concludes: "But that does not render the entire enterprise a fraud – not, at least, unless the judge wishes to make it so."[121]

Other commentators have agreed that Llewellyn overstated his arguments that the canons are indeterminate and inconsistent.[122] Many commentators have criticized Llewellyn's proposed substitute for the canons – that judges make decisions by making " 'sense of the situation as seen by the court' "[123] or " 'sense *as a whole* out of our law *as a whole*' "[124] – as far too vague and unstructured.[125]

There is an argument for active judicial use of the traditional canons of construction. On the whole, they probably have a conservative bias, not in the current political sense but in the older meaning as favoring the status quo, or at most, moderate change.[126] For the judiciary, there are advantages in using traditional methods of interpretation that have proven themselves for several generations.[127] By using the same background principles as their predecessors when they interpret statutes, judges can promote the values of consistency and continuity [128] Unless there are important constitutional rights at stake or a common law regime has proven a failure over time and there is a strong need for change, judges generally ought to serve as instruments of continuity rather than radical change, to give litigants some

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[118] *Id.* (quoting Llewellyn, *supra* note 97, at 403).

[119] SCALIA, *supra* note 105, at 27

[120] *See id.*

[121] *Id.*

[122] *See* Shapiro, *supra* note 86, at 924-25; Sunstein, *Interpreting Statutes*, *supra* note 1, at 441.

[123] Sunstein, *Interpreting Statutes*, *supra* note 1, at 452 (quoting Llewellyn, *supra* note 97, at 397).

[124] *See* Farber, *supra* note 8, at 537 n.21 (quoting Llewellyn, *supra* note 97, at 399).

[125] *See* Sunstein, *Interpreting Statutes*, *supra* note 1, at 452 (criticizing Llewellyn's situation sense formula). *But see* Farber, *supra* note 8, at 537 (defending Llewellyn's basic situation sense formula).

[126] *See* Shapiro, *supra* note 86, at 926, 941-50.

[127] *See id.* at 941-50; *supra* notes 77-80 and accompanying text.

[128] *See* Shapiro, *supra* note 86, at 925, 941-50.

ability to predict judicial decisions. Accordingly, doctrine such as the canons that promote the reading of statutes against existing customs should be favored.[129] Moreover, to the extent the canons reflect experience with how most legislators write statutes, the canons are more likely to reflect a statute's probable intent than an individual judge's ad hoc approach to interpreting an ambiguous phrase.[130] Furthermore, as Justice Scalia has suggested, if judges apply consistent principles of interpretation, Congress and state legislatures may eventually use language more carefully in anticipation of how judges are likely to interpret a statute.[131]

4. *Substantive Canons*

Modern commentators have recognized that Llewellyn largely criticized grammatical or structural canons, not addressing substantive canons in any depth.[132] Even if there is some truth to Llewellyn's critique of the grammatical or structural canons of construction as lacking real meaning and being contradictory, the substantive canons reflect real value choices.[133] Indeed, while there are some relatively neutral ways to rank the substantive canons, such as giving priority to fundamental constitutional principles,[134] the substantive canons reflect evolving social and judicial priorities much more than do the grammatical or structural canons.

Since the 1980s, commentators have emphasized the importance of evaluating, changing, and creating substantive canons.[135] These commentators recognize that interpretive principles, especially substantive value choices, remain a fundamental feature of modern law [136] Because statutes often are ambiguous, courts must use interpretive principles of some sort

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[129] *See id.* at 925.

[130] *See id.*, *supra* notes 86-94 and accompanying text.

[131] *See supra* text accompanying note 60.

[132] *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV 593, 595 (1992) [hereinafter Eskridge & Frickey, *Quasi-Constitutional Clear Statement Rules*].

[133] *See id.* at 595-96.

[134] *See infra* notes 508-23 and accompanying text.

[135] *See, e.g.*, Eskridge, *Public Values*, *supra* note 7, at 1011, Macey, *supra* note 5, at 264-66; *see generally* ESKRIDGE & FRICKEY, *supra* note 83.

[136] *See* Eskridge, *New Textualism*, *supra* note 21, at 663; Posner, *supra* note 100, at 805-17; Shapiro, *supra* note 86, at 923; Sunstein, *Law and Administration*, *supra* note 86, at 2106; Sunstein, *Interpreting Statutes*, *supra* note 1, at 452-53.

to decide their meaning.[137] Accordingly, as Part VIA will discuss, some commentators have sought to develop a more refined list of canons of construction and others have proposed more general interpretive principles to aid in statutory interpretation.[138]

B. Modern Textualism and the Canons

While textualism in theory ought to be relatively value neutral, modern or "new" textualists, most notably Justice Scalia, often use "canons" of statutory construction that narrow the interpretation of a statute.[139] "New textualist" judges and commentators have tended to emphasize statutory canons based upon grammar and logic, proceduralism, and federalism.[140] On the other hand, textualists generally have not sought to use canons based upon broader social principles such as social justice or equality [141]

Many commentators argue or suggest that Justice Scalia gives excessive weight to syntactical canons and fails to recognize that Congress and ordinary users of the English language seldom use grammar and dictionary definitions as precisely as he does.[142] Justice Stevens has accused

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[137] *See* Sunstein, *Law and Administration*, *supra* note 86, at 2106.

[138] *See generally* Sunstein, *Law and Administration*, *supra* note 86, at 2106-07 (proposing interpretive principles for the regulatory state); Sunstein, *Interpreting Statutes*, *supra* note 1, at 462-505 (same), 506-08 (Appendix A listing interpretive principles for regulatory state). *But see* Eben Moglen & Richard J. Pierce, Jr., *Sunstein's New Canons: Choosing the Fictions of Statutory Interpretation*, 57 U. CHI. L. REV 1203 (1990) (criticizing Sunstein's proposed interpretive principles).

[139] *See, e.g.*, Breininger v Sheet Metal Workers Int'l Ass'n, 493 U.S. 67, 91-92 & n.15 (1989) (using *ejusdem generis* canon: context may narrow the meaning of a term); National R.R. Passenger Corp. v National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974) (using *expressio unius* canon: by expressing one thing, statute excludes others); Eskridge, *New Textualism*, *supra* note 21, at 663-66; Karkkainen, *supra* note 11, at 403-04, 428-30, 445-49 (discussing and criticizing Justice Scalia's use of grammatical and structural canons to resolve apparent ambiguities in statutory language); Maggs, *supra* note 18, at 396; Spence, *supra* note 37, at 587

[140] *See* Eskridge, *New Textualism*, *supra* note 21, at 663. *But see* Karkkainen, *supra* note 11, at 450 n.196 (arguing Eskridge's reference to Scalia's use of "procedural" and "structural" canons often misses the mark, and that Scalia is really using "clear statement" and other substantive canons); *infra* notes 419-27 and accompanying text.

[141] *See supra* note 80 and accompanying text.

[142] *See* Eskridge, *New Textualism*, *supra* note 21, at 679; Karkkainen, *supra* note 11, at 449-50; William D. Popkin, *An "Internal" Critique of Justice Scalia's*

Scalia of reading statutes through "thick grammarian's spectacles."[143] Accordingly, his rigid adherence to these canons often leads him to reach interpretations that are at odds with congressional intent, good policy, or even common sense.[144]

Justice Scalia often uses syntactic canons, sometimes also referred to as grammatical or structural canons, such as *ejusdem generis* (general words following an enumeration are to be construed as being of the same type or class enumerated)[145] and *in pari materia*[146] (terms used in other statutes on the same subject will be interpreted as having the same meaning throughout) to find the "plain" or "ordinary" meaning of a statutory term.[147] In some cases, he has revived canons that have been used infrequently by the Supreme Court in recent years. For instance, in *Chan v. Korean Air Lines, Ltd.*,[148] Justice Scalia used the canon *inclusio unius est exclusio alterius* (the inclusion of one thing implies the exclusion of all others). The Burger Court during the 1970s and first half of the 1980s rarely employed this canon except in implied action cases, but Justice Scalia during the late 1980s convinced the Court to invoke it in a number of cases,[149] and invoked it himself in dissent.[150] Most often he uses syntactical canons to narrow a statute's possible meaning.[151]

This Article will examine Justice Scalia's and other textualists' approach to the substantive canons. Parts III, IV, and V will show that his approach to the canons reflects underlying values favoring states' rights and private interests and tends to undervalue certain types of individual

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Theory of Statutory Interpretation, 76 MINN. L. REV 1133, 1143 (1992) [hereinafter Popkin, *An "Internal" Critique*].

[143] West Virginia Univ. Hosp., Inc. v Casey, 499 U.S. 83, 113 (1991) (Stevens, J., dissenting).

[144] *See* Eskridge, *New Textualism*, *supra* note 21, at 679; Karkkainen, *supra* note 11, at 449-50; Popkin, *An "Internal" Critique*, *supra* note 142, at 1143.

[145] *See* Arcadia v Ohio Power Co., 498 U.S. 73, 78 (1991) (using *ejusdem generis* canon to narrowly construe phrase "or any other subject matter" in § 318 of Federal Power Act); *supra* note 89 and accompanying text.

[146] *See* Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, 706 (1991) (Scalia, J., dissenting).

[147] *See* Karkkainen, *supra* note 11, at 445-50; *supra* notes 51-59 and accompanying text.

[148] Chan v Korean Air Lines, Ltd., 490 U.S. 122 (1989).

[149] *See, e.g.*, Eskridge, *New Textualism*, *supra* note 21, at 664.

[150] *See Pauley*, 501 U.S. at 706 (Scalia, J., dissenting).

[151] *See* Karkkainen, *supra* note 11, at 445-50; *supra* notes 139-44 and accompanying text.

liberties, congressional authority, and, surprisingly, even executive authority

III. TEXTUALISTS FAVOR CLEAR-STATEMENT CANONS

Justice Scalia and other modern textualists often use "clear-statement canons" that require express congressional authorization for a particular type of government regulatory action; this results in narrow constructions of a statute.[152] Clear-statement principles are specific applications of the common law's traditional presumption in favor of narrowly construing statutes that arguably change the law [153] Most scholars believe that clear-statement principles generally tend to narrow the scope of statutory language.[154]

While other judges also use clear-statement rules, textualist judges tend to apply these principles more narrowly because of their greater focus on the text of the statute compared to judges who also examine legislative intent.[155] In *Landgraf v. USI Film Products*,[156] Justice Stevens in his majority opinion discussed the legislative history of the Civil Rights Act of 1991 before holding that certain provisions of that Act do not apply

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[152] *See* United States v R.L.C., 503 U.S. 291, 307 (1992) (declaring that one should not construe a textually ambiguous statute against a criminal defendant based on legislative history) (Scalia, J., concurring in part and concurring in the judgment); Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 286-90 (1992) (presuming common law principles apply unless Congress makes a clear statement that it intends to override them) (Scalia, J., concurring); United States v Nordic Village, Inc., 503 U.S. 30, 33-34 (1992) (declaring that waiver of sovereign immunity in bankruptcy statute must be unequivocally expressed in statute); Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 841 (1990) (stating that unless statutes specifically indicate otherwise, they should be applied prospectively) (Scalia, J., concurring); Karkkainen, *supra* note 11, at 450-54.

[153] *See* RUPERT CROSS, STATUTORY INTERPRETATION 169-72 (John Bell & George Engle eds., Butterworth & Co. Ltd. 2d ed. 1987) (1976); Posner, *supra* note 100, at 811, 821-22; *see generally Holmes*, 503 U.S. at 286-90 (stating common law principles are presumed unless Congress makes clear statement it intends to override them) (Scalia, J., concurring).

[154] *See* CROSS, *supra* note 153, at 169-72; Karkkainen, *supra* note 11, at 452-53; Posner, *supra* note 100, at 811, 821-22.

[155] *See* Bernard W Bell, *Using Statutory Interpretation to Improve the Legislative Process: Can It Be Done in the Post-*Chevron *Era?*, 13 J.L. & POL. 105, 136 n.162 (1997).

[156] Landgraf v. USI Film Products, 511 U.S. 244 (1994).

retroactively [157] Justice Scalia, however, in a concurring opinion joined by his fellow textualists Justices Kennedy and Thomas, objected to the majority's use of legislative history and argued that only an express provision in a statute can satisfy the clear-statement principle and allow Congress to override the court-created presumption against retroactive application.[158] Professors Eskridge and Frickey have distinguished between a clear-statement approach that is willing to consider evidence of legislative intent outside the statutory text, such as legislative history, and to consider indications of congressional intent in a text that are less than absolutely clear, and what they consider the more questionable "super-strong" clear-statement rules that can only be satisfied by a specific statement in the statutory text.[159]

Textualist judges often have invoked clear-statement rules to limit federal statutes that restrict state autonomy or regulate private interests.[160] While other justices have employed federalist canons based upon the nation's federal system of government, textualists have so frequently employed principles like federal subject matter jurisdiction,[161] the constitutional principles of intergovernmental immunity,[162] and the Eleventh Amendment's rule of state immunity[163] that they have transformed the federalist canon.[164]

A. Clear-Statement Rules and State Sovereign Immunity

During the early and middle 1980s, before Justice Scalia became a member, the Court had begun to apply clear-statement rules to protect

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[157] *See id.* at 262-63 (1994); Bell, *supra* note 155, at 136 n.162.

[158] *See Landgraf*, 511 U.S. at 287-88 (Scalia, J., concurring); Bell, *supra* note 155, at 136 n.162.

[159] *See* Eskridge & Frickey, *Quasi-Constitutional Clear Statement Rules*, *supra* note 132, at 597

[160] *See supra* notes 152, 158-59 and accompanying text; *infra* notes 161-64, 209-13, 239-59 and accompanying text.

[161] *See* Finley v United States, 490 U.S. 545, 547-48 (1989) (restricting pendent and ancillary jurisdiction based on the canon that federal courts have strictly limited jurisdiction).

[162] *See* Davis v Michigan Dep't of Treasury, 489 U.S. 803, 813-15 (1989) (finding plain meaning of statute partly based on constitutional principles of intergovernmental immunity law).

[163] *See* Dellmuth v. Muth, 491 U.S. 223 (1989) (holding that Education of the Handicapped Act of 1975 did not abrogate state immunity from lawsuits despite imposing explicit substantive obligations on states and despite legislative history to contrary).

[164] *See, e.g.*, Eskridge, *New Textualism*, *supra* note 21, at 665-66.

states' rights and promote federalist values by requiring Congress to be explicit in imposing financial or legal burdens on states. In 1981, in *Pennhurst State School & Hospital v. Halderman*,[165] the Court used a clear-statement approach to conclude that a statute disbursing federal financial assistance to states to care for the developmentally disabled, which included a bill of rights stating that people with mental disabilities have a "right" to "appropriate treatment" in the "least restrictive" surroundings, did not create enforceable rights against participating states.[166] In 1985, in *Atascadero State Hospital v. Scanlon*, Justice Powell's majority opinion strengthened the clear-statement approach by concluding that the principles of state sovereign immunity in the Eleventh Amendment require courts to be certain of congressional intent by imposing a rule that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute."[167] In dissent, Justice Brennan argued that this strong clear-statement rule frustrated congressional intent.[168] In 1986, Congress expressed its disagreement with *Atascadero* by enacting a statute stating: "A State shall not be immune under the Eleventh Amendment from suit in Federal Court for a violation of.[several statutes protecting people with disabilities]."[169]

Despite the 1986 statute strongly suggesting Congress did not like clear-statement rules, during the late 1980s, Justices Scalia and Kennedy joined other justices to expand the use of clear-statement rules to create a strong presumption of state immunity under several federal statutes. In *Dellmuth v. Muth*,[170] Justice Kennedy's five-justice majority opinion held that the Education of the Handicapped Act of 1975[171] did not abrogate state immunity from lawsuits despite the statute's broad jurisdiction, the applicability of the 1986 statute quoted above, and strong legislative history indicating Congress intended to abrogate state immunity [172] In a brief

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[165] Pennhurst State Sch. & Hosp. v Halderman, 451 U.S. 1 (1981).

[166] *See id.* at 17; The Developmentally Disabled Assistance Act and Bill of Rights Act of 1975, 42 U.S.C. §§ 6000-6083 (1994), Pub. L. No. 94-103, 89 Stat. 486 (1975); *accord* Board of Educ. v. Rowley, 458 U.S. 176, 190 n.11 (1982).

[167] *See* Atascadero State Hosp. v Scanlon, 473 U.S. 234, 242 (1985); *accord* Hoffman v Connecticut Dep't of Income Maintenance, 492 U.S. 96 (1989).

[168] *See Atascadero*, 473 U.S. at 254 (Brennan, J., dissenting).

[169] 42 U.S.C. § 2000d-7(a)(1) (1994); *see also* Eskridge & Frickey, *Quasi-Constitutional Clear Statement Rules*, *supra* note 132, at 639.

[170] Dellmuth v Muth, 491 U.S. 223 (1989).

[171] 20 U.S.C. §§ 1400-1485 (1994).

[172] *See Dellmuth*, 491 U.S. at 223 (holding that Education of the Handicapped Act of 1975 did not abrogate state immunity from lawsuits despite imposing

concurring opinion, Justice Scalia observed that the Court's decision did not preclude Congress from enacting a statute that clearly abrogated state sovereign immunity "though without explicit reference to state sovereign immunity or the Eleventh Amendment."[173] In dissent, Justice Brennan, joined by Justices Marshall, Blackmun and Stevens, argued that the statute's text and legislative history met even the rigorous clear-statement rule enunciated in *Atascadero* and that Congress in 1986 had expressed its dissatisfaction with *Atascadero* by enacting corrective legislation that the majority blatantly disregarded.[174] Just one year later, Congress overrode *Dellmuth* by enacting more specific legislation.[175]

Justice Scalia would argue that it is appropriate for the Court to force Congress to express its intent to abrogate state immunity, but Justice Stevens would contend that the textualist interpretation wastes the Court's and Congress' time by ignoring strong legislative history that ought to satisfy a reasonable clear-statement rule and forces Congress to pass corrective legislation.[176] While there is a place for clear-statement rules to protect underenforced constitutional norms, including federalism and state sovereignty, *Dellmuth* illustrates how judges can selectively use clear-statement rules to protect certain values, such as states' rights, but that they do not always apply them to protect individual liberties, as Part IV will demonstrate.

During the late 1980s, some Supreme Court decisions found a statute to clearly waive state sovereign immunity to lawsuits. In *Pennsylvania v. Union Gas Co.*,[177] Justice Brennan's plurality opinion held that Congress has the authority under the Commerce Clause to enact a statute permitting suit for money damages in federal court if a statute expressly makes a state liable for damages. The court then found that the Superfund Amendments and Reauthorization Act of 1986 ("SARA")[178] amended the Comprehensive

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explicit substantive obligations on states and legislative history to contrary); Eskridge, *New Textualism*, *supra* note 21, at 666.

[173] *Dellmuth*, 491 U.S. at 233 (Scalia, J., concurring).

[174] *See id.* at 233-42 (Brennan, J., dissenting).

[175] *See* 20 U.S.C. § 1403(a) (1994); H. REP NO. 101-544, at 12 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1723, 1734 (stating "[t]he Committee has determined that the Supreme Court [in *Dellmuth*] misinterpreted Congressional intent"); Eskridge & Frickey, *Quasi-Constitutional Clear Statement Rules*, *supra* note 132, at 639

[176] *See supra* notes 71-74 and accompanying text.

[177] Pennsylvania v Union Gas Co., 491 U.S. 1 (1989).

[178] Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499, 100 Stat. 1613 (1986).

