2001

Making Laws Moral: A Defense of Substantive Canons of Construction

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I. INTRODUCTION

We live, it is often said, in a cynical age.[1] Americans, we hear, do not trust the media, Hollywood, the President, Congress, or most of the other institutions of our society.[2] Our fellow citizens believe that these institutions have failed to accomplish the tasks for which they were designed. The police do not protect us from crime, and Congress and the President cannot agree on the budget. Not surprisingly, those inclined to such criticism have found the legal system an easy target. The title of a recent best seller, *The Death of Common Sense*,[3] says everything one needs to know about current popular opinion regarding the legal system.

Much of Philip Howard's book consists of anecdotes describing the senseless actions seemingly required by many legal rules. When an experienced attorney like Howard tells society that our laws do not work, it is necessarily an indictment of the judiciary's ability to interpret statutes in a way that makes sense to those subject to the laws. At bottom, the average citizen relies on the judge in her case to ensure that she gains the benefit of sensible legal rules. Given the widespread belief that many legal rules are absurd, much of society must believe that judges are willing accomplices in the imposition of these nonsensical rules.

Many Americans also blame their loss of faith in the legal system on judges' refusal to act as neutral interpreters of the law; judges, the critics say, pretend they are interpreting the law, but instead impose their narrow political preferences on citizens who never voted for these policies.[4] Judges, for example, are

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[1]*See, e.g.*, WILLIAM J. BENNETT, THE DEATH OF OUTRAGE 67–68 (1998).

[2]*See* Judith Valente, *Do You Believe What Newspeople Tell You,* PARADE, Mar. 2, 1997, at 4; David W. Moore & Lydia Saad, *Perks for Clinton's Donors Draw Public Yawn in Poll,* THE SUNDAY OKLAHOMAN, Mar. 2, 1997, at A12.

[3]PHILIP HOWARD, THE DEATH OF COMMON SENSE (1994).

[4]One may look at, for example, Republican attacks on President Clinton's judicial appointments. A central feature of this criticism is these judges' supposed desire to smuggle into law their unpopular, liberal political views through incorrect interpretations of the Constitution. *See* Richard Willing, *GOP Targets President's Judicial Picks,* USA TODAY, Mar. 10, 1997, at 3A ("[C]onservatives define 'activists' as judges who make decisions that should be left to legislatures

said to unjustifiably favor criminals' rights over the rights of the community to self-protection and justice.[5] If judges were more concerned about the reasonableness of the law rather than satisfying their ideological desires, the legal system might again serve the interests of the people.[6]

If we in the legal community wish to regain the confidence of the public, we must assist the judiciary in convincing citizens that judges are committed to making the laws and regulations devised by the political branches work for the citizens who are subject to them. Judges must not sit fiddling while Rome burns. They must work in partnership with the legislature to ensure that the laws benefit the public. To borrow from Howard, judges must ensure that the laws reflect common sense.[7] We must also, though, persuade citizens that judges are not mere partisans. Citizens must believe that judges are neutral arbiters who are interpreters of the law, not political actors.

The problem with these two objectives is that they are often in tension. If a judge concludes that a statute should not be applied in a particular context in a case where one could reasonably read the statute so that it does apply, she must have some benchmark, some theory that permits her to decide that the application of the statute makes no sense in the particular situation. If, to give another example, a statute, because of careless drafting or unanticipated circumstances, is hopelessly ambiguous regarding its application to a specific case, a judge can only decide which particular interpretation makes sense in this context by bringing to bear principles or values that are not obviously contained within the statute.

Some might say that the solution to these dilemmas is quite simple: just do what would best implement the purpose of the legislature. This "solution," however, begs the question: if it were so easy—or even, one might argue, possible—to determine the legislative purpose, judging would be an easy job. There are times, one must concede, that either it is not possible to identify a specific legislative purpose or it is difficult to understand what best fulfills the purpose in a particular case. In those cases, the judge has no choice but to supply the legal principles necessary to choose among alternative interpretations. If the judge refuses to supply these principles and instead attempts to guess at the legislative purpose, there is an increased risk that she will make a wrong decision, wrong in that either it cannot be justified by legislative intent or that it is not

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or executives.").

[5]*See* Max Boot, *The Exoneration Rule*, WALL ST. J., Feb. 4, 1997, at A18.

[6]This is a complaint that is voiced on the left and the right. *See* Guido Calabresi, *Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 109–10 (1991); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 668–69 (1990).

[7]HOWARD, *supra* note 3, at 184–85.

sufficiently justified by strong legal or policy arguments. In other words, in order to make the right or "common sense" decision, a judge must sometimes bring in her "own" principles—meaning values that cannot be directly traced to the enacting legislature.

The trouble, however, with a judge importing principles that are not traceable to legislative intent is that she opens herself up to the charge that she is not applying the law—following the directive of the legislature—but is instead smuggling her own political views into the law. The legitimacy of judicial power is largely based on the idea that judges neutrally apply a rule made by someone else. If a judge concedes that she is applying principles that come from someplace other than from the legislature, the judge appears to act politically and loses that legitimacy. This desire to maintain the appearance of neutrality often forces judges to state that they are basing their interpretation of statutes on legislative intent when it is questionable that any such intent exists or is knowable.

Thus, the faithful judge finds herself in a bind. On the one hand, in cases in which the text of a statute is ambiguous and the legislative purpose cannot be discerned, the judge must refer to extrinsic legal principles to resolve particular cases. Without reference to these principles, the judge may be forced either to base her decision on a fictional intent or, worse yet, to make a decision unguided by any coherent legal or policy principles. On the other hand, when the judge does go beyond the text and purpose of the statute and bases her interpretation on other legal principles, she is alleged to have acted illegitimately because she has not based her decision on authoritative guidance from the legislature.

If we accept the proposition, as does much of the legal academic community, that statutes are often ambiguous regarding particular questions,[8] this dilemma will arise frequently. Some commentators, such as William Eskridge, have suggested that the only alternative to judges masking their decisions by referring to a legislative intent they have concocted, or rendering an interpretation that make little policy sense, is allowing judges to consider their own evaluations of policy in making hard decisions.[9] Eskridge calls this new method of reasoning about statutes "dynamic interpretation."[10] We should, the supporters of dynamic interpretation argue, accept that there are times when judges should base their interpretations on sound policy, even if such interpretations are admittedly contrary to what the enacting legislature intended.[11] Instead of lamenting and attempting to prevent these decisions, we should concentrate instead on whether the judges have made good policy.

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[8]WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 9–10 (1994).

[9]William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987) [hereinafter Eskridge, *Statutory Interpretation*].

[10]*Id.* at 1481.

[11]ESKRIDGE, *supra* note 8, at 49.

While it is true that, contrary to legal convention, legislative intent or purpose is often unknowable and that judges must find some other basis for decision in these hard cases, we need not say that judges should be set free to interpret statutes in order to achieve what are, in the judge's opinion, desirable policy goals. The problem with the theory of dynamic interpretation articulated by Eskridge and other scholars is that it authorizes judges, given changes in the factual or legal assumptions underlying a statute, to disregard the original legislature's intentions regarding the statute.[12] This kind of discretion on the part of judge, if used widely, will demonstrate to citizens both inside and outside the legal community that judges believe that they can openly import their own policy views into the interpretation of statutes. This explicit disavowal of the principle of judicial neutrality will lead to questioning the legitimacy of judicial decisions. In order to avoid this problem, we must devise an alternative to the theory of dynamic interpretation that will permit judges to use extrinsic legal principles to render sound statutory interpretations, while confining judicial discretion in such a manner as to preserve the legitimacy of the process of judicial interpretation.

This Article will articulate such an alternative. This approach is based on the old idea of the canons of construction. These canons were judge-made rules that purported to provide legislatures guidance on how courts would interpret statutes.[13] Many of them were rules of textual construction that courts were to follow while reading statutes. The canons, however, that judges should develop are not merely textual ones. Rather, they should develop their own substantive canons of interpretation in different areas of law. A judge, for example, should articulate canons of construction that she will use in criminal law cases or in tort cases.