Environmental Response, Compensation and Liability Act of 1980 ("CERCLA")[179] to clearly create that state liability [180] In his concurring opinion, Justice White, joined in part by Chief Justice Rehnquist and Justices O'Connor and Kennedy, applied a strong clear-statement approach to conclude that there was no clear language in CERCLA or SARA expressing Congress' intent to abrogate the states' Eleventh Amendment immunity [181] Despite this, Justice White, in a separate portion of his concurring opinion joined by no other justices, used an intentionalist approach and agreed with the plurality's conclusion that Congress has the authority under Article I to abrogate the states' Eleventh Amendment immunity [182] Interestingly, in an opinion concurring in part and dissenting in part, Justice Scalia agreed with Justice Brennan that CERCLA and SARA, when read together, render states liable for money damages in private suits because the text clearly allows them, even if Justice White was correct that the subjective intent of the enacting Congress in 1980 or 1986 was to retain state immunity [183] Accordingly, Justice Scalia's textualist approach in this case, including his use of a clear-statement rule, read the statute more broadly against state immunity than Justice White's intentionalist approach. Nevertheless, Justice Scalia, joined in part by Chief Justice Rehnquist and Justices O'Connor and Kennedy, then argued that Congress did not have authority under the Commerce Clause to abrogate state immunity [184] Notably, despite his strong commitment to states' rights, Justice Scalia's textualism sometimes leads him to surprising results, including his conclusion that CERCLA and SARA meet his clear-statement test. However, on the whole, Justice White's conclusion, joined by three other justices, including Justice Kennedy, a moderate textualist, that CERCLA and SARA do not clearly waive state immunity is more typical of how clear-statement rules work.

More recent cases have continued to protect state sovereignty against federal encroachment. In *Gregory v. Ashcroft*,[185] Justice O'Connor's majority opinion, joined by Chief Justice Rehnquist and Justices Scalia, Kennedy, and Souter, applied a new clear-statement rule to statutes that

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[179] CERCLA §§ 101(20)(D), (21), 107(a), (d)(2), (g), 120(a)(1), 310(a)(1), 42 U.S.C. §§ 9601(20)(D), (21), 9607(a), (d)(2), (g), 9620(a)(1), 9659(a)(1) (1994).

[180] *See Union Gas Co.*, 491 U.S. at 7-22.

[181] *See id.* at 45-56 (White, J., concurring).

[182] *See id.* at 56-57 (White, J., concurring).

[183] *See id.* at 29-30 (Scalia, J., concurring in part and dissenting in part).

[184] *See id.* at 31-42 (Scalia, J., concurring in part and dissenting in part).

[185] Gregory v Ashcroft, 501 U.S. 452 (1991).

attempt to regulate "core" state functions and held that the federal Age Discrimination in Employment Act[186] did not apply to appointed state judges. What is remarkable about her opinion is that the Court could have concluded that appointed judges fall within the statute's exception for "appointee[s] on the policymaking level."[187] Instead, Justice O'Connor created a super-strong clear-statement rule for federal regulation of "core" state functions. "[I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress's Commerce Clause powers, we must be *absolutely* certain that Congress intended such an exercise."[188] Her opinion argued that Congress' authority under the Supremacy Clause to preempt state law "in areas traditionally regulated by the States" is "an extraordinary power in a federalist system" that "we must assume Congress does not exercise lightly."[189]

While there is a case for using clear-statement rules to protect state sovereignty against federal encroachment, *Gregory* illustrates the problems with applying federalist canons or clear-statement rules. *Gregory* provides little direction for when courts should apply a clear-statement rule to prevent a federal statute from impairing "areas traditionally regulated by the States,"[190] state actions of "the most fundamental sort for a sovereign entity,"[191] or state authority that lies at "'the heart of representative government.'"[192] The same day it decided *Gregory*, the Court in *Chisom v Roemer*[193] held that section 2 of the Voting Rights Act[194] applied to the election of state judges without requiring a clear statement from Congress, which indirectly undercuts *Gregory's* clear-statement protection of state judges. In his dissenting opinion in *Roemer*, Justice Scalia suggested that *Gregory's* clear-statement principle potentially was applicable, which demonstrates his commitment to using such rules to protect state sovereignty, but even he acknowledged that *Gregory* might be distinguishable because *Roemer* clearly involved congressional authority under the

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[186] 29 U.S.C. §§ 621-634 (1994).

[187] *Id.* § 630(f); *see also* Eskridge & Frickey, *Quasi-Constitutional Clear Statement Rules*, *supra* note 132, at 623-24.

[188] *Gregory*, 501 U.S. at 464 (emphasis added) (citing Garcia v San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)).

[189] *Id.* at 460.

[190] *Id.*

[191] *Id.*

[192] *Id.* at 462 (quoting Sugarman v Dougall, 413 U.S. 634, 647 (1973)).

[193] Chisom v Roemer, 501 U.S. 380 (1991).

[194] 42 U.S.C. § 1973 (1994).

Fourteenth Amendment and in *Gregory* it was unclear whether that Amendment or the commerce power was at issue.[195] Even if *Roemer* in fact was distinguishable, *Gregory* and other clear-statement cases protecting state sovereignty place significant burdens on congressional lawmaking without articulating a clear theory of the types of state functions that deserve such protection.[196]

During the last few years the Supreme Court, in a number of different decisions, has emphasized the importance of protecting states' rights against national power. While not directly implicating the use of clear-statement rules, these cases suggest that the Court is likely to continue to use clear-statement principles to narrow federal statutes and protect state interests. In 1992, in *New York v. United States*,[197] Justice O'Connor's majority opinion, which Chief Justice Rehnquist and Justices Scalia, Kennedy, Souter, and Thomas joined in its entirety, held that Congress cannot "commandeer" the regulatory authority of state legislatures.[198] In 1995, Chief Justice Rehnquist's majority opinion in *United States v. Lopez*,[199] which was joined by Justices O'Connor, Scalia, Kennedy, and Thomas, struck down the Federal Gun-Free School Zones Act, which prohibited possession of a gun near a school, because the statute exceeded Congress' authority under the Commerce Clause. *Lopez* emphasized, "Under our federal system, the 'States possess primary authority for defining and enforcing the criminal law.'"[200] In 1996, in *Seminole Tribe v Florida*,[201] Chief Justice Rehnquist, joined by Justices Scalia, Thomas, Kennedy, and O'Connor, concluded that the Indian Gaming Regulatory Act clearly intended to abrogate states' sovereign immunity,[202] but overruled *Pennsylvania v. Union Gas Co.*[203] and held that Congress did not have

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[195] *See Chisom*, 501 U.S. at 411-12 (Scalia, J., dissenting); Eskridge & Frickey, *Quasi-Constitutional Clear Statement Rules*, *supra* note 132, at 633-34.

[196] *See* Eskridge & Frickey, *Quasi-Constitutional Clear Statement Rules*, *supra* note 132, at 633-34.

[197] New York v. United States, 505 U.S. 144 (1992).

[198] *See id.* at 176. Justice White filed an opinion concurring in part and dissenting in part, in which Justices Blackmun and Stevens joined. *See id.* at 188-210 (White, J., concurring in part and dissenting in part). Justice Stevens also filed an opinion concurring in part and dissenting in part. *See id.* at 210-13 (Stevens, J., concurring in part and dissenting in part).

[199] United States v Lopez, 514 U.S. 549 (1995).

[200] *Id.* at 561 n.3 (quoting Brecht v Abrahamson, 507 U.S. 619, 635 (1993)).

[201] Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996).

[202] *See id.* at 1119.

[203] Pennsylvania v Union Gas Co., 491 U.S. 1 (1989).

authority under the Commerce Clause to abrogate states' sovereign immunity [204] In 1997, in *Printz v. United States*,[205] the same five-justice majority, in an opinion by Justice Scalia, invoked the principles of dual federal/state sovereignty espoused in *Gregory* to hold that Congress' attempt in the Brady Act[206] to force local law enforcement officials to conduct background checks on gun purchasers violates the Constitution's protection of state sovereignty [207]

It is notable that the three textualist judges on the Court, Scalia, Kennedy, and Thomas, were in the majority in *Lopez*, *New York*, *Seminole Tribe*, and *Printz*. While there is not a direct connection between a textualist approach to statutory interpretation and support for states' rights, an examination of the voting patterns in those four cases, as well as *Gregory*, suggests that five justices (Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas) who favor states' rights in general also find clear-statement rules that protect state sovereign immunity to be attractive. Justice Souter, however, supported a clear-statement approach in *Gregory* and voted with the majority in *New York*, but his subsequent dissenting votes in *Lopez*, *Seminole Tribe*, and *Printz* suggest he is far less committed to states' rights. Because clear-statement rules for state immunity or lenity for state and local officials operate to advance these federalist views, the Court is likely to continue to invoke them, even if a statute's purpose or legislative history is relatively clear, and to force Congress to go through the time-consuming process of amending statutes to unequivocally state its views. Even if Congress unequivocally expresses its views, however, *New York*, *Lopez*, *Seminole Tribe*, and *Printz* all place constitutional limits on Congress' ability to regulate state governments.

B. Federal Sovereign Immunity

Beginning in the early 1990s, Justice Scalia and other textualist judges began encouraging their colleagues to use clear-statement rules to expand federal sovereign immunity. Again, Justice Stevens, often joined by Justice Blackmun, has consistently voted against applying clear-statement rules to expand federal sovereign immunity, both because he believes that

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[204] *See Seminole Tribe*, 116 S. Ct. at 1125-32.

[205] Printz v United States, 117 S. Ct. 2365 (1997).

[206] The Brady Handgun Violence Prevention Act, 18 U.S.C. § 922(s)(1)(A)(i)(III), (IV), (s)(1)(A)(ii) (1994).

[207] *See Printz*, 117 S. Ct. at 2376-78.

sovereign immunity is anachronistic and because of his nontextualist approach to statutory interpretation.[208] In *United States v Nordic Village, Inc.*,[209] Justice Scalia expanded cases protecting state sovereignty to create a strong clear-statement rule against federal statutory waivers of the United States' own sovereign immunity in a decision involving the federal bankruptcy code.[210] Justice Scalia applied a super-strong clear-statement approach that required an unequivocal waiver of federal sovereign immunity in the text of section 106(c) of the Bankruptcy Code,[211] and refused to consider contrary evidence in the statute's legislative history [212] In dissent, Justice Stevens criticized the majority's reading of the statute's text, especially its refusal to consider legislative history [213]

Similarly, in *Ardestani v. INS*,[214] which was decided one year before *Nordic Village*, Justice O'Connor's opinion declared that the "plain language of the [Equal Access to Justice Act ("EAJA")], coupled with the strict construction of waivers of sovereign immunity,"[215] forced the Court to conclude that an Immigration and Naturalization Service ("INS") deportation hearing is not an adjudication under section 554 of the Administrative Procedure Act, and, accordingly, that such a hearing was not an "adversary adjudication" under the EAJA in which a prevailing party was entitled to attorneys' fees and expenses.[216] In dissent, Justice Blackmun, joined by Justice Stevens, disagreed with the majority's characterization of the statutory language as unambiguous, and especially objected to the Court's refusal to consider the statute's purpose.[217]

In *United States Department of Energy v Ohio*,[218] the Court in a six-to-three decision held that none of the provisions of the Clean Water Act or

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[208] *See* John Paul Stevens, *Is Justice Irrelevant?*, 87 NW U. L. REV 1121 (1993) (arguing that sovereign immunity does not serve contemporary social needs); John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV 771, 774 n.22 (citing seven cases in which Justice Stevens voted against federal sovereign immunity and four in which Justice Blackmun did so).

[209] United States v Nordic Village, Inc., 503 U.S. 30 (1992).

[210] *See id.* at 34 (using clear-statement principle to narrow bankruptcy statute and avoid abrogating federal sovereign immunity).

[211] 11 U.S.C. § 106(c) (1994).

[212] *See Nordic Village, Inc.*, 503 U.S. at 34-37

[213] *See id.* at 40-45 (Stevens, J., dissenting).

[214] Ardestani v INS, 502 U.S. 129 (1991).

[215] *Id.* at 138.

[216] *See id.* at 134-38; 5 U.S.C. §§ 504(a)(1), 504(b)(1)(C)(i) (1994).

[217] *See Ardestani*, 502 U.S. at 139-50 (Blackmun, J., dissenting).

[218] United States Dep't of Energy v Ohio, 503 U.S. 607 (1992).

Resource Conservation Recovery Act ("RCRA") waive the sovereign immunity of federal agencies from civil penalties for violations of state or federal pollution laws.[219] Section 313(a) of the Clean Water Act makes the United States liable for "sanctions" under federal, state, and local law to the same extent as any nongovernmental entity,[220] and section 6001 of the RCRA makes the federal government subject to "all Federal, State, interstate, and local requirements."[221] However, the Court concluded in each instance that these terms applied only to "coercive" penalties for violating a prospective judicial or agency order, and not to "punitive fines" for past conduct violating a statutory or regulatory requirement.[222]

Section 313(a) of the Clean Water Act also states that "the United States shall be liable only for those civil penalties arising under Federal law or imposed by a state or local court to enforce an order or the process of such court."[223] Ohio contended that a civil penalty imposed for violation of a state law permit program approved by the Environmental Protection Agency ("EPA") is one "arising under Federal law" as defined by section 313(a), but the Court held that a fine for violating a state statute, even one approved by a federal agency, is not a fine "arising under Federal law."[224] The Court recognized that it was possible to read the language "arising under Federal law" expansively to include state statutes approved by federal agencies, but it relied on the canon that statutes waiving sovereign immunity must be construed narrowly, and, therefore, that ambiguous statutory language may not effectuate a waiver.[225] By invoking a clear-statement canon to avoid waiving sovereign immunity, however, the Court selectively ignored the contrary canon that statutes should be read to avoid rendering any language superfluous.[226] In the dissent, Justice White, joined by Justices Blackmun and Stevens, argued both statutes waived sovereign immunity, and, in particular, maintained that the civil penalties arose under federal law as defined by section 313(a) of the Clean Water Act.[227]

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[219] *See id.* at 611.

[220] *See* 33 U.S.C. § 1323(a) (1994).

[221] 42 U.S.C. § 6961 (1994).

[222] *See Ohio*, 503 U.S. at 623, 627-28.

[223] 33 U.S.C. § 1323(a).

[224] *Ohio*, 503 U.S. at 623.

[225] *See id.* at 625-26; Nagle, *supra* note 208, at 786.

[226] *See* Ratzlaf v United States, 510 U.S. 135, 140 (1994) (invoking canon against making any statutory terms superfluous); *see also* Nagle, *supra* note 208, at 786.

[227] *See Ohio*, 503 U.S. at 630-36 (White, J., dissenting).

Four months after the Supreme Court decided *Ohio*, Congress amended the RCRA to explicitly waive the federal government's sovereign immunity from civil penalties for violating state hazardous waste statutes, regulations, or orders.[228] The conference committee report and individual members of Congress stated that they intended to reverse *Ohio*, and that the decision's refusal to waive sovereign immunity was inconsistent with Congress' intent in enacting section 6001.[229] Congress, however, failed to amend the Clean Water Act despite the introduction of several proposed bills that would have waived federal sovereign immunity for civil penalties. This is largely attributed to the legislative inability to agree on other, unrelated, proposed amendments to that Act.[230]

Taken together, *Ardestani*, *Nordic Village*, and *Ohio* require that Congress use clear statutory language to waive sovereign immunity because the Court will not consider a statute's purpose, legislative history, or arguably ambiguous language.[231] While Justices O'Connor, Souter, and Rehnquist are not new textualists in the same sense as Justices Scalia, Thomas, or even Kennedy, they have helped to create a largely textualist clear-statement approach to waiving sovereign immunity

In 1995, however, the Court in an opinion in which Justice Scalia concurred appeared to limit its clear-statement approach to federal sovereign immunity [232] In *Williams v. United States*,[233] the Court held in a six-to-three opinion that a divorced woman had standing to protest a tax lien on a house in which she now held sole title, but which she formerly had owned jointly with her ex-spouse, although the Internal Revenue Service ("IRS") had assessed the tax against her former husband.[234] In her majority opinion, Justice Ginsburg began her analysis by applying the clear-statement rules in *Ohio* and *Nordic Village*: "[W]e may not enlarge the waiver beyond the purview of the statutory language," and "[O]ur task is to discern the 'unequivocally expressed' intent of Congress, construing ambiguities in favor of immunity "[235] Section 1346(a)(1) of Title 28 of the

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[228] *See* Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, § 102(a)(3), 106 Stat. 1505 (1992) (codified as amended at 42 U.S.C. § 6961 (1994)).

[229] *See* 138 CONG. REC. H8864 (daily ed. Sept. 22, 1992); Nagle, *supra* note 208, at 825 n.262.

[230] *See* Nagle, *supra* note 208, at 825 n.263 (citing proposed legislation).

[231] *See id.* at 787

[232] *See id.* at 794-96.

[233] United States v. Williams, 514 U.S. 527 (1995).

[234] *See id.*

[235] *Id.* at 531 (quoting United States v Nordic Village, Inc., 503 U.S. 30, 33 (1992)).

United States Code creates federal jurisdiction over "[a]ny civil action against the United States for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected."[236] While there is a general principle that a party may not challenge the tax liability of another, Justice Ginsburg concluded that § 1346(a)(1) clearly waived federal sovereign immunity for taxpayers in Williams' situation because the lien on her house made Williams a taxpayer and subject to any internal revenue tax.[237] While Ginsburg claimed to follow *Ohio* and *Nordic Village*, she applied a purposive approach at odds with the formal textualist approach of those earlier cases. She argued that adopting the IRS' reading of the Code would deny taxpayers in Williams' situation any practical relief, which was at odds with the Court's "preference for common sense inquiries over formalism."[238]

Remarkably, Justice Scalia, the author of *Nordic Village*, filed a concurring opinion that largely agreed with Justice Ginsburg's opinion.[239] While the clear-statement rule for waivers of sovereign immunity applies to the question of how broadly a court should read the scope of such a waiver, Justice Scalia argued that a clear-statement approach did not "require explicit waivers to be given a meaning that is implausible,"[240] and, quoting Justice Cardozo, maintained that "'"[t]he exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."'"[241]

Chief Justice Rehnquist, joined by his textualist colleagues Justices Kennedy and Thomas, persuasively argued that the majority's approach to waiving sovereign immunity was "an unusual departure from the bedrock principle that waivers of sovereign immunity must be 'unequivocally expressed,'" and was thus inconsistent with recent cases such as *Nordic Village* and *Ohio*.[242] While acknowledging that some provisions of the Code suggested that Williams should have standing, Rehnquist agreed with

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[236] 28 U.S.C. § 1346(a) (1994).

[237] *See Williams*, 514 U.S. at 539-41.

[238] *See id.* at 1618-20; Nagle, *supra* note 208, at 795.

[239] *See Williams*, 514 U.S. at 541 (Scalia, J., concurring). Justice Scalia, however, found it unnecessary to decide whether Williams was a "taxpayer" under the Code. *See id.* (Scalia, J., concurring); Nagle, *supra* note 208, at 795.

[240] *Williams*, 514 U.S. at 541 (Scalia, J., concurring).

[241] *Id.* (quoting United States v Aetna Casualty & Sur. Co., 338 U.S. 366, 383 (1949) (quoting Anderson v John L. Hayes Constr. Co., 153 N.E. 28, 29-30 (N.Y 1926) (Cardozo, J.))).

[242] *Id.* (Rehnquist, C.J., dissenting).

the government that the Code's administrative exhaustion provisions defined "taxpayer" narrowly to include only one actually liable for a tax, and that these provisions were enough to show that Congress had not unequivocally waived federal sovereign immunity because courts construe ambiguous statutes as not waiving immunity [243]

In 1996, in *Lane v. Pena*,[244] Justice O'Connor's seven-justice majority opinion applied a clear-statement approach and stated that a statute's legislative history cannot supply a waiver of federal sovereign immunity that does not appear clearly in any statutory text.[245] She emphasized that Congress must unequivocally express its intent to waive federal sovereign immunity in a statute's text.[246] The Court then reaffirmed the approach to clear-statement rules of *Ohio* and *Nordic Village*. Accordingly, the Court held that Congress had not waived the federal government's sovereign immunity against awards of monetary damages for violations of section 504(a) of the Rehabilitation Act of 1973,[247] which prohibits, among other things, discrimination on the basis of disability "under any program or activity conducted by any Executive agency "[248]

While the Supreme Court has not been as explicit about invoking a clear-statement rule in deciding waivers of federal sovereign immunity as it has with state sovereign immunity, *Ardestani's* refusal to consider a statute's purpose in deciding whether to waive sovereign immunity, *Nordic Village's* rejection of legislative history as a factor, and *Ohio's* principle that an ambiguous statute may not waive immunity effectively created a clear-statement rule for federal sovereign immunity, although admittedly, *Williams* has created some doubts.[249] It is likely that the pervasive use of clear-statement rules in cases involving state sovereign immunity has had some impact when judges have addressed its cousin, federal sovereign immunity An interesting question is whether *Williams* signals a more pragmatic approach to textualism by Justice Scalia, reflects his lesser commitment to federal sovereign immunity than state immunity or, perhaps, reflects a reaction against the IRS in general or the specific facts

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[243] *See id.* (Rehnquist, C.J., dissenting) (discussing 26 U.S.C. §§ 6511(a) (1994) (providing administrative claims "shall be filed by the taxpayer"), 7422 (requiring administrative exhaustion prior to suit), 7701(a)(14) (defining "taxpayer" as "any person subject to any internal revenue tax")); Nagle, *supra* note 208, at 795-96.

[244] Lane v. Pena, 116 S. Ct. 2092 (1996).

[245] *See id.* at 2096-97

[246] *See id.*

[247] 29 U.S.C. § 794(a) (1994).

[248] *See Lane*, 116 S. Ct. at 2097-2100; 29 U.S.C. § 794(a).

[249] *See* Nagle, *supra* note 208, at 796-98.

of that case. *Lane* indicates that the Court remains committed to the use of clear-statement rules in determining whether to waive federal sovereign immunity. It is important to observe that textualist judges may show certain intellectual tendencies, such as using clear-statement rules to read statutes narrowly, but they are hardly machines and sometimes reach unexpected decisions in individual cases. The fact that Justices Thomas and Kennedy dissented in *Williams* probably is reflective more of textualism's preference for clear-statement rules than is Justice Scalia's unexpectedly pragmatic concurrence in that case.

C. *Clear Statements and Private Businesses*

Textualist judges also have favored clear-statement rules to limit statutes regulating private businesses. In several concurring opinions, Justice Scalia has sought to encourage the Court to transform traditional canons limiting government regulation into stronger clear-statement rules. In *Kaiser Aluminum & Chemical Corp. v. Bonjorno*,[250] Justice Scalia argued that statutes should be construed to apply only prospectively unless there is a clear statement to the contrary [251] Similarly, in *Landgraf v. USI Film Products*,[252] Justice Scalia's concurring opinion took an existing canon against retroactive application of statutes and helped to transform that principle into a harder clear-statement rule.[253] In *Holmes v. Securities Investor Protection Corp.*,[254] Justice Scalia's concurring opinion sought to create a new clear-statement principle that Congress intends to apply common law concepts such as "proximate cause" and "zone-of-interest" tests unless it clearly states otherwise. Accordingly, the Court should read the jurisdiction of the federal civil RICO statute[255] narrowly to exclude claims in which a plaintiff cannot satisfy traditional common law proximate cause and zone-of-interest requirements.[256]

Clear-statement principles often are valuable in preserving certain under-enforced constitutional norms, such as federalism.[257] There is a

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[250] Kaiser Aluminum & Chem. Corp. v Bonjorno, 494 U.S. 827 (1990).

[251] *See id.* at 841 (Scalia, J., concurring) (stating that statute should be construed prospectively unless it contains clear statement to contrary).

[252] Landgraf v USI Film Prods., 511 U.S. 244 (1994).

[253] *See id.* at 287-88 (Scalia, J., concurring); Bell, *supra* note 155, at 136.

[254] Holmes v Securities Investor Protection Corp., 503 U.S. 258 (1992).

[255] 18 U.S.C. §§ 1961-1968 (1994).

[256] *See id.* at 287-88 (stating that common law principles are presumed unless Congress makes clear statement it intends to override them) (Scalia, J., concurring); Karkkainen, *supra* note 11, at 450-51.

[257] *See* Eskridge & Frickey, *Quasi-Constitutional Clear Statement Rules*, *supra* note 132, at 597

danger, however, that when clear-statement rules are applied too rigorously they will undermine Congress' purpose in enacting a statute. That problem is intensified if a judge ignores other traditional canons that tend to enlarge statutory meaning. Justice Scalia has derided as "meaningless" the canon that remedial statutes are to be construed liberally to achieve their purpose, because there are no accepted criteria by which to judge whether a statute is remedial.[258] As a result, Justice Scalia's version of textualism is biased in favor of narrow statutory interpretations that may not reflect congressional intent and that often defeat majoritarian expectations by imposing clear-statement rules that the enacting Congress did not expect.[259] While Congress in theory can override clear-statement rules by enacting more specific statutes, the political difficulties of enacting such legislation are formidable. This is true even when a majority of Congress would prefer to do so, because powerful interest groups, a presidential veto, or sheer inertia in Congress may obstruct override efforts.[260]

IV TEXTUALISM AND INDIVIDUAL RIGHTS

Justice Scalia and his fellow textualists sometimes use the canons of construction, such as the principle of narrowly construing criminal statutes if there are two possible meanings, to protect individual rights. However, they are more likely to apply this canon when it serves other principles that they value, such as states' rights. Similarly, textualists sometimes invoke the canon of avoiding serious constitutional questions, yet failed to invoke it in a case involving the highly charged issue of abortion.

A. The Rule of Lenity

Justice Scalia sometimes uses the "rule of lenity" to narrowly construe a penal statute that has more than one possible meaning.[261] He is more

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[258] *See* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV 581 (1989).

[259] *See* Bell, *supra* note 155, at 136 n.162; Eskridge & Frickey, *Quasi-Constitutional Clear Statement Rules*, *supra* note 132, at 636-40; Karkkainen, *supra* note 11, at 450-54; *supra* notes 71-74, 173-76 and accompanying text.

[260] *See* Eskridge & Frickey, *Quasi-Constitutional Clear Statement Rules*, *supra* note 132, at 639-40.

[261] *See, e.g.*, United States v. RLC, 503 U.S. 291, 307 (1992) (Scalia, J., concurring in part and concurring in the judgment); *see also* Smith v. United States, 508 U.S. 223, 246-47 (1993) (Scalia, J., dissenting) (using rule of lenity as secondary argument). *But cf.* Deal v United States, 508 U.S. 129, 141 (1993)

likely, however, to apply the rule of lenity to protect state or local officials from federal prosecution, which reflects his sympathy for local sovereignty against federal control. In *McNally v. United States*,[262] the Court in a seven-person majority opinion written by Justice White held that the federal mail fraud statute[263] did not apply to a state official who assigned state insurance business to certain agencies that were required to "kick back" part of the insurance premiums. The majority interpreted the statute, using the rule of lenity, to apply only to fraud involving money or property rights, and the federal prosecutor failed to prove monetary loss to the state. The Court refused to read the statute broadly because, it said, courts should avoid involving "the Federal Government in setting standards of disclosure and good government for local and state officials" unless "Congress has spoken in clear and definite language."[264] Justice Stevens, joined in all but a tiny portion of his dissenting opinion by Justice O'Connor, argued that numerous Supreme Court and lower court decisions over a long period had endorsed a broad reading of the mail fraud statute, and that Congress had at least implicitly endorsed this broad reading.[265]

As part of the Anti-Drug Abuse Act of 1988, however, Congress rejected *McNally* by adding the following section to the mail and wire fraud statutes: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to defraud another of the intangible right of honest services."[266] While the statute does not specify that the term "honest services" applies to government officials, the limited legislative history addressing this issue suggests that Congress intended to criminalize misconduct by public officials.[267] In 1996, a divided panel of the Court of Appeals for the Fifth Circuit applied a clear-statement approach to conclude the term "honest services" did not apply to state government officials who were convicted of depriving citizens of their

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(finding, in majority opinion by Justice Scalia, that statute has "plain meaning" despite Justice Stevens' dissenting opinion invoking rule of lenity).

[262] McNally v United States, 483 U.S. 350 (1987).

[263] 18 U.S.C. § 1341 (1994).

[264] *McNally*, 483 U.S. at 359-60.

[265] *See id.* at 362-77 (Stevens, J., dissenting).

[266] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4508 (codified as amended at 18 U.S.C. § 1346 (1994)).

[267] *See* George D. Brown, *Should Federalism Shield Corruption? -Mail Fraud, State Law and Post-*Lopez *Analysis*, 82 CORNELL L. REV 225, 231 n.47 (1997); Geraldine Szott Moohr, *Mail Fraud and Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV J. ON LEGIS. 153, 169 (1994).

right to good and faithful service because they accepted "loans" from attorneys with cases before their state agency [268] On rehearing, however, the circuit in a fourteen-to-three en banc decision affirmed their convictions, holding that "honest services" did refer to services they owed to their state employer under state law [269]

Despite Congress' apparent rejection of *McNally's* clear-statement approach to applying federal criminal statutes to state officials, in *McCormick v. United States*,[270] Justice White's majority opinion applied a similar approach. The Court read the Hobbs Act[271] narrowly, using the rule of lenity, to avoid federal prosecutorial involvement in state political processes, and, specifically, the ability of public officials to solicit and accept campaign contributions.[272] In *McCormick*, a lobbyist did not list as campaign contributors or report as income for federal tax purposes a series of cash payments to a state legislator, who had complained to the lobbyist about his need for additional money for his election campaign. The legislator was reelected and sponsored more legislation favorable to interests represented by the lobbyist.[273] Emphasizing the role that political contributions play in American electoral politics, the Court narrowed the statute by adding a quid pro quo requirement applicable only to prosecutions of elected public officials accused of extorting campaign funds.[274] Accordingly, an elected public official extorts campaign contributions in violation of the Hobbs Act only where the official explicitly represents that the terms of her promise will control her official conduct.[275]

In a concurring opinion, Justice Scalia reluctantly agreed with the majority's reasoning because of the "assumptions on which this case was briefed and argued," but suggested that the text of the statute required an even narrower definition of when elected officials may commit extortion under the Hobbs Act.[276] Observing that the text of the statute "contains not even a colorable allusion to campaign contributions or *quid pro quos*," Scalia suggested that the phrase "receipt of money under color of official

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[268] *See* United States v Brumley, 79 F.3d 1430 (5th Cir. 1996) (2-1 decision).

[269] *See* United States v. Brumley, 116 F.3d 728 (5th Cir.) (en banc), *cert. denied*, 118 S. Ct. 625 (1997).

[270] McCormick v United States, 500 U.S. 257 (1991).

[271] 18 U.S.C. § 1951 (1994).

[272] *See McCormick*, 500 U.S. at 271-74.

[273] *See id.* at 259-60.

[274] *See id.* at 268-74.

[275] *See id.* at 273.

[276] *Id.* at 276-80 (Scalia, J., concurring).

right" does not mean extortion paid on account of one's office, as courts have traditionally interpreted this and similar language.[277] Rather, Scalia suggested that the phrase applies only to money paid under a false claim of right; however, he was careful not to decide the issue.[278] Under Scalia's suggested false pretenses rule, a public official would be liable under the Hobbs Act only if she wrongfully asserted her entitlement to the money for the performance of official acts. Therefore, his approach would allow most accused officials to escape conviction if they had acknowledged to the contributor that they were not entitled to the payoff for the exercise of public duties.[279]

In 1992, in *Evans v. United States*,[280] Justice Stevens, who had dissented in *McCormick*, wrote a majority opinion that relied heavily on common law extortion cases to conclude that the Hobbs Act did not require the government to prove that a public official had coerced, induced, or made false statements to someone to obtain a payment.[281] Rather, Stevens held that a prosecutor "need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts."[282]

In a long, vitriolic dissent joined by Chief Justice Rehnquist and Justice Scalia, Justice Thomas, during his first term on the Court, argued that the statute required the government to prove a public official induced the payment, and, furthermore, that the official had received it under a pretense of entitlement.[283] Thomas took issue with the majority's historical account of the common law definition of extortion,[284] and also argued that the majority failed to apply the rule of lenity and instead adopted the harshest possible interpretation of a criminal statute.[285] Furthermore, Thomas argued

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[277] *Id.* (Scalia, J., concurring).

[278] *See id.* (Scalia, J., concurring); James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV 1695, 1711-12 (1993).

[279] *See* Eric David Weissman, Note, McCormick v. United States*: The Quid Pro Quo Requirement in Hobbs Act Extortion Under Color of Official Right*, 42 CATH. U. L. REV 433, 463-64 (1993).

[280] Evans v United States, 504 U.S. 255 (1992).

[281] *See id.* at 268.

[282] *Id.* (footnote omitted).

[283] *See id.* at 278-97 (Thomas, J., dissenting).

[284] *See id.* at 278-87 (Thomas, J., dissenting). *But see id.* at 269-71 (arguing that Thomas's historical analysis of common law extortion cases is seriously flawed); Lindgren, *supra* note 278, at 1720-32, 1739-40 (same).

[285] *See Evans*, 504 U.S. at 287-90 (Thomas, J., dissenting).

that the majority's approach was inconsistent with the "basic tenets of federalism" because it expanded a federal criminal statute into a "field traditionally policed by state and local laws – acts of public corruption by state and local officials."[286] Thomas invoked *Gregory's* clear-statement rule and *McNally's* caution against reading federal criminal statutes too broadly to compel "good government" by state and local officials, arguing that the Court should not construe the Hobbs Act to allow federal prosecutors to interfere with the electoral behavior of state elected officials unless Congress had explicitly authorized such prosecutions.[287] While Justice Thomas's dissent is based partially on the rule of lenity, federalist concerns about excessive federal prosecutorial interference with state and local officials appear to have been an even stronger reason for the harsh tone of his vigorous dissent.

In a concurring opinion, Justice Kennedy rejected the false pretenses argument in Thomas's dissenting opinion, but argued that the Hobbs Act did require the government to prove inducement under a quid pro quo test.[288] Acknowledging that "the phrase 'under color of official right,' standing alone, is vague almost to the point of unconstitutionality,"[289] Justice Kennedy applied the rule of lenity, a state-of-mind requirement, and the canon that statutes are to be construed so that they are constitutional to find a quid pro quo requirement. Kennedy rejected Justice Thomas's argument that because the quid pro quo requirement was not explicitly contained in the statute, courts must have made it up.[290] Thus, Justice Kennedy applied a more moderate textualism that sought to read the text in light of the traditional canons of construing statutes, which permitted him to find a quid pro quo requirement derived from the statutory language.[291]

In *City of Columbia v. Omni Outdoor Advertising, Inc.*,[292] a civil case involving the Sherman Antitrust Act,[293] Justice Scalia, in a six-justice

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[286] *Id.* at 290 (Thomas, J., dissenting).

[287] *See id.* at 291-94 (Thomas, J., dissenting) (citing Gregory v Ashcroft, 501 U.S. 452, 460-61, 467 (1991); McNally v United States, 483 U.S. 350, 359-60 (1987)).

[288] *See id.* at 272-78 (Kennedy, J., concurring).

[289] *Id.* at 275 (Kennedy, J., concurring) (quoting United States v Grady, 742 F.2d 682, 695 (2d Cir. 1984) (Van Graafeiland, J., concurring in part and dissenting in part)).

[290] *See id.* at 275-76 (Kennedy, J., concurring).

[291] *See id.* (Kennedy, J., concurring).

[292] City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365 (1991).

[293] 15 U.S.C. §§ 1-5 (1994).

opinion, applied the principle of avoiding federal involvement in local politics to conclude that public-private conspiracies against competition are immune from federal antitrust liability.[294] In his dissenting opinion in *Summit Health, Ltd. v. Pinhas*,[295] which was joined by Justices O'Connor, Kennedy, and Souter, Justice Scalia would have gone even further by adopting a presumption against a broad reading of the Sherman Act's interstate commerce provisions.[296]

While Justice Scalia has a libertarian streak in some criminal cases, he and his fellow textualists, Justices Kennedy and Thomas, are especially likely to invoke the rule of lenity in cases involving federal prosecution of state and local political officials. Furthermore, Justice Scalia's support for restrictions on federal habeas corpus suggests that his commitment to states' rights is usually stronger than his interest in preserving the rights of criminal defendants.[297]

B. Title VII and Extraterritoriality

In *EEOC v. Arabian American Oil Co.*,[298] the Court acknowledged the power of Congress to enact statutes that apply beyond our nation's boundaries, but invoked the canon that unless a contrary intent appears, congressional legislation is meant to apply only within the territorial jurisdiction of the United States. Therefore, as a result, it rejected the Equal Employment Opportunity Commission's interpretation that Title VII of the Civil Rights Act applied extraterritorially.[299] The Court argued that the canon avoided international discord by preventing unintended conflicts between American laws and those of other nations.[300] What is notable is that the Court transformed an old "presumption" into a new and stronger "clear-statement rule" that may be rebutted only by clear statutory language.[301] Justice Scalia wrote a concurring opinion emphasizing that a

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[294] *See Omni Outdoor Adver., Inc.*, 499 U.S. at 370-84. Justice Stevens wrote a dissenting opinion joined by Justices White and Marshall. *See id.* at 385-99 (Stevens, J., dissenting).

[295] Summit Health, Ltd. v Pinhas, 500 U.S. 322 (1991).

[296] *See id.* at 333-34, 343 (Scalia, J., dissenting).

[297] *See, e.g.*, Coleman v. Thompson, 501 U.S. 722 (1991) (holding that constitutional claims presented for the first time in state habeas corpus proceedings are not subject to federal habeas corpus review).

[298] EEOC v Arabian Am. Oil Co., 499 U.S. 244 (1991).

[299] *See id.* at 248.

[300] *See id.*

[301] *See id.*

court could not "give effect to mere implications from the statutory language" in the face of a clear-statement rule requiring Congress to "clearly express[ ]" its intent to apply a statute extraterritorially.[302] In dissent, Justice Marshall argued that the majority's use of a clear-statement rule thwarted strong evidence that Congress intended for Title VII to apply to United States citizens working in foreign nations for American companies.[303]

In *Arabian American Oil Co.*, the Court's reliance on principles of international comity was misplaced because these problems are usually insignificant when American law regulates American companies' treatment of United States citizens.[304] A better explanation is that the Court used a clear-statement rule to make it more difficult for Congress to regulate American businesses abroad and to protect disadvantaged groups against discrimination.[305] Justice Scalia generally has favored placing greater procedural burdens on Title VII plaintiffs that make it easier for defendants to defeat disparate impact cases.[306] He also rejects affirmative action.[307] Thus, Justice Scalia's substantive views about Title VII may well have influenced his eagerness to impose a clear-statement rule in *Arabian American Oil Co.*

C. *Avoiding Constitutional Questions: Inconsistent Application*

Perhaps the most important of the constitutionally based canons is that "'[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'"[308] During

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[302] *Id.* at 259-60 (Scalia, J., concurring in part and concurring in the judgment); *see also* Bell, *supra* note 155, at 136.

[303] *See Arabian Am. Oil Co.*, 499 U.S. at 260-75, 278 (Marshall, J., dissenting).

[304] *See* Eskridge & Frickey, *Quasi-Constitutional Clear Statement Rules*, *supra* note 132, at 616.

[305] *See id.* at 616-17

[306] *See, e.g.*, Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (requiring that the plaintiff show that challenged practice has a significantly disparate impact on employment opportunities for whites and non-whites to support a prima facie case).

[307] *See, e.g.*, Martin v Wilks, 490 U.S. 755 (1989) (allowing collateral attacks on prior consent decrees containing hiring and promotion preferences).