A canons-based approach to interpretation will permit judges to bring in extrinsic legal principles to resolve hard cases without making ad hoc decisions based on one's policy preferences. Rather than simply choosing to follow her favored policy and calling it an interpretation of the statutory text or the legislative purpose, when it is apparent that neither source supports the interpretation given by the court, a judge following a canons approach will be forced to openly elucidate a set of principles applicable in every similar case. Even if judges, as they invariably will, have different views as to what should be the substantive canons in a particular area, in contrast to the usual silence regarding judicial philosophy, citizens will have a fair opportunity to evaluate the legal views of their judges. Thus, judges can contribute to the solution of legal

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[12] *Id.* at 52–53.

[13] *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium,* 108 HARV. L. REV. 26, 97 (1994) (providing Appendix that lists canons developed and used by United States Supreme Court during 1986 to 1993 terms).

problems while retaining their legitimacy as neutral arbiters, subject to, and not above, the law.

More important than full disclosure, however, is that by expecting judges to articulate and adhere to substantive canons of construction, we encourage judges to think of themselves as partners in the enterprise of lawmaking, rather than simple agents who are forced to accept bad policy. Judges, as partners, should engage in a dialogue with the legislature regarding the best laws. As respected actors who are above politics, judges are in a particularly good position to help supply the kinds of public values to lawmaking that are often missing or submerged in legislatures corrupted by special interests.[14]

In addition to the legitimacy earned by honestly articulating sensible rules of construction, basing judicial interpretations on canons of construction will also preserve judicial legitimacy by making it clear that the legislature maintains power, at all times, to override interpretations based on these canons. In other words, as time goes on, the legislature will become aware of these principles and will draft legislation with these principles in mind. If they know, for example, that the court has made clear that it will interpret criminal statutes narrowly, the legislature will have to be especially careful in writing these statutes. Thus, this canons-based approach preserves the essence of legitimate democratic government in that it does not foreclose the legislature from accomplishing its goals; rather, the legislature must operate with the canons in mind.

In elucidating this argument, I will begin by discussing the recent scholarship on statutory interpretation demonstrating that the search for determinate statutory meaning in the text of a statute or its purpose is often futile. The difficulty of finding meaning in these orthodox sources of interpretation requires that judges refer to extrinsic legal principles in order to decide hard cases. In this section, I will also demonstrate, however, that there is a limit on how far an interpreter may go in importing principles to decide hard cases. If citizens perceive that judges are deciding cases based on their political views, instead of by applying neutral principles of law, citizens will lose faith in the legitimacy of these decisions.

In the final section, I will demonstrate that judges can both resolve hard cases of statutory interpretation and maintain their legitimacy by developing substantive canons of construction. I will demonstrate how adoption of this canons-based approach will result in more coherent and principled statutory law than will result if judges either pretend to see a clear text or purpose when there is none, or if judges have carte blanche to interpret statutes based on their personal policy views.

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[14]Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 224 (1986).

II. FAILED APPROACHES TO STATUTORY INTERPRETATION

A. The Futile Search for a Definable Text, Intent, or Purpose

In recent years, there has been a revival in serious legal scholarship regarding statutory interpretation.[15] Much of this scholarship has been inspired by the increasing influence on jurisprudence of other disciplines, such as modern hermeneutics, which is skeptical about the search for an author's intent, and post-modernist theory, which questions the possibility of attributing an objective meaning to a text.[16] This scholarship has also been enriched by the use of positive political theory, which seeks to explain how participants in the lawmaking process actually come to an agreement on a policy.[17] This theory, borrowing from game theory, seeks to demonstrate the complexity of determining who were the key political actors in the final enactment of a statute.[18]

Much of this revival in the theory of statutory interpretation has been aimed at debunking the orthodox theory of how judges interpret statutes.[19] That approach starts with the premise that judges are mere agents of the legislature and that, as agents, their job is to implement the instructions given to them by the principal.[20] These instructions are contained in the text of the statute. If the text of the statute is ambiguous, the agent is then expected to determine the intent of the legislature regarding the application of the statute to the problem in question. If the legislative intent cannot be determined, as a final recourse, the judge may attempt to determine what the legislature's broader purpose was in enacting the statute. Once this purpose is identified, the judge can select the interpretation that will best satisfy that purpose.