[308] International Ass'n Machinists v. Street, 367 U.S. 740, 749-50 (1961) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)); *see also* Eskridge & Frickey,

the late 1970s and early 1980s, the Burger Court frequently invoked this super-canon.[309] Since Justice Scalia joined the Court in 1986, the Court has been less consistent in applying this canon. Some argue that this canon gives judges too much discretion to narrowly interpret statutes that do not actually violate a constitutional principle, so its use should be limited.[310] There is a stronger argument, however, that many constitutional norms are underenforced and this canon allows courts to vindicate constitutional principles by narrowing questionable but not necessarily invalid statutes.[311]

In *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*,[312] the National Labor Relations Board issued an order instructing a union to stop distributing handbills at a shopping mall. The Board believed that such activity violated a provision of the National Labor Relations Act[313] making it an unfair labor practice to "threaten, coerce, or restrain any person" from doing business with another.[314] Justice White's opinion for the Court cited *Chevron v. Natural Resources Defense Council, Inc.*[315] and observed that the NLRB's interpretation "would normally be entitled to deference unless that construction were clearly contrary to the intent of Congress."[316] The Court did not defer to the Board, however, because "[a]nother rule of statutory construction is pertinent here: where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."[317] The Court found that the Board's interpretation raised serious First Amendment concerns and

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Quasi-Constitutional Clear Statement Rules, *supra* note 132, at 599-600; Sunstein, *Interpreting Statutes*, *supra* note 1, at 468-69.

[309] *See, e.g.*, NLRB v. Catholic Bishop, 440 U.S. 490, 501, 504 (1979) (interpreting NLRB jurisdiction narrowly to avoid conflict with First Amendment); *see also* Eskridge & Frickey, *Quasi-Constitutional Clear Statement Rules*, *supra* note 132, at 599 n.11 (listing cases).

[310] *See* RICHARD POSNER, THE FEDERAL COURTS 285 (1985) [hereinafter POSNER, FEDERAL COURTS].

[311] *See* Sunstein, *Interpreting Statutes*, *supra* note 1, at 468-69.

[312] Edward J. DeBartolo Corp. v Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988).

[313] 29 U.S.C. § 158(b)(4) (1994).

[314] *See DeBartolo Corp.*, 485 U.S. at 570-73 (discussing § 8(b)(4) of the National Labor Relations Act).

[315] Chevron v Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[316] *DeBartolo Corp.*, 485 U.S. at 574.

[317] *Id.* at 575 (citation omitted).

decided to "independently inquire whether there is another interpretation, not raising these serious constitutional concerns, that may fairly be ascribed to § 8(b)(4)(ii)(B)."[318] The Court concluded "that the section is open to a construction that obviates deciding whether a congressional prohibition of handbilling on the facts of this case would violate the First Amendment," and accordingly refused to defer to the Board's interpretation.[319] Perhaps because the majority opinion extensively discussed the statute's legislative history,[320] Justices Scalia and O'Connor concurred in the judgment only; Justice Kennedy took no part in the consideration or decision of the case.[321]

The controversial case of *Rust v. Sullivan*[322] involved Department of Health and Human Services regulations that prohibited the use of Title X funds to support abortion counseling and referral and activities advocating abortion as a method of family planning. Chief Justice Rehnquist's majority opinion, joined by Justices White, Scalia, Kennedy, and Souter, refused to apply the canon disfavoring interpretations raising serious constitutional questions.[323] The opinion rejected arguments that the regulations violated the First Amendment rights of Title X fund recipients, their staffs, or their patients by impermissibly imposing viewpoint-discriminatory conditions on government subsidies, and that the agency's interpretation violated a woman's Fifth Amendment right to choose whether to terminate a pregnancy.[324] Based implicitly upon their substantive rejection of the constitutional challenges,[325] the majority held that the regulations did not "raise the sort of 'grave and doubtful constitutional questions[ ]' that would lead us to assume that Congress did not intend to authorize their issuance. Therefore, we need not invalidate the regulations to save the statute from unconstitutionality."[326] While not strictly a textualist opinion, *Rust* demonstrates that textualist judges, including Justices Scalia and Kennedy, will join opinions that selectively employ or ignore established canons designed to protect individual rights against potentially overbroad interpretations of a statute.

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[318] *Id.* at 577

[319] *Id.* at 578-88.

[320] *See id.* at 583-88.

[321] *See id.* at 588.

[322] Rust v Sullivan, 500 U.S. 173 (1991).

[323] *See id.* at 190-91.

[324] *See id.*

[325] *See id.* at 192-202.

[326] *Id.* at 191 (quoting United States *ex rel.* Attorney General v Delaware & Hudson Co., 213 U.S. 366, 408 (1909)).

Writing for three justices, Justice Blackmun in the dissenting opinion argued that the majority's interpretation of the statute violated both the First Amendment right of the doctors to provide advice to patients and the Fifth Amendment right of patients to obtain abortions.[327] Even if this constitutional analysis was incorrect, Blackmun argued, the majority unnecessarily addressed difficult constitutional questions, despite the canon against doing so, because of their ideological "zeal" to uphold the regulations.[328] The majority's "facile" claim that the challenged regulations did not raise grave and doubtful constitutional questions was "disingenuous at best."[329] Justice Blackmun argued:

> Whether or not one believes that these regulations are valid, it avoids reality to contend that they do not give rise to serious constitutional questions. The canon is applicable to these cases not because "it was likely that [the regulations] would be challenged on constitutional grounds," but because the question squarely presented by the regulations – the extent to which the Government may attach an otherwise unconstitutional condition to the receipt of a public benefit – implicates a troubled area of our jurisprudence in which a court ought not entangle itself unnecessarily [330]

Justice O'Connor wrote a separate dissenting opinion in which she did not address the ultimate constitutional issues, but relied solely on the canon about avoiding serious constitutional questions.[331] She argued: "If we rule solely on statutory grounds, Congress retains the power to force the constitutional question by legislating more explicitly "[332]

Rust suggests that the Rehnquist Court is less willing than the Burger Court to invoke the canon to avoid serious constitutional questions and thereby protect individual liberties. While not strictly a textualist decision, *Rust* depended on the votes of Justices Scalia and Kennedy It is notable that the Rehnquist Court invoked this canon in a major case involving the separation of powers, but did not invoke it when individual liberties were at stake.[333] One explanation of *Rust* is that it reflects deference to executive

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[327] *See id.* at 203-20 (Blackmun, J., dissenting).

[328] *See id.* at 204-05 (Blackmun, J., dissenting).

[329] *Id.* at 205 (Blackmun, J., dissenting).

[330] *Id.* (Blackmun, J., dissenting).

[331] *See id.* at 223-25 (O'Connor, J., dissenting).

[332] *Id.* at 224 (O'Connor, J., dissenting).

[333] *See* Public Citizen v United States Dep't of Justice, 491 U.S. 440 (1989); Eskridge & Frickey, *Quasi-Constitutional Clear Statement Rules*, *supra* note 132,

agencies under the *Chevron* doctrine,[334] but other decisions show that Justice Scalia and other textualist judges are far less committed to *Chevron* than many commentators initially believed.[335]

V TEXTUALIST JUDGES ARE LESS LIKELY TO FOLLOW *CHEVRON*

In *Chevron v. Natural Resources Defense Council, Inc.*,[336] a 1984 case, the Supreme Court announced a two-step test to determine when courts should defer to an administrative agency's construction of a statute.[337] Many commentators believed the *Chevron* decision would revolutionize administrative law by making judges much more deferential to agencies.[338] During the late 1980s and early 1990s, however, the Supreme Court and lower courts deferred no more frequently to agency interpretations, and perhaps even less frequently, than before *Chevron*.[339] While there are several theories about this phenomenon, one important factor, although it is not dispositive, is that textualist judges are less likely to defer to agency interpretations.[340]

Some commentators have suggested that Justices Scalia and Thomas, and perhaps Justice Kennedy, are inclined to favor executive authority and therefore might use *Chevron* to justify deference in too many cases.[341] In theory and in some cases, Justice Scalia is in some ways a strong supporter of judicial deference to executive authority and of *Chevron*.[342] Justice Scalia and probably Justice Thomas, however, also tend to favor the

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at 614-15. In *Gomez v. United States*, 490 U.S. 858, 864 (1989), the Rehnquist Court applied the rule against raising constitutional issues to avoid infringing on Seventh Amendment jury rights, but in a subsequent case the Court narrowly interpreted *Gomez* in a decision involving the same statutory provision. *See* Peretz v. United States, 501 U.S. 923, 930-34 (1991); Eskridge & Frickey, *Quasi-Constitutional Clear Statement Rules*, *supra* note 132, at 615 n.103.

[334] *See* Eskridge & Frickey, *Quasi-Constitutional Clear Statement Rules*, *supra* note 132, at 618-19.

[335] *See infra* notes 341-44, 389-96 and accompanying text.

[336] Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[337] *See id.* at 842-43.

[338] *See infra* notes 364-79 and accompanying text.

[339] *See infra* notes 380-85 and accompanying text.

[340] *See* Mank, *supra* note 33; *infra* notes 389-96 and accompanying text. *But see generally* Maggs, *supra* note 18 (arguing Scalia's application of *Chevron* is not dramatically different from that of other justices).

[341] *See infra* notes 342, 389-90 and accompanying text.

[342] *See infra* notes 389-90, 402-05 and accompanying text.

protection of private property rights, which sometimes leads them to disfavor expansive agency interpretations of statutes that restrict private property rights.[343] Furthermore, textualism's very methodology may lead textualist judges to believe they are better able to interpret statutes than agencies are, and, accordingly, to ignore the spirit of *Chevron*.[344]

A. The Chevron *Decision*

Before 1984, courts were inconsistent about the degree of deference given to administrative statutory interpretations.[345] A number of Supreme Court decisions stated or implied that there was a presumption that courts ought to exercise independent judgment about the meaning of statutes, and that deference to executive interpretations required special justifications such as an express delegation by Congress of lawmaking authority to an agency [346] As a result, courts usually decided whether to defer to an agency interpretation only after engaging in a case-specific analysis of the extent to which the resolution of a statutory question depended on agency

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[343] *See infra* notes 421-24 and accompanying text.

[344] *See infra* notes 391-95, 412-18 and accompanying text.

[345] *See* RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS § 7 4, at 348-49 (2d ed. 1992) (noting that before the *Chevron* decision in 1984, "the Supreme Court maintained two inconsistent lines of cases that purported to instruct courts concerning the proper judicial role in reviewing agency interpretations of agency-administered statutes"); John F Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV 612, 623-24 (1996) [hereinafter Manning, *Constitutional Structure*] (stating that "the cases were not all easily reconcilable"); Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV 83, 93-94 (1994) (noting that before *Chevron*, courts were inconsistent about the amount of deference they paid to agency statutory interpretations; some courts were quite deferential while others paid little heed to agency interpretations).

[346] *See* Manning, *Constitutional Structure*, *supra* note 345, at 623-24; Merrill, *Judicial Deference*, *supra* note 21, at 977; Peter L. Strauss, *One Hundred Fifty Cases Per Year· Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV 1093, 1120 (1987); *see generally* Skidmore v. Swift & Co., 323 U.S. 134 (1944) (establishing doctrine of cautious deference with regard to agency statutory interpretations); NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130-31 (1944) (using the theory of delegation to support deference to National Labor Relation Board's determination that news vendors are "employees" within the meaning of the National Labor Relations Act).

expertise, or, similarly, of whether the statute delegated to the agency clear authority to promulgate legislative rules.[347]

In 1984, however, the Supreme Court decided the landmark case of *Chevron v. Natural Resources Defense Council, Inc.*,[348] which fundamentally changed the law regarding when a court should defer to an agency's construction of a statute.[349] During the beginning of the Reagan administration, the Environmental Protection Agency ("EPA"), reversing a policy adopted during the Carter administration, issued a revised rule interpreting the term "stationary source" in the Clean Air Act[350] to allow operators of polluting facilities to treat all emitting devices as if they were under a single "bubble."[351] The Supreme Court chastised the court of appeals for failing to defer to the EPA's interpretation of the statute despite the fact that the EPA's definition of "stationary source" arguably represented a "sharp break with prior interpretations of the Act."[352]

Chevron established a two-part test for determining when courts should defer to an agency's construction of a statute. First, a court examines "whether Congress has directly spoken to the precise question at issue."[353] If Congress has so spoken, then the court must effectuate that intent regardless of the agency's interpretation.[354] If the statute is ambiguous,

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[347] *See* Manning, *Constitutional Structure*, *supra* note 345, at 623-24.

[348] Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[349] *See* Merrill, *Judicial Deference*, *supra* note 21, at 975-76 (commenting that while the Court may not have intended to do so, *Chevron* revolutionized the issue of when courts should defer to agencies); Kenneth W Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 284 (1986) [hereinafter Starr, *Judicial Review*] (same); *see generally* Robert Glicksman & Christopher H. Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, 54 LAW & CONTEMP. PROBS., Autumn 1991, at 249, 286-92 (discussing *Chevron*); Seidenfeld, *supra* note 345, at 94-99 (same).

[350] 42 U.S.C. § 7411(2), (3) (1994).

[351] *See Chevron*, 467 U.S. at 840-41. The revised rule authorized "bubbles" even if a source was located in an area not in compliance with the national ambient air quality standards. *See id.* at 840.

[352] *Id.* at 862-64; *see also* Merrill, *Judicial Deference*, *supra* note 21, at 977; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (declaring that under *Chevron*, "there is no longer any justification for giving 'special' deference to 'longstanding and consistent' agency interpretations of law.").

[353] *Chevron*, 467 U.S. at 842.

[354] *See id.* at 842-43. "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n.9

however, the court in the second level of analysis must defer to the agency's interpretation if it is "permissible," or, in other words, if it is reasonable.[355] The Court in *Chevron* concluded that courts ought to defer to reasonable agency interpretations of silent or ambiguous statutes if Congress has expressly or *implicitly* delegated policymaking or law-interpreting power to the agency.[356] The Court did not provide a clear explanation or formula for what constitutes an "implicit" delegation, but the close of Justice Stevens' opinion suggested that a "gap" in congressional intent or statutory language might be enough in some cases to create such an implicit delegation.[357]

Justice Stevens suggested that agencies are usually better equipped than judges at filling in gaps in complex statutory schemes because agencies are closer to the political branches and possess greater expertise.[358] The Court observed that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer"[359] and further stated that "an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments."[360] The *Chevron* Court also mentioned the EPA's expertise as a reason for deference.[361]

On the other hand, in a footnote, Justice Stevens' *Chevron* opinion states:

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[355] *See id.* at 840, 843-45; Starr, *Judicial Review*, *supra* note 349, at 288 (stating that *Chevron*'s use of the term "permissible" is equivalent to whether agency action is reasonable); Keith Werhan, *Delegalizing Administrative Law*, 1996 U. ILL. L. REV 423, 457 (same).

[356] *See Chevron*, 467 U.S. at 843-44. If a court finds "an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," the court must accept the regulation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* On the other hand, if the legislative delegation is "implicit rather than explicit," the "court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 844. *See also* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and Courts?*, 7 YALE J. ON REG. 1, 25 (1989) (discussing *Chevron's* distinction between explicit and implicit delegations).

[357] *See Chevron*, 467 U.S. at 865-66; *see also* Anthony, *supra* note 356, at 32-35 (discussing what constitutes an implicit delegation pursuant to *Chevron*).

[358] *See Chevron*, 467 U.S. at 856-66.

[359] *Id.* at 844.

[360] *Id.* at 865.

[361] *See id.*, *see also* Merrill, *Judicial Deference*, *supra* note 21, at 977 n.39.

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.[362]

Depending upon how courts apply the "traditional tools of statutory construction," including canons of construction, judges might be more or less likely to defer to an agency's interpretation under *Chevron's* first step.[363]

Many commentators initially believed that the *Chevron* decision was revolutionary and established a new framework for administrative law.[364] After *Chevron*, a court apparently may exercise independent judgment only if Congress has spoken to the precise question at hand, and deference to executive interpretations of statutes appears to be the norm.[365] *Chevron* justified this shift in presumptions by invoking democratic theory.[366] Judges

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[362] *Chevron*, 467 U.S. at 843 n.9 (citations omitted).

[363] *See* Mark Burge, Note, *Regulatory Reform and the* Chevron *Doctrine: Can Congress Force Better Decisionmaking by Courts and Agencies?*, 75 TEX. L. REV 1085, 1094-96 (1997) (arguing that the use of canons of construction leads to a less deferential approach to *Chevron* and agency interpretations).

[364] *See* Merrill, *Judicial Deference*, *supra* note 21, at 969-70 ("Indeed, read for all it is worth, the decision would make administrative actors the primary interpreters of federal statutes and relegate courts to the largely inert role of enforcing unambiguous statutory terms."); Sunstein, *Law and Administration*, *supra* note 86, at 2075 (declaring that "[*Chevron*] has become a kind of *Marbury*, or counter-*Marbury*, for the administrative state"); Panel Discussion, *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV 353, 367 (1987) (containing observations of Professor Cass Sunstein contrasting "strong" and "weak" readings of *Chevron*).

[365] *See* Merrill, *Judicial Deference*, *supra* note 21, at 976-77

[366] *See id.* at 978; Richard J. Pierce, *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV 1239, 1239 n.1 (1989) (stating that *Chevron* is the best example of the Supreme Court's increasing willingness to construct public law doctrines designed to maximize the power of the people to control their agents). *But see* ESKRIDGE, *supra* note 2, at 290 (arguing *Chevron* wrongly relies on democratic theory to justify judicial deference to agencies; instead, courts should try to enforce the intent of Congress, "whose members are elected by and accountable directly to the people").

"are not part of either political branch," and they "have no constituency "[367] On the other hand, while agencies are "not directly accountable to the people," they are subject to the general oversight and supervision of the President, who is a nationally elected public official.[368] In addition, *Chevron* appeared to presume that whenever Congress has delegated authority to administer a statute, it also has delegated authority to the agency to fill in any gaps present in the statute rather than leave that role to the judiciary [369] Thus, while the traditional approach to administrative law had viewed the interpretation of ambiguous statutes as a question of law,[370] *Chevron* transformed such interpretations into a question of an agency policy choice.[371]

There was disagreement among commentators about the extent of judicial deference to an agency's statutory interpretations that *Chevron* required.[372] Commentators have debated whether *Chevron* announced a new paradigm in administrative law in which agencies would have the leading role in interpreting statutes and formulating policy with limited

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[367] Chevron v Natural Resources Defense Council, Inc., 467 U.S. 837, 865-66 (1984).

[368] *Id.* at 865; *see also* Merrill, *Judicial Deference*, *supra* note 21, at 978 n.44 ("*Chevron's* democratic theory thesis appears to presuppose a unitary executive, i.e., an interpretation of separation of powers that would place all entities engaged in the execution of the law – including the so-called independent regulatory agencies – under Presidential control.").

[369] *See Chevron*, 467 U.S. at 843-44 (stating Congress sometimes implicitly delegates to an agency the authority to fill a gap in a statute); Merrill, *Judicial Deference*, *supra* note 21, at 979 ("*Chevron* in effect adopted a fiction that assimilated all cases involving statutory ambiguities or gaps into the express delegation or 'legislative rule' model."); Scalia, *supra* note 352, at 516-17 (suggesting *Chevron* presumes that ambiguities entail a delegation of interpretive power).

[370] *See* 5 U.S.C. § 706 (1994) (providing that the agency's reviewing court shall interpret constitutional and statutory provisions); Werhan, *supra* note 355, at 457

[371] *See Chevron*, 467 U.S. at 844-45; Werhan, *supra* note 355, at 457

[372] *Compare* ESKRIDGE, *supra* note 2, at 162-63 ("Stevens's opinion in *Chevron* is a legal process exemplar. *Chevron* delivers the punch line for Hart and Sack's purpose-oriented approach to statutory interpretation: especially in complicated technical regulatory statutes, Congress cannot anticipate most problems of application.") *with* SUNSTEIN, AFTER THE RIGHTS, *supra* note 9, at 143, 224 (stating that *Chevron* undermines the traditional role of courts as ultimate interpreter of statutes and allows agencies too much discretion to define the scope of their own authority).

judicial supervision,[373] or merely established voluntary or flexible prudential limitations.[374]

The best explanation of *Chevron* is that whenever Congress writes an ambiguous statute or one containing a "gap," it relinquishes its policymaking discretion to the interpreter of the statute to decide among reasonable alternative readings of the statute.[375] Before *Chevron*, the Supreme Court and lower courts tried to decide on a case-by-case basis whether Congress more likely intended in a particular statute that an agency or a court should exercise policymaking discretion, but the cases were inconsistent.[376] *Chevron* sought to decrease uncertainty about whether

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[373] *See generally* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV 452 (1989) (arguing *Chevron* implicitly redefines separation of powers); Douglas W Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269 (1988) (arguing that *Chevron* is a logical corollary to the courts' acceptance of extremely liberal delegations of authority to executive agencies despite the nondelegation doctrine); Seidenfeld, *supra* note 345, at 96-97 (arguing that a strong reading of *Chevron* "essentially transfers the primary responsibility for interpreting regulatory statutes from the courts to the agency authorized to administer the statute").

[374] *See generally* Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes? A New Doctrinal Basis for* Chevron U.S.A. v Natural Resources Defense Council, 1991 WIS. L. REV 1275 (arguing that *Chevron* is best interpreted as a voluntary, prudential limitation on the Supreme Court's review of agencies, and, therefore, should be applied flexibly, on a case-by-case basis); Seidenfeld, *supra* note 345, at 94-99 (stating that while courts have disagreed to some extent about how to read *Chevron*, most "lower courts have applied its dictates with unusual consistency and often with an almost alarming rigor"); Sunstein, *Law and Administration*, *supra* note 86 (arguing *Chevron* should be reinterpreted so that a reviewing court may reject reasonable agency interpretations if court believes agency interpretation is wrong).

[375] *See* Manning, *Constitutional Structure*, *supra* note 345, at 625; Moglen & Pierce, *supra* note 138, at 1207-15; *supra* note 369 and accompanying text; *infra* notes 377, 399, 407 and accompanying text.

[376] *See* PIERCE ET AL., *supra* note 345, § 7 4, at 348-49 (noting that before the *Chevron* decision in 1984, "the Supreme Court maintained two inconsistent lines of cases that purported to instruct courts concerning the proper judicial role in reviewing agency interpretations of agency-administered statutes"); Manning, *Constitutional Structure*, *supra* note 345, at 623-24 (stating "the cases were not all easily reconcilable"); Seidenfeld, *supra* note 345, at 93-94 (stating that before *Chevron*, courts were inconsistent about the amount of deference they paid to agency statutory interpretations; some courts were quite deferential, others paid

a court or an agency should be the primary interpreter of a statute by creating a presumption or fiction that when Congress has not clearly designated the judiciary as holder of interpretive discretion, Congress has assigned that discretion to the agency, especially if it possesses rulemaking authority, because of both the agency's expertise and its accountability to the political branches.[377] As subsequent cases demonstrated, however, *Chevron's* framework has not eliminated all inconsistencies in how courts review agency interpretations; nevertheless, its intellectual rationale is different from previous decisions and it is a significant decision regarding how judges ought to approach such questions.[378]

B. How Often Do Courts Defer to Agency Interpretations?

1. *Empirical Evidence*

While many commentators initially assumed that *Chevron* would substantially increase the likelihood that courts would affirm agency decisions,[379] there is significant evidence that the rate of affirmance in the Supreme Court[380] and circuit courts[381] is approximately the same or even

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little heed to agency interpretations); *supra* notes 345-47 and accompanying text.

[377] *See* Manning, *Constitutional Structure*, *supra* note 345, at 625; Moglen & Pierce, *supra* note 138, at 1207-15; *supra* notes 369, 375 and accompanying text; *infra* notes 399, 407 and accompanying text.

[378] *See supra* notes 345-47 and accompanying text.

[379] *See supra* notes 338, 364 and accompanying text.

[380] *See* William N. Eskridge, Jr. & Philip P Frickey, *Forward: Law as Equilibrium*, 108 HARV. L. REV 27, 72 (1994) [hereinafter Eskridge & Frickey, *Law as Equilibrium*] (stating that the Supreme Court affirmed only 62% of agency civil cases in the 1993 term); Merrill, *Judicial Deference*, *supra* note 21, at 984 (stating that the Supreme Court affirmed agencies about 70% of the time for the five years following *Chevron* as compared to 75% of the time for the three years before).

[381] *See generally* Linda R. Cohen & Matthew L. Spitzer, *Solving the* Chevron *Puzzle*, 57 LAW & CONTEMP PROBS. 65, 103 (1994) (concluding the affirmance rate in federal appellate courts dropped from the lower-to-mid-70% range in 1983-87 to the 60-70% range in 1988-1990); Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1038 (finding the rate of affirmance in federal appellate courts was 75.5% three years after *Chevron* as compared to 70.9% for the year preceding the decision; the authors conclude that *Chevron* significantly reduced the rate at which federal courts of appeal remanded cases based upon rejection of an administrative agency's interpretation of its own statute, but that effect had weakened somewhat by 1988).

lower than before *Chevron* was decided in 1984.[382] Furthermore, the Supreme Court itself has continued to apply the *Chevron* framework in only about one-third of the cases presenting a deference question.[383] As a result of this empirical evidence, a growing number of commentators have questioned whether *Chevron* has resulted in a significant increase in judicial deference to agency interpretations.[384] Even some lower court decisions have cast doubt on whether judges consistently employ *Chevron*.[385]

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[382] *See* Sidney A. Shapiro & Richard Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1070-71 (1995). There are significant limitations in all evidence about the impact of *Chevron* because scholars disagree about how to measure when courts affirm agency decisions, and there is the fundamental problem of comparing apples to oranges because post-*Chevron* cases are not necessarily similar to those decided before *Chevron*. *See* Cohen & Spitzer, *supra* note 381, at 91-92 ("Although Merrill's data were suggestive, they did not support his conclusions. Because the cases reviewed by the Supreme Court change over time, the overall Supreme Court uphold rates reveal little about changes in the Court's preferences for agency discretion and judicial deference.")

[383] *See* Merrill, *Judicial Deference*, *supra* note 21, at 982; *see also* Merrill, *Textualism*, *supra* note 20, at 361-62 (explaining that the Supreme Court largely ignored the *Chevron* framework during the 1992 Term); Shapiro & Levy, *supra* note 382, at 1071 (citing Merrill's work). *But see* Cohen & Spitzer, *supra* note 381, at 91-92 (questioning Merrill's data).

[384] *See* Paul L. Caron, *Tax Myopia Meets Tax Hyperopia: The Unproven Case of Increased Judicial Deference to Revenue Rulings*, 57 OHIO ST. L.J. 637, 657 n.123 (citing sources), 657-60 (1996); Merrill, *Textualism*, *supra* note 20, at 361-62 (finding that *Chevron* appeared to be playing "an increasingly peripheral role in the decisions" of the Supreme Court during its 1991 and 1992 Terms, and that the decision was employed as "just another pair of pliers in the statutory interpretation tool chest"). *But see* Pierce, *supra* note 62, at 749-50 ("The *Chevron* test has largely realized its potential at the circuit court level. Appellate courts routinely accord deference to agency constructions of ambiguous language in agency-administered statutes."); Seidenfeld, *supra* note 345, at 84 n.5 ("Although [Merrill's *Judicial Deference* article, *supra* note 21] has led some commentators to question whether *Chevron* represents the revolution in administrative law that many have proclaimed, the lower courts' consistent application probably has a greater day-to-day impact on the administrative operation of the state.") (citations omitted).

[385] *See* Mississippi Poultry Ass'n v Madigan, 31 F.3d 293, 299 n.34 (5th Cir. 1994) (observing that "*Chevron* is not quite the 'agency deference' case that it is commonly thought to be by many of its supporters (and detractors)"); Ohio State Univ v Secretary, United States Dep't of Health & Human Servs., 996 F.2d 122,

2. *Why Have Judges Not Followed* Chevron?

Some commentators argue that *Chevron* has not produced greater judicial deference to agency determinations because the decision's framework is inherently indeterminate and manipulable.[386] As a result, judges can use *Chevron* to justify decisions based upon their ideological preferences.[387] These commentators, however, do not fully explain why so many observers, who presumably understood that judges retain some discretion in applying *Chevron's* framework, thought that the decision would have greater impact.

Some scholars believe that judges appointed by President Reagan, including Justice Scalia and many other new textualists, were more likely to defer to agency interpretations during the Reagan administration, but became less deferential during the more politically liberal Bush and Clinton administrations.[388] There is some empirical support for this hypothesis, but a purely political explanation of judicial behavior seems too simplistic.

3. *Textualist Judges and* Chevron

Presidents Reagan and Bush appointed a number of "new" textualist judges shortly after the Supreme Court decided *Chevron*. There has been a debate among scholars about whether textualist judges are more, less, or equally likely to defer to agency interpretations.

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123 n.1 (6th Cir. 1993), *vacated and remanded on other grounds*, 512 U.S. 1231 (1994); Combee v. Brown, 5 Vet. App. 248, 257 n.22 (1993) (Steinberg, J., dissenting from *en banc* denial of review), *rev'd on other grounds*, 34 F.3d 1039 (Fed. Cir. 1994); Caron, *supra* note 384, at 659-60.

[386] *See* Caron, *supra* note 384, at 658-59; Shapiro & Levy, *supra* note 382, at 1069-72.

[387] *See* Caron, *supra* note 384, at 659; Richard J. Pierce, Jr., *Legislative Reform of Judicial Review of Agency Actions*, 44 DUKE L.J. 1110, 1110 (1995); Shapiro & Levy, *supra* note 382, at 1071-72; *see also* Zeppos, *supra* note 37, at 1334 n.179 ("[T]he effect of *Chevron* may [have been] more in the area of judicial rhetoric than actual judicial decision-making.").

[388] *See* Cohen & Spitzer, *supra* note 381, at 68; *see also* Eskridge & Frickey, *Law as Equilibrium*, *supra* note 380, at 76 (stating the 1993 Supreme Court term provides "some evidence" that conservative justices are less likely to affirm more liberal Clinton administration policies); Pierce, *supra* note 62, at 780 ("By the 1993-1994 Term, the Court had a majority of conservative Justices who could predict that they would prevail in most disputes with respect to the meaning of an ambiguous statute. It follows that the conservative Justices would be even less likely to defer to an agency during the 1993-1994 Term.").

Many commentators have argued that Justice Scalia is philosophically inclined to support executive power and, therefore, likely to invoke *Chevron* too often.[389] Several commentators have suggested that Justice Scalia and many other "new" textualists are more likely to defer to administrative agencies because they refuse to consider legislative history that might contradict the agency's interpretation and show that the statute has a clear meaning.[390] Commentators who argue that the refusal of Justice Scalia and other textualists to give independent consideration to legislative history leads them to be more deferential to agency interpretations, however, wrongly assume that textualists are more likely than followers of other theories of statutory interpretation to find that a statute is ambiguous. If textualists were really more deferential to agency interpretations, one would have expected to see courts becoming more likely to follow *Chevron* during the late 1980s and early 1990s as more textualist judges gained positions of influence, but instead there appears to be less deference. The only possible explanation, for these commentators, is that textualist judges have become less deferential for political reasons as the White House shifted from Presidents Reagan to Bush to Clinton.

Some scholars believe that textualist judges are less likely to defer to agency interpretations.[391] During the late 1980s and early 1990s, when courts may have become less faithful to *Chevron*, it is notable that the Supreme Court increasingly used a textualist approach to statutory interpretation.[392] Some scholars have argued that textualist statutory interpretation has led to less judicial deference to agency interpretations because textualist judges often believe they can find the one "correct"

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[389] *See* Maggs, *supra* note 18, at 401-04 (summarizing and citing arguments of commentators who believe that Justice Scalia defers too often to administrative agencies); William D. Popkin, *Law-Making Responsibility and Statutory Interpretation*, 68 IND. L.J. 865, 872 n.36 (1993) [hereinafter Popkin, *Law-Making Responsibility*]; Bernard Schwartz, *"Shooting the Piano Player"? Justice Scalia and Administrative Law*, 47 ADMIN. L. REV 1, 50 (1995); Sunstein, *Interpreting Statutes*, *supra* note 1, at 430 n.91.

[390] *See* Maggs, *supra* note 18, at 401-04 (summarizing and citing arguments of commentators who believe that Justice Scalia defers too often to administrative agencies); Popkin, *Law-Making Responsibility*, *supra* note 389, at 872; Schwartz, *supra* note 389, at 50; Sunstein, *Interpreting Statutes*, *supra* note 1, at 430 n.91.

[391] *See* Maggs, *supra* note 18, at 404-06 (summarizing and citing sources); Merrill, *Textualism*, *supra* note 20, at 353-55, 372-73; Merrill, *Judicial Deference*, *supra* note 21, at 970; Pierce, *supra* note 62, at 750-52; *see supra* notes 340, 344 and accompanying text; *infra* notes 392-95, 412-18 and accompanying text.

[392] *See infra* notes 394-95 and accompanying text.

interpretation or "plain meaning" of a statute through a textual analysis.[393] During the 1988 to 1990 terms, just as Justice Scalia's textualist approach began to strongly influence the Court, the Supreme Court was less likely to defer to agency statutory constructions than it had been during the 1985 and 1986 terms.[394] From 1990 to 1994, the Supreme Court often used a textualist approach to find that a statute had a "plain meaning" and an agency's interpretation of the statute was therefore not entitled to *Chevron* deference.[395]

Another commentator, however, maintains that Justice Scalia's record of applying *Chevron* is not dramatically different from that of other justices of the Supreme Court.[396] While it is an overstatement to claim that Justice Scalia's approach to *Chevron* is radically different from that of other judges, his textualist views do make him less deferential than nontextualist judges in at least some types of cases.

Because Justice Scalia is the most prominent exponent of textualism on the Supreme Court, an examination of his approach to *Chevron* is a logical place to begin to study whether the rise of textualism is a factor affecting how courts apply *Chevron*.

C. *Justice Scalia and* Chevron

1. *Justice Scalia:* Chevron *as a Presumption*

In theory, Justice Scalia strongly supports *Chevron*. He explains that "the theoretical justification for *Chevron* is no different from the theoretical

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[393] *See* Maggs, *supra* note 18, at 404-06 (summarizing and citing sources); Merrill, *Textualism*, *supra* note 20, at 353-55, 372-73; Merrill, *Judicial Deference*, *supra* note 21, at 970; Pierce, *supra* note 62, at 750-52; *supra* notes 340, 344, 391-92 and accompanying text; *infra* notes 394-95, 412-18 and accompanying text.

[394] *See* Merrill, *Judicial Deference*, *supra* note 21, at 990-93. *But see* Cohen & Spitzer, *supra* note 381, at 91-92 ("Although Merrill's data were suggestive, they did not support his conclusions. Because the cases reviewed by the Supreme Court change over time, the overall Supreme Court uphold rates reveal little about changes in the Court's preferences for agency discretion and judicial deference.").

[395] *See* Merrill, *Textualism*, *supra* note 20, at 355-63, 372-73 (arguing that the Supreme Court's use of a textualist approach to statutory interpretation resulted in less *Chevron* deference during the 1992 term); Pierce, *supra* note 62, at 750-52, 762-63 (arguing that the Supreme Court during the 1993-94 term applied a "hypertextualist" approach that led to insufficient application of the *Chevron* deference principle).

[396] *See* Maggs, *supra* note 18, at 395, 409-16.

justification for those pre-*Chevron* cases that sometimes deferred to agency legal determinations," and is simply a matter of congressional intent.[397] He maintains that "[a]n ambiguity in a statute committed to agency implementation can be attributed to either of two congressional desires: (1) Congress intended a particular result, but was not clear about it; or (2) Congress had no particular intent on the subject, but meant to leave its resolution to the agency "[398] While pre-*Chevron* cases tried to distinguish between situations one and two on a statute-by-statute basis, *Chevron* established "an across-the-board presumption that, in the case of ambiguity, agency discretion is meant," and established that courts should uphold an agency's exercise of that discretion whenever it is reasonable.[399]

Justice Scalia articulates several reasons to support this presumption. First, he believes that it "is a more rational presumption than it would have been thirty years ago" because of the growth of the administrative state and the need for expertise.[400] Furthermore, he contends that even "[i]f the *Chevron* rule is not a 100% accurate estimation of modern congressional intent, the prior case-by-case evaluation was not so either;" accordingly, the *Chevron* rule "is unquestionably better than what preceded it."[401]

In addition, Justice Scalia thinks that there are a number of positive policy consequences that flow from *Chevron's* across-the-board presumption that courts should defer to reasonable agency interpretations of ambiguous statutes. "Congress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known."[402] Accordingly, because courts no longer search for a statute's single "correct" meaning, but instead defer to permissible agency interpretations, he argues that there is no longer any justification for the traditional judicial rule giving "special" deference to "long-standing and consistent" agency interpretations of a statute.[403] As a result, he predicts that the abandonment of consistency will provide "major advantages from the standpoint of governmental theory" by providing agencies with the flexibility to change policies to respond to new political forces, social attitudes, or

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[397] Scalia, *supra* note 352, at 516.
[398] *Id.*
[399] *Id.*
[400] *Id.*
[401] *Id.* at 517
[402] *Id.*
[403] *See id.*

information.[404] Because judicial interpretations of a statute usually are difficult to change even in the face of changing social conditions, Scalia concludes that "the capacity of the *Chevron* approach to accept changes in agency interpretation ungrudgingly seems to me one of the strongest indications that the *Chevron* approach is correct."[405]

Justice Scalia's somewhat implicit and somewhat explicit blessing of *Chevron* is consistent with his overall effort to reduce statutory interpretation to a series of simple, objective rules of interpretation.[406] For Justice Scalia, *Chevron* is a rule of decision that assigns the resolution of ambiguous statutes to executive agencies and gives notice to Congress that it must write clear statutes or expect courts to defer to any reasonable executive interpretation.[407]

2. *What is Ambiguous?*

Justice Scalia has argued that if *Chevron* is to have meaning, a statute must be regarded as ambiguous even if a court believes its own interpretation is superior to an agency's as long as "two or more reasonable, though not necessarily equally valid, interpretations exist," and that *Chevron* "suggests that the opposite of 'ambiguity' is not 'resolvability' but rather 'clarity'"[408] Justice Scalia warns that "*Chevron* becomes virtually meaningless if ambiguity exists only when the arguments for and against the various possible interpretations are in absolute equipose."[409] He maintains that judges must avoid the temptation to use the various possible techniques of statutory interpretation as a way to avoid finding that a statute is ambiguous when multiple reasonable interpretations exist, even if they are not equally valid.[410] He has argued that it is especially inappropriate to consider legislative history when an agency interprets a statute because reliance upon such nontextual material to contradict an agency interpretation would transform the *Chevron* principle into "a doctrine of desperation," permitting deference only when courts cannot find any extrinsic evidence that might challenge the agency's interpretation.[411]

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[404] *Id.* at 517-19.

[405] *Id.* at 517-18.

[406] *See* Sheldon, *supra* note 43, at 508-14; *supra* notes 397-405 and accompanying text.

[407] *See* Sheldon, *supra* note 43, at 509

[408] Scalia, *supra* note 352, at 520 (footnote omitted).

[409] *Id.*

[410] *See id.* at 520; *see also* Maggs, *supra* note 18, at 421.

[411] Maggs, *supra* note 18, at 454 (quoting Justice Scalia).