The central proposition of this traditional agency approach is that a judicial decision based on an interpretation of a statute must be connected to the intentions of the enacting legislature.[21] Because only the legislature has the authority to make statutory law, any effect of the statute must be directly traceable to the actions of the authorized body. If a judge cannot show that her decision was required by the original legislature's commands, she is making law,

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[15]ESKRIDGE, *supra* note 8, at 1.

[16]*Id.* at 5.

[17]*Id.* at 6.

[18]*Id.* at 75.

[19]When considering theoretical critiques of traditional methods of statutory interpretation, though, we should keep in mind Justice Joseph Story's admonition that common law rules regarding statutory interpretation were rooted in the lessons of hard experience rather than theory. Joseph Story, *Law, Legislation, and Codes*, *in* JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 359–60 (1971).

[20]ESKRIDGE, *supra* note 8, at 14.

[21]*Id.* at 9.

not interpreting it, thus rendering her decision illegitimate. Legislation scholars, drawing on various theories, have demonstrated that in many cases, this orthodox approach cannot produce the predictable, determinate results sought by defenders of traditional interpretation. Let us begin with the problems of textual analysis.

The most obvious problem with relying on the text of the statute to yield certain results is that the text may be ambiguous.[22] Certainly, no one can dispute that very often different words mean different things to different people. In response, textualists argue that one must look to the context in which the language is used.[23] This context, however, may be of little help. Indeed, given the need of legislators to compromise on heated political issues in order to pass legislation, they may deliberately build an ambiguity into the statute and leave any problems with interpretation to the courts or administrative agencies. Even if the statute does not contain a planned ambiguity, the language included may be so general that legislators with different views will vote for the statute for different reasons. Thus, it is plausible that, given the reality of the legislative process, no interpreter can fairly assign a definite meaning to the text that truly expresses the views of the majority.

Recent scholarship has provided a more sophisticated version of the argument that the text does not necessarily express the majority views of the legislature. Defenders of the theory that a legitimate interpretation of the statute must be rooted in the text[24] argue that the only way to make federal law under our Constitution is through the processes of majority bicameral approval by Congress and presentment to the President.[25] Only those actions that have met these requirements become law. Thus, the only statutory material that has the status of law is the text of the statute.[26] Reliance on anything outside of the text (excepting certain limited outside sources)[27] is illegitimate because it lacks the imprimatur of majority approval.

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[22]*Id.* at 34.

[23]*Id.* at 226. *See also* 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, 284 (1990) ("[I]n at least some cases, mere language will not suffice. In those cases, judges must resort to the 'context' or 'structure' of the statute ....").

[24]Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction,* 11 HARV. J.L. & PUB. POL'Y 59, 60 (1988).

[25]*Id.* at 64–65. *See also* Kenneth W. Starr, *Observations About the Use of Legislative History,* 1987 DUKE L.J. 371, 375 (denouncing use of legislative history in statutory interpretation because it may not represent opinion of President and Congress as a whole).

[26]It is this argument that forms the basis of Justice Antonin Scalia's hostility to the use of legislative history. *See* Thompson v. Thompson, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring).

[27]Justice Scalia, for example, will look to precedent in place at the time of the drafting of the statute, some traditional canons of interpretation, and other provisions of the same statute and related statutes. ESKRIDGE, *supra* note 8, at 42.

Legislation scholars, however, drawing on the work of political scientists, contend that in many cases, it is not possible to identify any one majority preference for a particular understanding of a text.[28] The reason for this difficulty comes from the phenomenon of majority cycling. Majority cycling takes place when, depending on how the different policy alternatives are presented for decision, opposite policy outcomes will be adopted by different majorities.[29] For example, if policy #1 would defeat policy #2 in a vote, while #3 would defeat #1, but #2 would defeat #3, it is impossible to determine which policy is the one approved by the majority.[30]

If you accept that legislative reality can reflect this abstract model then you can conclude that, in some cases, it is impossible to determine what was the majority coalition behind a given text.[31] Given the possibility that the text could have been the result of an infinite number of different coalitions, a judge, rather than being confined to a determinate text, is free to interpret the text in any number of ways and can still plausibly argue that it was connected to a majority coalition. In sum, reliance on the text of the statute does not, contrary to the agency theory, confine the discretion of the judge.