3. *Textualism and Less Deference to* Chevron

While Justice Scalia in many ways supports the *Chevron* doctrine, he has indicated that textualist judges may need to use it less often than interpreters who consult legislative history He has observed that how one addresses the question of "how clear is clear" under *Chevron's* first step affects one's view "of what *Chevron* means and whether *Chevron* is desirable."[412] Scalia argues that "'strict constructionist[s]' of statutes,"[413] by which he apparently means followers of his textualist approach to interpretation, are more likely to support *Chevron* because they are less likely to need to employ it, and that those who examine legislative history are more troubled by the case because they are more likely to find that a statute is ambiguous and, accordingly, that a court must defer to an agency's permissible construction.[414]

> One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists. It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt. Contrariwise, one who abhors a "plain meaning" rule, and is willing to permit the apparent meaning of a statute to be impeached by the legislative history, will more frequently find agency-liberating ambiguity, and will discern a much broader range of "reasonable" interpretation that the agency may adopt and to which the courts must pay deference. The frequency with which *Chevron* will require *that* judge to accept an interpretation he thinks wrong is infinitely greater.[415]

If a statute has a clear textual meaning, courts should give no deference to the agency's interpretation. In *EEOC v. Arabian American Oil Co.*,[416] Justice Scalia argued in his concurring opinion: "[D]eference is not abdication, and it requires us to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ."[417]

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[412] Scalia, *supra* note 352, at 521.

[413] *Id.*

[414] *See id.*

[415] *Id.*, *see also* Michael E. Herz, *Textualism and Taboo: Interpretation and Deference for Justice Scalia*, 12 CARDOZO L. REV 1663, 1670 & n.33 (1991).

[416] EEOC v Arabian Am. Oil Co., 499 U.S. 244 (1991).

[417] *Id.* at 260 (Scalia, J., concurring in part and concurring in the judgment).

Justice Scalia does not appear to appreciate entirely the irony of vigorously supporting *Chevron* because he does not expect to invoke its doctrine very often when he himself is interpreting a statute. He does not acknowledge that what he believes is the value of *Chevron* in promoting flexible agency reinterpretations of a statute is considerably diminished if a textualist judge usually concludes that a statute is clear and so no deference is owed to an agency interpretation. One also wonders why he is so worried that nontextualists judges who consult legislative history will deliberately not follow *Chevron*, if textualists rarely need to use the case. Probably, this is because he fears nontextualist judges will reach an interpretation based on legislative history that is at odds with how he would interpret the plain meaning of the text, and he is more willing to trust an agency's interpretation than that of a nontextualist judge. Whether he is correct that textualist judges are less likely to invoke *Chevron* remains a matter of controversy [418]

D. Sweet Home

Justice Scalia's adherence to textualism often leads him to believe that he can find the one "correct" interpretation of even a very complex statutory and regulatory scheme, and, accordingly, to give no deference to an agency's interpretation.[419] In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,[420] Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, selectively used canons of construction to narrow the statute, but ignored the broad purposes of the Endangered Species Act and the *Chevron* deference principle.

Scalia's dissenting opinion in *Sweet Home* may also reflect an overall philosophy of protecting private property against "excessive" government regulation while often declining to find that regulatory beneficiaries of public interest statutes have standing.[421] Justice

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[418] *See supra* notes 340, 344, 391-95, 412-17 and accompanying text.

[419] *See, e.g.*, Pauley v Bethenergy Mines, Inc., 501 U.S. 680, 706-07 (1991) (Scalia, J., dissenting) (refusing to defer to the Secretary of Labor's interpretation of HEW's regulations implementing Black Lung Benefits Act because in his view "the HEW regulations are susceptible of only one meaning, although they are so intricate that meaning is not immediately accessible").

[420] Babbitt v Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687 (1995).

[421] *See* Karkkainen, *supra* note 11, at 462-64; Mank, *supra* note 33, at 1249 n.91, Gene R. Nichol, Jr., *Justice Scalia, Standing and Public Law Litigation*, 42 DUKE L.J. 1141, 1167-68 (1993) (contending Justice Scalia's approach to standing

Thomas[422] and Chief Justice Rehnquist[423] share with Justice Scalia similar

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"threatens to constitutionalize an unbalanced scheme of regulatory review" in which "courts can protect the interests of regulated entities" while " 'regulatory beneficiaries' are left to the political process"); Lujan v. Defenders of Wildlife, 504 U.S. 555, 562-68, 571-73 (1992) (holding environmental plaintiffs who only occasionally view endangered species cannot show concrete "injury-in-fact" and, therefore, lack standing to challenge agency action under Endangered Species Act); *see generally* Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV 163 (1992) (arguing Justice Scalia's approach to standing in *Lujan* favors private economic interests and favors mere beneficiaries of public interest statutes). Justice Scalia also has been strongly protective of private property interests in cases holding that government regulation constitutes a taking of private property under the Fifth and Fourteenth Amendments. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992) (holding government regulation that deprives private property owner of 100% of value always constitutes a taking of private property under the Fifth and Fourteenth Amendments); Nollan v California Coastal Comm'n, 483 U.S. 825 (1987) (holding government regulation must be reasonably related to public need or burden and that government may not condition granting of permit on compliance with exaction unrelated to harm caused by private activity).

[422] In takings cases, Justice Thomas has joined majority opinions holding that government regulation deprives property owner of rights under the Fifth and Fourteenth Amendments. *See* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (holding government has burden of demonstrating that there is a "reasonable relationship" between the exactions imposed by government regulation and the projected impacts of private property owner); *Lucas*, 505 U.S. at 1019 (holding government regulation that deprives private property owner of 100% of value always constitutes a taking of private property under the Fifth and Fourteenth Amendments). In environmental cases, Justice Thomas has tended to favor private interests over government regulation. *See, e.g.*, Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 206 (D.C. Cir. 1991) (Thomas, J.) (concluding that Federal Aviation Administration could limit discussion of alternatives in environmental impact statement to those proposed by private applicant).

[423] *See, e.g.*, *Dolan*, 512 U.S. at 391 (holding government has burden of demonstrating that there is "reasonable relationship" between the exactions imposed by government regulation and the projected impacts of private property owner); First Evangelical Lutheran Church v County of Los Angeles, 482 U.S. 304 (1987) (holding temporary regulation of private property preventing any use may constitute a taking of property under Fifth and Fourteenth Amendments); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (Rehnquist, C.J., dissenting) (arguing that because a mining regulation allows the state to prohibit any use of "support estate," it constitutes "taking" of property under Fifth and Fourteenth Amendments); Penn Central Transp. Co. v. New York City, 438 U.S.

views about the protection of private property from government regulation. Justice Kennedy has generally supported the protection of private property rights and a restrictive approach to standing regulatory beneficiaries of public interest statutes, but often has written concurring opinions suggesting a less rigid approach than that taken by Justice Scalia or Chief Justice Rehnquist.[424]

1. *The Endangered Species Act of 1973*

Section 9(a)(1)(B) of the Endangered Species Act of 1973[425] makes it unlawful for any person to "take" an endangered species,[426] and section 3(14)[427] defines "take" to mean to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct."[428] In a resulting regulation, the Fish & Wildlife Service of the Interior Department, acting under the authority of the Secretary of Interior, defined the word "harm" in section 3(14) of the Act to include "significant habitat modification or degradation where it actually kills or injures wildlife."[429]

2. *The D.C. Circuit and* Noscitur a Sociis

In 1992, small logging companies and other groups from Oregon filed a declaratory judgment action in the United States District Court for the District of Columbia against the Secretary of Interior, contending that the regulation's definition of "take" was broader than Congress intended when it enacted the statute,[430] but the court rejected all of the plaintiffs' chal-

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104 (1978) (Rehnquist, J., dissenting) (arguing that a regulation preventing owner of historic building from using "air" rights above landmark building constitutes "taking" of property under Fifth and Fourteenth Amendments).

[424] *See, e.g.*, *Lucas*, 505 U.S. at 1032-36 (Kennedy, J., concurring); *Defenders of Wildlife*, 504 U.S. at 579-81 (Kennedy, J., concurring in part and concurring in the judgment).

[425] Endangered Species Act of 1973 § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B) (1994).

[426] *See id.*, *see also* Starla K. Dill, Note, *Animal Habitats in Harm's Way:* Sweet Home Chapter of Communities for a Great Oregon v Babbitt, 25 ENVTL. L. 513, 516 (1995).

[427] Endangered Species Act of 1973 § 3(14), 16 U.S.C. § 1532(19) (1994).

[428] *Id.*, *see also* Dill, *supra* note 426, at 516.

[429] 50 C.F.R. § 17.3 (1998); *see also* Dill, *supra* note 426, at 516.

[430] *See* Sweet Home Chapter of Communities for a Great Or. v Lujan, 806 F Supp. 279 (D.D.C. 1992), *modified sub nom.*, Sweet Home Chapter of

lenges and granted summary judgment for the government, finding "that Congress intended an expansive interpretation of the word 'take,' an interpretation that encompasses habitat modification."[431] In its first decision, the United States Court of Appeals for the District of Columbia Circuit initially affirmed the lower court's decision, but the panel split two-to-one over the issue of whether the section 9 regulation was facially invalid, and all three judges wrote separate opinions.[432] In the majority, Chief Judge Mikva thought that the Fish and Wildlife Service's interpretation was entitled to *Chevron* deference because the statute was ambiguous and the agency interpretation was reasonable.[433] Judge Williams, however, thought that the regulation was inconsistent with the statute's textual language, but that Congress in amending the Act in 1982 had implicitly ratified the regulation's restrictions on habitat modification by private individuals by creating an incidental-take permit scheme that created exceptions to those restrictions. Accordingly, he stated that Congress' establishment of the permit system "support[s] the inference that the ESA otherwise forbids some such incidental takings, including habitat modification."[434]

In his dissenting opinion, Judge Sentelle acknowledged there was some ambiguity about the meaning of the word "harm" in the statute, but invoked the *noscitur a sociis* canon of statutory construction, which suggests that words grouped in a statutory list be given a related meaning,[435] to conclude that the term "harm," as used in the statute, must be read narrowly to allow the Fish and Wildlife Service to impose civil or criminal liability only where a private landowner has taken direct action against a species.[436] Even

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Communities for a Great Or. v. Babbitt, 17 F.3d 1463 (D.C. Cir. 1994), *rev'd*, 515 U.S. 687 (1995); *see also* David A. Schlesinger, Comment, Chevron *Unlatined: The Inapplicability of the Canon* Noscitur A Sociis *Under Prong One of the* Chevron *Framework*, 5 N.Y.U. ENVTL. L.J. 638, 678 (1996).

[431] *Sweet Home*, 806 F Supp. at 282, 285; *see also* Schlesinger, *supra* note 430, at 678; *see generally* Craig Robert Baldauf, Comment, *Searching for a Place to Call Home: Courts, Congress, and Common Killers Conspire to Drive Endangered Species Into Extinction*, 30 WAKE FOREST L. REV 847 (1995).

[432] *See* Sweet Home Chapter of Communities for a Great Or. v Babbitt, 1 F.3d 1 (D.C. Cir. 1994), *modified*, 17 F.3d 1463 (D.C. Cir. 1994), *rev'd*, 515 U.S. 687 (1995).

[433] *See id.* at 8-11 (Mikva, C.J., concurring in section II(A)(1) of the opinion).

[434] *Id.* at 11 (Williams, J., concurring in section II(A)(1)).

[435] *See* Dole v. United Steelworkers, 494 U.S. 26, 36 (1990) (defining the canon *noscitur a sociis*); BLACK'S LAW DICTIONARY 1060 (6th ed. 1990) (same); Schlesinger, *supra* note 430, at 640 (same).

[436] *See Sweet Home*, 1 F.3d at 12 (Sentelle, J., dissenting).

if the word "harm" was ambiguous under the first prong of *Chevron*, it was unreasonable under the second prong for the Service to define "harm" and "take" to include "significant habitat modification or degradation."[437] Judge Sentelle applied the *noscitur a sociis* canon to limit the meaning of "harm," and to conclude that the Service's broad reading to include habitat modification was unreasonable under *Chevron's* second step.[438] "In the present statute, all the other terms among which 'harm' finds itself keeping company relate to an act which a specifically acting human does to a specific individual representative of a wildlife species."[439] In addition, Judge Sentelle applied another rule of statutory construction, the presumption against surplusage, to argue that "[t]he construction placed upon the word 'harm' by the agency and adopted by the court today renders superfluous everything else in the definition of 'take.'"[440] As a result of reading "harm" narrowly, Judge Sentelle argued there was no "reasonable way that the term 'take' can be defined to include 'significant habitat modification or degradation.'"[441] Judge Williams agreed with much of Sentelle's dissent, stating: "But for the 1982 amendments, I would find Judge Sentelle's analysis highly persuasive – including his discussion of the *noscitur a sociis* canon."[442]

Judge Williams was clearly troubled by his own opinion in the first case because the panel quickly agreed to rehear the case, and partially reversed its decision.[443] In the second decision, Judge Williams changed his vote and largely adopted Judge Sentelle's *noscitur a sociis* argument.[444] Although conceding that "[t]he potential breadth of the word 'harm' is indisputable,"[445] the majority concluded that the immediate statutory context in which Congress placed "harm" strongly suggested a narrow interpretation of the word, limiting "harm" only to "the perpetrator's direct application of force against the animal taken The forbidden acts fit, in ordinary language, the basic model 'A hit B.'"[446] The majority contended that Congress could not have intended to criminalize behavior by private

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[437] *See id.* (Sentelle, J., dissenting).

[438] *See id.* (Sentelle, J., dissenting).

[439] *Id.* (Sentelle, J., dissenting).

[440] *Id.* at 13 (Sentelle, J., dissenting).

[441] *Id.* at 12 (Sentelle, J., dissenting).

[442] *Id.* at 11 (Williams, J., concurring in Section II(A)(1) of the opinion).

[443] *See* Sweet Home Chapter of Communities for a Great Or. v. Babbitt, 17 F.3d 1463 (D.C. Cir. 1994), *rev'd*, 515 U.S. 687 (1995).

[444] *See id.* at 1464-72.

[445] *Id.* at 1464.

[446] *Id.* at 1465.

individuals that could apply to vast amounts of land, including the thirty-five to forty-two million acres of critical habitat in which grizzly bears live.[447] Accordingly, it was appropriate to apply the *noscitur a sociis* canon to avoid the Fish and Wildlife Service's overly broad interpretation of "harm."[448] Judge Williams concluded that the 1982 "incidental-take permit" amendment to section 10 did not change the meaning of the term "take" as defined in the 1973 statute.[449]

In his concurring opinion, Judge Sentelle "join[ed] with enthusiasm those portions of Judge Williams's opinion that rely on the structure of the Act and on the maxim *noscitur a sociis*" and repeated his surplusage argument from his earlier dissent, but found it unnecessary to rely on the legislative history in Judge Williams's opinion.[450]

In dissent, Chief Judge Mikva argued that the *noscitur a sociis* canon should not be applied in this case because the surrounding words in the statute were too ambiguous to provide a clear meaning to the term "harm," questioned whether it was even appropriate to invoke "a seldom-used and indeterminate principle of statutory construction," and argued that the statute's legislative history strongly supported the Secretary's definition.[451] Chief Judge Mikva also criticized the majority for placing the burden on the government to prove it was acting within the scope of the statute and for failing to specify under which prong of *Chevron* it was deciding the case.[452] The Department of the Interior suggested a rehearing en banc, but the full D.C. Circuit refused, with four judges dissenting.[453]

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[447] *See id.*

[448] *See id.* at 1465-66.

[449] *Compare* Sweet Home Chapter of Communities for a Great Or. v Babbitt, 1 F.3d 1, 11 (D.C. Cir. 1993) (Williams, J., concurring in part II(A)(1)) (arguing 1982 amendments changed meaning of "take") *with* Sweet Home Chapter of Communities for a Great Or. v Babbitt, 17 F.3d 1463, 1467-72 (D.C. Cir. 1994) (arguing 1982 amendments did not change meaning of "take"), *rev'd*, 515 U.S. 687 (1995).

[450] *Sweet Home*, 17 F.3d at 1472-73 (Sentelle, J., concurring), *rev'd*, 515 U.S. 687 (1995).

[451] *Id.* at 1474-75 (Mikva, C.J., dissenting).

[452] *See id.* at 1473-74 (Mikva, C.J., dissenting).

[453] *See* Sweet Home Chapter of Communities for a Great Or. v. Babbitt, 30 F.3d 190 (D.C. Cir. 1994), *rev'd*, 515 U.S. 687 (1995). Judge Silberman wrote a dissenting opinion joined by Chief Judge Mikva and Judge Wald. *See id.* at 194 (Silberman, J., dissenting from denial of rehearing en banc). Judge Rogers also dissented from the denial of rehearing en banc but did not join Judge Silberman's opinion. *See id.* at 191.

3. *Justice Stevens's Majority Opinion*

In a six-to-three decision, the Supreme Court reversed the D.C. Circuit and upheld the Fish and Wildlife Service's broad regulation of private landowners.[454] Justice Stevens's majority opinion argued that the text of the statute provided three reasons for concluding that the Secretary of Interior's interpretation of the statute is reasonable.[455] First, the Court used the dictionary definition of the verb form of "harm," which is "to cause hurt or damage to: injure," to find that the agency's definition was consistent with the "ordinary understanding" of the word, and that such a "definition naturally encompasses habitat modification that results in actual injury or death to members of an endangered or threatened species."[456] Additionally, Justice Stevens rejected the argument that the word "harm" in the Act should be limited to direct attempts to kill an endangered species and not applied to indirect harms resulting from habitat destruction. He pointed out that the dictionary definition does not limit itself to direct injuries and, furthermore, that the word "harm" as used in the statute would be mere surplusage unless it encompassed indirect harms.[457] Second, the Court found that "the broad purpose of the ESA supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid."[458] Third, the Court concluded that Congress' 1982 amendments to section 10 of the statute, known as the "incidental take" permit provision,[459] was evidence that Congress understood the Act to apply to indirect as well as direct harm because the most likely use for such a permit was to avert liability for habitat modification.[460] This section allows the Secretary to grant an exception to section

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[454] *See* Babbitt v Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687 (1995). Justice Stevens wrote for a majority including Justices Kennedy, Souter, Ginsburg, and Breyer, with Justice O'Connor concurring. *See id.* at 688. Justice Scalia wrote a dissenting opinion joined by Chief Justice Rehnquist and Justice Thomas. *See id.* at 714 (Scalia, J., dissenting).

[455] *See Sweet Home*, 515 U.S. at 697

[456] *Id.*

[457] *See id.* at 697-98.

[458] *Id.* at 699. The Supreme Court reaffirmed its reasoning in *TVA v. Hill*, in which it stated that " '[t]he plain intent of Congress in enacting this statute' 'was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute.' " *Id.* (quoting TVA v Hill, 437 U.S. 153, 184 (1978)).

[459] 16 U.S.C. § 1539(a)(1)(B) (1994).

[460] *See Sweet Home*, 515 U.S. at 700.

9(a)(1)(B)'s prohibition against takings of endangered species by granting a permit to an individual whose activities will cause incidental harm to an endangered species so long as the applicant provides a satisfactory conservation plan for minimizing any such harm.[461] Additionally, the Court stated that the plain meaning of section 10's requirement of a conservation plan makes sense only as "an alternative to a known, but undesired, habitat modification."[462] Accordingly, the majority concluded that the agency's interpretation was a reasonable reading of the statutory terms.[463] Furthermore, Justice Stevens observed that the statute's legislative history provided additional evidence that Congress had envisioned the possibility of a regulation similar to the one at issue in the case.[464]

Justice Stevens's majority opinion also applied the *noscitur a sociis* and presumption-against-surplusage canons of construction to conclude that the agency's interpretation was reasonable, but only by applying them in a manner directly opposite to that used by the court of appeals. This lends support to Karl Llewellyn's criticism that the canons can often support contradictory interpretations of statutory language.[465] In *Sweet Home*, the Court criticized the court of appeals' use of the *noscitur a sociis* canon to conclude that "'harm' must refer to a direct application of force because the words around it do."[466] First, the Court stated that "[s]everal of the words that accompany 'harm' in the § 3 definition of 'take,' especially 'harass,' 'pursue,' 'wound,' and 'kill,' refer to actions or effects that do not require the direct applications of force," and therefore, the court of appeals had erred in arguing that all other terms besides "harm" in the definition clearly refer to direct applications of force.[467] Moreover, Justice Stevens argued that the *noscitur a sociis* canon does not require a court to treat all the words in a list as having the same meaning. Rather, it suggests that words in such a list are likely to have related but separate meanings.[468]

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[461] *See* 16 U.S.C. § 1539(a)(1)(B).

[462] *Sweet Home*, 515 U.S. at 701 n.14.

[463] *See id.* at 697; *see also* Burge, *supra* note 363, at 1103 ("Justice Stevens cited reasons for determining that the Interior Department's interpretation was 'reasonable' based upon the 'text of the Act' and thus implied a decision based upon step two of *Chevron*.") (quoting *Sweet Home*, 515 U.S. at 695); *infra* notes 476-80 and accompanying text.

[464] *See Sweet Home*, 515 U.S. at 699.

[465] *See* Burge, *supra* note 363, at 1102; *supra* notes 97-98 and accompanying text.

[466] *Sweet Home*, 515 U.S. at 701.

[467] *Id.*

[468] *See id.* at 702.

Accordingly, the Supreme Court concluded that "[t]he statutory context of 'harm' suggests that Congress meant that term to serve a particular function in the ESA, consistent with but distinct from the functions of the other verbs used to define 'take.' "[469]

Furthermore, Justice Stevens invoked the presumption against surplusage in a far different manner than had Judge Sentelle, arguing that Congress must have had a purpose for adding the word "harm" to the long list defining "take." Therefore, it was likely that the legislature intended the term "harm" to have a meaning different from other words in the definition.[470] Justice Stevens criticized the court of appeals for giving the word " 'harm' essentially the same function as other words in the definition, thereby denying it independent meaning."[471] While Judge Sentelle had argued that a broad definition of the term "harm" violated the presumption against surplusage by rendering the other terms useless,[472] Justice Stevens argued that a narrow definition of "harm" made the word ineffectual and mere surplusage by giving it the same meaning as other defining terms for the word "take."[473] Justice Stevens concluded that "unless the statutory term 'harm' encompasses indirect as well as direct injuries, the word has no meaning that does not duplicate the meaning of other words that section 3 uses to define 'take.' "[474] Accordingly, Justice Stevens concluded that both the *noscitur a sociis* and the presumption-against-surplusage canons supported the Service's interpretation of "harm" to encompass a broader range of behavior than the other words defining "take," including a prohibition against habitat modification by private landowners.[475]

Finally, the Court invoked the *Chevron* deference principle, finding that the definition of the word "harm" in the statute was ambiguous and that the Secretary's interpretation was reasonable.[476] Citing a 1986 law

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[469] *Id.*

[470] *See id.* at 697-703.

[471] *Id.* at 702.

[472] *See* Sweet Home Chapter of Communities for a Great Or. v. Babbitt, 1 F.3d 1, 13 (D.C. Cir. 1993) (Sentelle, J., dissenting), *modified*, 17 F.3d 1463 (D.C. Cir. 1994), *rev'd*, 515 U.S. 687 (1995).

[473] *See* Babbitt v Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687, 697-98, 701-02 (1995).

[474] *Id.* at 697-98.

[475] *See id.* at 697-98, 701-02; *supra* notes 465-74 and accompanying text.

[476] *See Sweet Home*, 515 U.S. at 704. Additionally, the Court found that the legislative history of the statute supported the conclusion that the Secretary's definition of harm was based upon a permissible construction of the Act. *See id.* at 704-07

review article by then-Judge Breyer,[477] the majority asserted that "[t]he latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary's reasonable interpretation,"[478] and that "[w]hen it enacted the ESA, Congress delegated broad administrative and interpretive power to the Secretary The proper interpretation of a term such as 'harm' involves a complex policy choice."[479] Citing *Chevron*, the Court stated, "When Congress has entrusted the Secretary with broad discretion, we are especially reluctant to substitute our views of wise policy for his," and concluded that the "Secretary reasonably construed the intent of Congress when he defined 'harm' to include 'significant habitat modification or degradation that actually kills or injures wildlife.' "[480]

4. *Justice Scalia's Dissenting Opinion*

In his dissenting opinion, Justice Scalia argued that the words "take" and "harm" as used in the Act could not possibly mean "habitat modification," and that under *Chevron's* first step Congress clearly did not intend to authorize a regulation as broad as the one issued by the Fish and Wildlife Service.[481] While acknowledging that the verb "harm" has a range of meanings, Justice Scalia argued that "the more directed sense of 'harm' is a somewhat more common and preferred usage" according to style manuals and dictionaries.[482] Even more importantly, he contended that to define "harm" to include indirect actions by private individuals that cause habitat modification "is to choose a meaning that makes nonsense" of the term "take" in the statute, and, accordingly, judges should reject such a strained interpretation of the word "harm" unless there is "the strongest evidence to make us believe that Congress has defined a term in a manner repugnant to its ordinary and traditional sense."[483] Additionally, Justice Scalia argued that a broad reading of the word "harm" was inconsistent with the statute's structure and several of its other terms, including its civil and criminal

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[477] *See id.* at 703-04 (citing Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV 363, 373 (1986)).

[478] *Id.* at 703.

[479] *Id.* at 708.

[480] *Id.* (quoting 50 C.F.R. § 17.3 (1998)).

[481] *See id.* at 714-36 (Scalia, J., dissenting).

[482] *Id.* at 719 (Scalia, J., dissenting).

[483] *Id.* (Scalia, J., dissenting).

penalties and its forfeiture provisions.[484] Furthermore, Justice Scalia relied on the following external sources in finding a narrow definition of "take": an 1896 Supreme Court decision; Blackstone's Commentaries; a statute implementing a migratory bird treaty; and a 1973 treaty governing polar bear conservation.[485] He concluded, "There is neither textual support for nor even evidence of congressional consideration of" the agency's interpretation of the statute.[486]

Justice Scalia also relied upon the *noscitur a sociis* canon in concluding that the regulation was invalid.[487] While conceding the majority's point that some of the words surrounding the term "harm" can refer to indirect applications of force, Justice Scalia maintained, "What the nine other words in § 1532(19) have in common – and share with the narrower meaning of 'harm' described above, but not with the Secretary's ruthless dilation of the word – is the sense of affirmative conduct intentionally directed against a particular animal or animals."[488] Thus, Scalia agreed with Judges Williams and Sentelle that the application of *noscitur a sociis* resulted in a narrowing of the meaning of the word "harm" and was contrary to the Service's interpretation of that phrase. Justice Scalia also disagreed with the majority's view that the canon cannot be applied to deprive a word of its "'independent meaning'" and argued that it was common for words to have the same meaning when they are part of "long lawyer listings such as this."[489] Furthermore, he claimed that the narrow definition of "harm" added meaning beyond the other surrounding words by including intentional poisonings or destruction of habitat designed to kill a particular animal or animals.[490] Accordingly, Justice Scalia rejected the majority's use of the surplusage canon to broaden the meaning of the term "harm."

Furthermore, Justice Scalia attacked several other arguments advanced by the majority First, simply relying on a statute's "broad purpose" to justify reading a term expansively "is no substitute for the hard job (or in

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[484] *See id.* at 720-25 (Scalia, J., dissenting).

[485] *See id.* at 717 (Scalia, J., dissenting) (discussing use of "take" in Migratory Bird Treaty Act, 16 U.S.C. § 703 (1988 & Supp. V 1993); Agreement on the Conservation of Polar Bears, Nov. 15, 1973, art. I, 27 U.S.T. 3920, 3921, Geer v. Connecticut, 161 U.S. 519, 523 (1896); and 2 BLACKSTONE, *supra* note 80, at 411).

[486] *Id.* at 736 (Scalia, J., dissenting).

[487] *See id.* at 718-22 (Scalia, J., dissenting).

[488] *Id.* at 720 (Scalia, J., dissenting).

[489] *Id.* at 721 (Scalia, J., dissenting) (quoting *id.* at 702).

[490] *See id.* (Scalia, J., dissenting).

this case, the quite simple one) of reading the whole text."[491] Second, he argued that it was inappropriate for the majority to examine the legislative history of the 1973 Act "when the enacted text is as clear as this," and also that the legislative history from 1973 did not support the Service's interpretation.[492] Third, he conceded that the legislative history of the 1982 amendments clearly reveals that Congress contemplated enabling the Secretary to permit environmental modification, but he strongly contended that it was inappropriate to consider this legislative history when "the *text* of the amendment cannot possibly bear that asserted meaning, when placed within the context of an Act that must be interpreted (as we have seen) not to prohibit private environmental modification."[493] Justice Scalia maintained that "[t]he neutral language of the amendment cannot possibly alter that interpretation, nor can its legislative history be summoned forth to contradict, rather than clarify, what is in its totality an unambiguous statutory text."[494] Finally, it was inappropriate for the majority to read the regulation to contain a proximate causation or foreseeability requirement because a court "may not uphold a regulation by adding to it even the most reasonable of elements it does not contain."[495]

5. *Competing Visions of* Chevron. *Textualism Versus Purposivism*

In *Sweet Home*, Justice Stevens's majority opinion and Justice Scalia's dissenting opinion are good examples of the purposivist and textualist approaches to statutory interpretation, and, in particular, the application of the *Chevron* doctrine. Because Congress had given the Secretary of Interior broad discretion to interpret the Endangered Species Act and a liberal interpretation of the term "harm" to include the indirect effects of habitat modification by private landowners, Justice Stevens and the rest of the majority used the "traditional tools of statutory construction," including

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[491] *Id.* at 726 (Scalia, J., dissenting).

[492] *Id.* (Scalia, J., dissenting) (citing Chicago v Environmental Defense Fund, 511 U.S. 328, 337 (1994)). Justice Scalia also disagreed with the majority's interpretation of the legislative history of the 1973 Act, arguing that Congress intended that the section 5 land acquisition program would be the sole means to address the destruction of critical habitat by private persons on private land. *See id.* at 726-30 (Scalia, J., dissenting).

[493] *Id.* at 730 (Scalia, J., dissenting).

[494] *Id.* (Scalia, J., dissenting) (citing Chicago v. Environmental Defense Fund, 511 U.S. 328 (1994)).

[495] *Id.* at 733 (Scalia, J., dissenting).

noscitur a sociis and the presumption against surplusage, to conclude that the Service's interpretation of the word was reasonable under *Chevron*.[496]

By contrast, Justice Scalia focused on the "ordinary meaning" of the words in the text, along with logic, to conclude that the Fish and Wildlife Service's expansive interpretation of "harm" was inconsistent with the way most speakers of the English language use the word, as well as its usage in other contexts of the statute. Furthermore, he relied on four external sources, including an 1896 Supreme Court case and Blackstone's Commentaries, to explain what Congress must have meant when it used the word "take."[497] He did not explain why it is appropriate to use these external sources, which were not adopted by Congress or presented to the President, while rejecting the use of legislative history because it was not subject to adoption and presentment.[498] Furthermore, Justice Scalia emphatically rejected the notion that resort to a statute's broad purposes can be used to ignore a statutory text that clearly is contrary to an agency's interpretation.[499]

Justice Stevens's approach in *Sweet Home* better reflects the underlying rationale of the *Chevron* doctrine. In light of the statute's complexity and a prior Supreme Court case, *TVA v. Hill*,[500] which emphasized that Congress had delegated significant discretion to the Secretary and Service to implement the statute, the majority recognized that it ought to be deferential to the agency's interpretation and recognize its policymaking discretion. Thus, the majority used the canons as a means to affirm the agency's interpretation if possible. There are plausible arguments for using both the *noscitur a sociis* and surplusage canons to either narrow the definition of "harm" or to argue that it must have independent meaning beyond some of the limiting words it accompanies. To choose when the canons can be used in a contradictory manner, the best method is to look at the statute's overall purpose and whether deference to the agency is

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[496] *Id.* at 690-708; Chevron v Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[497] *See Sweet Home*, 515 U.S. at 717 (Scalia, J., dissenting) (discussing use of "take" in Migratory Bird Treaty Act, 16 U.S.C. § 703 (1988 & Supp. V 1993); Agreement on the Conservation of Polar Bears, Nov 15, 1973, art. I, 27 U.S.T. 3920, 3921, Geer v Connecticut, 161 U.S. 519, 523 (1896); and 2 BLACKSTONE, *supra* note 80, at 411).

[498] *See* Manning, *Textualism as a Nondelegation Doctrine*, *supra* note 33, at 705.

[499] *See supra* note 491 and accompanying text.

[500] TVA v Hill, 437 U.S. 153, 184 (1978); *see supra* notes 476-80 and accompanying text.

appropriate, as Justice Stevens did in *Sweet Home*. Justice Scalia's emphasis on the "ordinary" meaning of the text led him, Chief Justice Rehnquist, and Justice Thomas, as well as Judges Williams and Sentelle, to apply the canons without giving deference to the agency's expertise or the statute's broad purposes. Justice Scalia's and Judges Williams's and Sentelle's use of the *noscitur a sociis* and surplusage canons to narrow the meaning of the statute appears to have been motivated in part by a desire to protect private property owners from an expansive reading that subjects millions of acres to federal regulation, but their narrow reading is at odds with Congress's broad purposes and especially the 1982 Amendments to the Act.[501]

VI. A BALANCED APPROACH TO STATUTORY CANONS

A. Professor Sunstein's Hierarchy of Modern Interpretive Principles

Professor Sunstein has sought to update the traditional canons of construction by developing new canons or "interpretive principles" to deal with the types of issues that arise in the modern regulatory state.[502] He "focus[es] on norms that read legislative instructions in light of institutional or substantive concerns" and does not seek to address syntactical or congressional canons.[503] He acknowledges that institutional or substantive norms are value-laden and therefore controversial, but he seeks to find usable interpretations by seeking areas where there is sufficient consensus or by concentrating on core constitutional requirements.[504] Additionally, he seeks principles of statutory interpretation that will improve the performance of government institutions.[505] Finally, he seeks principles that take into account statutory functions and how statutes fail in practice.[506] Sunstein recognizes the potential for conflicts among his principles, and seeks to provide rules of priority and harmonization.[507]

His proposed principles are a major intellectual contribution to our understanding of statutory interpretation and the operation of the modern regulatory state, but they fail to provide a comprehensive system for

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[501] *See supra* notes 458-63, 476-80 and accompanying text.

[502] *See generally* Sunstein, *Interpreting Statutes*, *supra* note 1, at 462-505.

[503] *Id.* at 464.

[504] *See id.* at 466.

[505] *See id.*

[506] *See id.* at 466-67

[507] *See id.* at 497-502.

balancing competing canons or determining how broadly or narrowly to apply a canon in a particular case. This Part will focus on applying Professor Sunstein's principles to the cases discussed in Parts III, IV, and V to show that they do not provide a satisfactory basis for analyzing how the textualist approach to statutory interpretation tends toward selective use of the canons.

1. *Sunstein's Principles*

First, Professor Sunstein argues that the Constitution's norms provide a starting place for statutory analysis.[508] He particularly emphasizes that courts should use interpretive principles to vindicate constitutional norms that tend to be underutilized.[509] He proposes that courts vigorously apply the canon that statutes should be interpreted to avoid not only constitutional invalidity, but also serious constitutional doubts.[510] He acknowledges the argument that this canon gives judges too much discretion to limit statutes that do not actually violate a constitutional principle and that it is appropriate to limit its use.[511] However, he contends that many constitutional norms are underenforced and this canon allows courts to vindicate constitutional principles by narrowing questionable but not necessarily invalid statutes.[512]

Professor Sunstein encourages courts to use clear-statement rules or narrow construction to promote underenforced constitutional norms, including federalism, political accountability, checks and balances, and the nondelegation principle. Because in our federalist system states are presumed to have the authority to regulate their citizens, courts should require a clear statement before interpreting a statute to preempt state law [513] Where Congress broadly delegates policymaking authority to an administrative agency, Professor Sunstein believes there is a danger that the agency will seek to expand its authority beyond statutory limits or will try to act in ways that avoid centralized presidential control.[514] Especially where agencies seek to broadly interpret their power or jurisdiction, courts should consider narrowly construing a regulatory statute to promote agency accountability to Congress and the President. This would provide a

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[508] *See id.* at 468.
[509] *See id.*
[510] *See id.* at 468-69
[511] *See id.* at 469; *see also* POSNER, FEDERAL COURTS, *supra* note 310, at 285.
[512] *See* Sunstein, *Interpreting Statutes*, *supra* note 1, at 468-69.
[513] *See id.*
[514] *See id.* at 470.

modicum of substance to the neglected nondelegation principle that Congress should make political choices and not delegate excessive amounts of lawmaking authority to agencies.[515]

Professor Sunstein is very concerned with protecting disadvantaged groups and promoting individual civil rights. For example, he cites the well-established canon that courts should interpret statutes in favor of Native American tribes that the government has mistreated in the past.[516] Because antidiscrimination statutes protecting minorities are generally underenforced, Sunstein argues that courts should resolve interpretive doubts to protect disadvantaged groups, including women and minorities.[517]

2. *Sunstein's Rules of Priority and Harmonization*

Sunstein is aware that his principles may conflict with one another. "For example, the principle favoring state authority might collide with the principle favoring disadvantaged groups."[518] Nevertheless, he argues that "[p]rinciples of harmonization and priority can in fact be developed to resolve cases of conflict," although he acknowledges that the application of such principles cannot be "purely mechanical" and that "[i]nevitably, statutory construction is an exercise of practical reason, in which text, history, and purpose interact with background understandings in the legal culture."[519]

Sunstein maintains that the closely allied principles of political accountability and deliberation by politically accountable actors deserve the highest respect.[520] Second in Sunstein's hierarchy are other interpretive principles derived from constitutional norms, such as "broad interpretation of statutes protecting disadvantaged groups, against delegations of legislative authority, in favor of state autonomy, and in favor of narrow construction of interest-group transfers."[521] Furthermore, he contends it is possible to create a hierarchy among this group of constitutionally based interpretive principles by, for instance, treating the principle in favor of state autonomy on a lesser plane "than the principle in favor of protection of disadvantaged groups, which is the product of the fourteenth amend-

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[515] *See id.* at 469-71.
[516] *See id.* at 483.
[517] *See id.* at 483-85.
[518] *Id.* at 497
[519] *Id.* at 497-98.
[520] *See id.* at 498.
[521] *Id.*

ment, a self-conscious attempt to limit the scope of state power." Indeed, he notes that existing case law already does so.[522] Finally, interpretive principles without constitutional basis such as the promotion of regulatory efficiency occupy the lowest rung in Sunstein's hierarchy [523]

According to Sunstein, courts should try to avoid conflicts altogether by harmonizing potentially divergent norms.[524] Furthermore, courts should take into account the degree to which an interpretive norm is violated in deciding which to prefer.[525]

Sunstein criticizes the Supreme Court's decision in *Pennhurst State School & Hospital v. Halderman*[526] for using a clear-statement rule designed to protect states against lawsuits.[527] The Court claimed that Congress had imposed a condition on the grant of federal funds, thereby rejecting the claim of mentally retarded people that the Developmentally Disabled Assistance and Bill of Rights Act[528] created legally enforceable rights. Sunstein argues that courts should aggressively construe statutes in favor of the developmentally disabled because they have failed to use the Fourteenth Amendment's Equal Protection Clause to protect this vulnerable group, and should compensate by using statutory interpretation to fulfill the values of the clause.[529] Where the values of the Fourteenth Amendment are at issue, federalist principles supporting clear-statement rules should bow to the protection of the disadvantaged.[530]

3. *The Limitations of Sunstein's Model*

Despite his best efforts, Sunstein's principles of priority and harmonization do not provide a complete answer to the problems of conflicting canons or how broadly or narrowly to apply them in a given case.[531] For instance, even if one agrees with the principle that the Fourteenth Amendment should trump federalist clear-statement principles, there are difficult questions to resolve depending on the degree to which the

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[522] *Id.* at 498-99

[523] *See id.* at 499

[524] *See id.*

[525] *See id.* at 499-500.

[526] Pennhurst State Sch. & Hosp. v Halderman, 451 U.S. 1 (1981).

[527] *See id.* at 17

[528] 42 U.S.C. §§ 6000-6081 (1994).

[529] *See* Sunstein, *Interpreting Statutes*, *supra* note 1, at 500-02.

[530] *See id.*

[531] *See* Bell, *supra* note 155, at 137 n.168; Moglen & Pierce, *supra* note 138, at 1225-27

Amendment or states' rights principles are implicated. One might argue that the reluctance of the *Pennhurst* Court to apply the Fourteenth Amendment to protect the developmentally disabled means that federalist concerns should take precedence. *Seminole Tribe v. Florida*[532] provides another example. One might argue that the Indian Gaming Regulatory Act only marginally relates to the disadvantaged status of Native American groups in United States history, and, accordingly, that states' sovereign immunity should take precedence over any concern for the "right" of a disadvantaged group to make gambling profits.[533] Professor Sunstein's four levels of priority and attempts at providing additional guidance simply do not completely answer how to balance competing constitutional norms that may be implicated to a lesser or greater degree in a given case.[534]

In addition, one may disagree with some of Professor Sunstein's norms. He raises legitimate issues about agencies defining their own jurisdiction – foxes guarding henhouses – but does not fully appreciate the possibility that judges, especially textualists, may give lip service to *Chevron* and then conclude that an agency's interpretation is contrary to their own interpretation of a "clear" statute.[535]

Even Professor Sunstein's proposals to promote regulatory efficiency are open to criticism. Because the beneficiaries of environmental programs usually are diffuse and politically disorganized, whereas the targets of such regulation normally are concentrated and well-organized, Professor Sunstein suggests that judges could aggressively construe regulatory statutes to protect the environment.[536] On the other hand, the influence of unions and workers might create overzealous occupational regulation; this suggests that judges should narrowly construe such statutes.[537] While these collective action problems are real, interpreting specific environmental or occupational provisions may raise countervailing or contradictory issues that cloud how a judge should interpret a statutory provision.[538] For instance, how narrowly or aggressively should a judge interpret an environmental statute that also involves significant occupational issues?

Professor Sunstein deserves praise for his brilliant effort to create new interpretive principles for the modern regulatory state and for his attempt

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[532] Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996).

[533] *See id.* at 1123-24.

[534] *See* Bell, *supra* note 155, at 137 n.168.

[535] *See supra* notes 340, 344, 392-95, 412-18, 481-95 and accompanying text.

[536] *See* Sunstein, *Interpreting Statutes*, *supra* note 1, at 478.

[537] *See id.* at 478-79.

[538] *See* Moglen & Pierce, *supra* note 138, at 1225-27

to provide rules of priority and harmonization to resolve conflicts among competing norms. Nevertheless, his model does not completely address how to rank, balance, or apply the canons. There is a certain truth in Llewellyn's criticism that, for any given canon, there is usually a conflicting canon. Nevertheless, as both Llewellyn and Sunstein suggest, there are better and worse ways to apply the canons in light of practical experience and the interpreter's situation sense.[539]

B. Against Textualism: A More Balanced Approach to Canons

While it is difficult to develop a model for reconciling canons that always works, it is possible to recognize where judges have applied canons either too broadly or narrowly Textualist judges have too freely invoked clear-statement rules to protect federalist concerns and have not applied the canons vigorously enough to protect civil liberties or executive interpretations of regulatory statutes.

1. *Clear-Statement Rules*

a. State Sovereign Immunity

Commentators often have argued that federalist norms are likely to be underenforced because the political branches do not have a stake in protecting structural values that protect states against the expansion of national power, because courts have failed to develop principled constitutional limitations required by the Tenth Amendment and the Commerce Clause, and because "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal government itself."[540] Accordingly, Professor Sunstein, who values individual rights highly, acknowledges that federalism is likely to be an underenforced value and that clear-statement rules are an appropriate means to protect federalist values against overly expansive judicial readings of federal statutes.[541]

The Supreme Court's aggressive use of clear-statement principles to protect states' rights raises serious questions about whether the Court has

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[539] *See supra* notes 100, 120-25, 502-07 and accompanying text.

[540] Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550 (1985); *see* Eskridge & Frickey, *Quasi-Constitutional Clear Statement Rules*, *supra* note 132, at 630-33.

[541] *See* Sunstein, *Interpreting Statutes*, *supra* note 1, at 469, 498-502.

gone too far to protect states at the expense of national interests. Because textualist judges ignore evidence of congressional intent in a statute's legislative history, clear-statement rules are counter-majoritarian. They place a significant burden on Congress to explicitly regulate state behavior even though the legislative process is often haphazard about using exact language.[542]

Furthermore, in a series of cases – *New York*,[543] *Seminole Tribe v. Florida*,[544] *Lopez*,[545] and *Printz*[546] – the Court has restricted the authority of Congress to regulate the behavior of state officials and arguably shifted the balance of power from the national to the state level. While the Court since the late 1930s has aggressively read the Commerce Clause to expand national power, one may now argue that national authority is now being underenforced by the combination of a narrow reading of the Commerce Clause, a broad reading of state sovereign immunity, and the application of clear-statement rules in order to narrow federal regulation of state interests. In addition, *Gregory*[547] and similar cases use such vague and overly broad language and categories to protect "traditional" or "core" state interests that the danger now lies with the underenforcement of federal statutes.[548]

b. Federal Sovereign Immunity

The principle of federal sovereign immunity is far less compelling than the need to preserve some state immunity in light of encroaching national power. There is a separation-of-powers argument that federal sovereign immunity is needed to prevent courts from encroaching on congressional or executive authority [549] Clear-statement rules, however, often result in courts ignoring congressional intent by demanding far more explicit statements of legislative intent than is customary [550] Moreover, historically, Congress often has waived federal sovereign immunity, and, accordingly,

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[542] *See* Eskridge & Frickey, *Quasi-Constitutional Clear Statement Rules*, *supra* note 132, at 630-34, 643-44.

[543] New York v United States, 505 U.S. 144 (1992).

[544] Seminole Tribe v Florida, 116 S. Ct. 1114 (1996).

[545] United States v. Lopez, 514 U.S. 549 (1995).

[546] Printz v United States, 117 S. Ct. 2365 (1997).

[547] Gregory v Ashcroft, 501 U.S. 452 (1991).

[548] *See supra* notes 185-207 and accompanying text.

[549] *See generally* Harold Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV 1529, 1530-32, 1539-40 (1992); Nagle, *supra* note 208, at 813-19.

[550] *See* Nagle, *supra* note 208, at 818-19, 834-36.

it is difficult to argue that it is a core value that needs strong judicial protection through the use of a clear-statement rule.[551] A weaker presumption of federal sovereign immunity is more appropriate to protect the United States from excessive suits than is a super-strong clear-statement rule that ignores legislative purpose and legislative intent or demands unequivocal textual language.[552] *Ardestani*,[553] *Nordic Village*,[554] and *Ohio*[555] all ignored significant indications that Congress intended to waive the United States' sovereign immunity, and, therefore, thwarted the legislature for no strong policy reason. *Williams*'s[556] pragmatic approach to the Internal Revenue Code's text and the situation faced by taxpayers reflects a more appropriate approach to statutory interpretation. *Lane*,[557] however, suggests that the Court is still committed to its flawed super-strong clear-statement approach to waiving federal sovereign immunity

2. *Individual Liberties*

Textualist judges sometimes employ judicial canons to protect individual rights, including the rule of lenity in construing criminal statutes.[558] What is notable, however, is that the Court in recent years has been more aggressive about using clear-statement rules to protect states' rights or even federal sovereign immunity than it has been to safeguard individual liberties. Thus, in *Arabian American Oil Co.*,[559] the Court applied the principle against extraterritorial application of statutes to deny application of a central civil rights statute, Title VII, to protect an American citizen from discrimination by an American company even though the likelihood of controversy with foreign laws was minimal.[560] Here, Sunstein's principle that the values of the Fourteenth Amendment's Equal Protection Clause should take precedence over lesser norms, such as avoiding interference with the conduct of foreign relations, suggests that the Court should have decided that Title VII does apply at least to American citizens employed by American citizens, especially in light of

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[551] *See id.* at 834.

[552] *See id.*

[553] Ardestani v INS, 502 U.S. 129 (1991).

[554] United States v Nordic Village, Inc., 503 U.S. 30 (1992).

[555] United States Dep't of Energy v Ohio, 504 U.S. 607 (1992).

[556] Williams v United States, 514 U.S. 527 (1995).

[557] Lane v Pena, 116 S. Ct. 2092 (1996).

[558] *See supra* notes 261-91 and accompanying text.

[559] EEOC v Arabian Am. Oil Co., 499 U.S. 244 (1991).

[560] *See supra* notes 298-307 and accompanying text.

Justice Marshall's dissenting opinion, which pointed out strong evidence in Title VII's legislative history that Congress intended the statute to have extraterritorial application.

In applying the principle against construing a statute in a way that raises serious constitutional doubts, the Court needs to disregard as much as possible its substantive biases and use clear-statement rules as a means to protect individual liberties. In *Rust v. Sullivan*,[561] Justice O'Connor's application of a clear-statement approach requiring Congress to clearly express its desire to limit federal funding of abortion counseling was an appropriate means of avoiding a constitutional question while leaving the issue open until there is a clearer demonstration of majoritarian sentiment in Congress.[562] Indeed, the willingness of textualist judges to apply clear-statement rules to protect federalism while refusing to do so in *Rust* is striking.

There is an argument that federalist values are more likely to be underenforced than First Amendment or other civil liberties principles, and, therefore, that it is more appropriate to invoke clear-statement rules in federalist cases than in those involving individual liberties.[563] There are stronger reasons, however, for believing that individual rights are likely to be underenforced because of the time and cost of doing so, and, at the very least, courts ought to be as willing to use clear-statement rules to narrow statutes that arguably harm individual civil liberties as they are to protect state sovereignty or federal immunity from suit.[564]

3. *The Case for Deference to Executive Agencies*

While it may be entirely appropriate for judges to actively employ canons when they are the primary interpreters of a statute, a different situation is presented when they review an agency interpretation of a statute. *Chevron* stated or strongly implied that agencies generally possess greater expertise than most Article III judges about the often highly technical issues in modern administrative statutes, and pointed out that agencies are closer to the political branches, especially because they are under the supervision of the President, than the judiciary [565] While agencies

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[561] Rust v Sullivan, 500 U.S. 173 (1991).

[562] *See supra* notes 322-33 and accompanying text.

[563] *See* Eskridge & Frickey, *Quasi-Constitutional Clear Statement Rules*, *supra* note 132, at 630-33.

[564] *See id.* at 630-34, 643-44.

[565] *See* Mank, *supra* note 33, at 1278-84; *supra* notes 348-78 and accompanying text.

should not change a previous interpretation without a good reason, in *Chevron* itself and subsequent decisions, the Court has emphasized that agencies may change the interpretation of an ambiguous statute if there are reasonable policy grounds for doing so.[566]

Furthermore, the strongest reason for allowing agency interpretations to prevail is that many modern regulatory statutes are intransitive; that is, the statute has no real intent or meaning and Congress has left it to the agency to give it meaning, perhaps after consulting with a small "interpretive community" of regulated firms and public interest groups that have highly specialized knowledge about the subject matter.[567] Because Congress writes most modern regulatory statutes for the benefit or control of "a small community of lawyers, regulators, and people subject to their specific regulations,"[568] an agency's interpretation of that interpretive community's understanding of the language should prevail over how ordinary users of the English language might interpret the statute using the traditional canons of construction.[569] Judicial deference to an agency's filling in of the gaps in an intransitive statute is most appropriate where Congress has explicitly or implicitly delegated rulemaking authority to the agency, but is somewhat important even when the agency merely has the power to issue an informal interpretive opinion about a statute's meaning.[570]

While Justice Scalia is uncomfortable with the notion that Congress may actually delegate lawmaking authority to an executive agency, he is able to essentially sanction this result by treating *Chevron* as an across-the-board presumption that, in the case of ambiguity, agency discretion is meant.[571] Because it often is a fiction to say that Congress had a specific intent about an issue when it enacted a statute, it was appropriate for the Supreme Court in *Chevron* to adopt the fiction or presumption that Congress intended to delegate lawmaking or interpretive authority to the agency, which is most likely to know how to interpret the statute in light

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[566] *See supra* notes 348-78 and accompanying text.

[567] *See* Mank, *supra* note 33, at 1280-81, Moglen & Pierce, *supra* note 138, at 1207-15; Edward L. Rubin, *Modern Statutes, Loose Canons, and the Limits of Practical Reason: A Response to Farber and Ross*, 45 VAND. L. REV 579, 581-83 (1992) (discussing "the varying degrees of transitivity that modern statutes possess"); Shapiro, *supra* note 86, at 955-56.

[568] Ross, *supra* note 64, at 1057

[569] *See id.* at 1057-62, 1067; *see* Mank, *supra* note 33, at 1280-81.

[570] *See* Shapiro, *supra* note 86, at 955-56.

[571] *See* Scalia, *supra* note 352, at 515.

of changing social, political, and technical factors and in light of the views of the small interpretive community most affected by that interpretation.[572]

Accordingly, the *Chevron* principle that Congress has delegated lawmaking or interpretive authority to fill gaps in or interpret ambiguous statutes should prevail over various canons that favor narrow interpretation of a statute or continuity unless a judge strongly believes that the agency interpretation is contrary to the enacting legislature's intent or purpose in enacting the statute. The difficulty of applying interpretive principles in the modern regulatory state suggests the wisdom of the *Chevron* decision. Whether to read a statute narrowly or aggressively involves a number of political, technical, social, and economic issues. It often is not obvious whether judges or agencies are better qualified to address the different facets of a regulatory problem. Article III judges might be less susceptible to direct political influence by organized lobbyists than are agencies, but also less able to understand the practical problems of implementation. Even strong proponents of active judicial review and implementation of interpretive principles for the modern regulatory state acknowledge that agencies usually possess specialized fact-finding and policy-making competence superior to the judiciary.[573] *Chevron* creates a simple presumption that if a statute is ambiguous, courts assume that Congress has delegated policymaking authority to an agency, especially if the agency has rulemaking authority.[574] *Chevron's* across-the-board presumption is more workable than any proposed interpretive principle for the modern regulatory state.

In some cases, the *Chevron* canon providing a presumption of deference to administrative agencies must yield to countervailing constitutional and institutional principles. Despite Professor Sunstein's attempt to provide a hierarchy of interpretive principles, it is difficult to formulate precise rules for when an agency interpretation must yield even to a constitutional principle. In *Rust*, if there really had been no significant controversy about the ability of physicians to communicate with their patients, then the majority would have been right not to invoke the canon against raising constitutional difficulties and to defer to the agency's interpretation of the statute.[575] Both Justice Blackmun's and Justice

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[572] *See generally* Moglen & Pierce, *supra* note 138, at 1207-15. *But see* Cass R. Sunstein, *Exchange, Principles, Not Fictions*, 57 U. CHI. L. REV 1247, 1256-58 (1990) (arguing that statutory interpretation should be based not on fictions, but instead on principles).

[573] *See* Sunstein, *Law and Administration*, *supra* note 86, at 2117

[574] *See supra* notes 348-78 and accompanying text.

[575] *See supra* notes 348-78 and accompanying text.

O'Connor's dissents, however, made a more persuasive case that the agency's interpretation should not be granted deference because it raised significant constitutional issues that would better be avoided.[576] *Chevron* does not require judges to abdicate their role in protecting constitutional rights and preventing agencies from flagrantly ignoring congressional intent.

Commentators who have argued that textualist judges are especially likely to defer to executive agency interpretations because such judges refuse to consider legislative history have failed to consider that textualism as a methodology often leads judges to believe they can find the one "correct" interpretation or "plain meaning" of a statute regardless of how an agency interprets the statute.[577] In addition, because many textualists also are strong defenders of private property interests, they may be subtly biased against broad agency interpretations of regulatory authority even if an expansive interpretation is reasonable and consistent with congressional intent or purpose.[578] The possible bias of many textualist judges in favor of sovereign immunity and private property may partially explain why they often seem more inclined to favor canons such as clear-statement rules that narrow statutory intent rather than those that enlarge it to serve a statute's broad remedial purposes.[579] Textualist judges should be aware of the possible bias of their methodology in favor of narrow statutory interpretation. They should resist, to the extent possible, their instinctual need to invoke *Chevron* less often because the textualist method allows them, more often than interpreters who consider legislative history, to find the correct meaning of the text.[580]

CONCLUSION

In applying traditional canons such as the plain-meaning rule, *noscitur a sociis*, and *expressio unius est exclusio alterius*, and more modern clear-statement rules, such as the presumption against extraterritoriality, Justice Scalia and many other modern or "new" textualists have tended to apply them rigidly to find that a statute has a single, often narrow, meaning. Instead, Justice Scalia should remember his own advice that canons are

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[576] *See supra* notes 348-78 and accompanying text.

[577] *See supra* notes 340, 344, 392-95, 412-18, 481-95 and accompanying text.

[578] *See supra* notes 421-24 and accompanying text.

[579] *See supra* notes 152-249 and accompanying text.

[580] *See supra* notes 340, 344, 392-95, 412-18, 421-24, 481-95 and accompanying text.

"simply *one indication* of meaning" and cannot provide an absolute guide to statutory meaning.[581] If Justice Scalia and certain other textualists treated the plain-meaning rule, various syntactical canons, and several clear-statement rules merely as guides that could yield to contrary indications of statutory purpose or intent, there would be much less controversy about the new textualism.

It is striking that textualist judges aggressively use clear-statement rules to protect state sovereignty or federal sovereign immunity, but were unwilling to use similar principles in *Rust*, a civil liberties case.[582] Courts need to apply clear-statement rules in both federalist *and* civil liberties cases, where the danger of judicial underenforcement is significant. Indeed, with the Court's recent restrictions on the commerce power to regulate states, the unwillingness of the Court to treat individual liberties with the same degree of care as states' rights or federal sovereign immunity is striking. Furthermore, the unwillingness of textualist judges to consider legislative history heightens the danger that their use of clear-statement rules to protect state concerns or federal sovereign immunity will ignore majoritarian goals.

Many commentators believed that textualist judges were likely to invoke *Chevron* frequently to protect executive power and because their methodology refuses to consider legislative history that might show clear congressional intent, but textualist judges seem less likely to employ *Chevron* both because they believe they can interpret a statute's text without any need to defer to an agency interpretation and because they favor restricting government regulation of private property.[583] The confidence of textualist judges in their ability to interpret complex regulatory statutes is misplaced. As *Chevron* recognized, in many cases, Congress writes intransitive statutes where there are gaps the legislature expects the agency to fill.[584] In the case of intransitive statutes, it is folly for a textualist or a nontextualist judge to find the one correct original intent or purpose, and a judge should defer to any reasonable agency interpretation.[585]

If Professor Sunstein is unable to provide a comprehensive model for ranking and harmonizing various canons of construction, it may not be

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[581] SCALIA, *supra* note 105, at 27

[582] *See* Rust v Sullivan, 500 U.S. 173 (1991).

[583] *See supra* notes 340, 344, 392-95, 412-18, 421-24, 481-95 and accompanying text.

[584] *See supra* notes 567-74 and accompanying text.

[585] *See supra* notes 567-74 and accompanying text.

possible to do so. Nevertheless, it is possible to say that textualist judges too often use clear-statement rules and a willful blindness to legislative history to protect federalist values or even federal sovereign immunity, while failing to apply clear-statement rules to narrow statutes that threaten individual liberties. Furthermore, textualist judges often use canons of construction to disregard agency statutory interpretations while ignoring *Chevron's* principle of judicial restraint and deference, in appropriate circumstances, to agency expertise. Textualists have shifted the canons too far in favor of states' rights as opposed to majoritarian national values. It is time to restore judicial balance by reemphasizing canons protecting individual liberties, congressional intent, and also, perhaps paradoxically, executive authority