Advocates of the traditional approach of interpretation concede, not surprisingly, that language can sometimes be ambiguous. They argue next, however, that a faithful, legitimate interpretation of the statute can be rendered by identifying the intent of the enacting legislature. Once one determines the intent of the legislature, through such sources as the preamble of the statute, legislative history, or the context of the time of the enactment, the textual ambiguities lessen and the correct interpretation becomes apparent.

Many of the same arguments that lead scholars to question the utility of textual analysis, however, make a legislative intent inquiry problematic. Just as different legislators may have different justifications for voting for a particular text, so may legislators have different intentions as to how the statute they have voted for will operate. One provision of the statute, for example, may be all that is important to one legislator; she may have no intent regarding the rest of the statute.

Even more misleading than the legislator who has no intent is the one who articulates an intent but is not telling the truth.[32] Opponents of bills have been known to make statements exaggerating effects of legislation that do not reflect majority sentiment in order to persuade undecided voters to turn against the bill. Conversely, supporters of legislation sometimes minimize the effects of

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[28]*Id.* at 34.
[29]*Id.* at 35–37.
[30]*Id.* at 36.
[31]*Id.* at 37.
[32]Macey, *supra* note 14, at 263.

legislation in order to persuade wavering legislators to support the bill. All of these statements appear to be evidence of intent but, in fact, lead one away from the true intent—assuming that one even exists—of the legislature.

Even if one could determine the intent of the majority of one house of the legislature, the other branch could have a different intent regarding the bill. In addition, there are other players in the legislative process whose views need to be considered. For example, the president or governor who signs a bill may have a different understanding of the intent of the bill.

Finally, there are circumstances in which, based on the text, the statute may apply to a factual circumstance that the drafters of the legislation never considered. In this case, those who support an inquiry into legislative intent argue that one should solve this problem by attempting to imagine how the enacting legislature, given its views, would have resolved this issue.[33]

How, though, critics of the intent inquiry argue, in a case in which we are dealing with a statute that was enacted long ago, can we know what the original drafters would have wanted when the world in which they lived is very different from ours?[34] Who is to say that their values would not have changed if they lived with our circumstances? Because it is impossible to know whether and how the drafters of the statute would have changed their minds had they been exposed to our world, to say that we can determine the legislative intent in this kind of case is simply a fiction.

The last redoubt of defenders of the pure agency theory of statutory interpretation is the inquiry into legislative purpose. Defenders of basing statutory interpretation on finding the purpose of the legislature argue that, rather than trying to find the intent of the enacting legislature regarding the application of the statute to a particular case, the judge should instead concentrate on identifying the general policy purpose of the legislature and then interpret the statute so as to achieve the purpose in current circumstances.[35] This approach aims to provide judges with more discretion in applying the mandates of the legislature.[36]

One problem, however, with this approach is that, given a sufficiently general definition of purpose, the judge will be enabled to do anything she pleases. For example, if the purpose of a civil rights statute is to help African Americans, there are many different opinions on how to accomplish this goal. One judge might believe affirmative action is vital to the future of African

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[33]This technique is known as "imaginative reconstruction" and is associated with Judge Learned Hand. ESKRIDGE, *supra* note 8, at 21–23; *see also* Learned Hand, *How Far Is a Judge Free in Rendering a Decision?*, *in* THE SPIRIT OF LIBERTY 103, 106 (1952) (stating judge must determine will of government by asking how government would decide case if case was before government rather than judge).

[34]ESKRIDGE, *supra* note 8, at 23.

[35]*Id.* at 25–26.

[36]*Id.* at 26.

Americans; another might think these kinds of programs are stigmatizing.[37] Simply stating the purpose does not make interpretation of the law certain and predictable.[38]

In addition to this problem, we must recognize once again that, just as with the text and intent inquiries, different legislators may have had different purposes for voting for the statute. Indeed, as demonstrated by the work of public choice theorists, it may be a mistake to assume that legislators have any public interest purpose at all when voting for a statute.[39] They may instead be engaging in rent-seeking activity, meaning that they seek to please interest groups key to their re-election.[40] These legislators will, of course, often try to cover their tracks by cloaking their action in a broad public purpose, making it all the more difficult to identify their true purpose.[41]

In sum, if one accepts the arguments made by legislation scholars, the orthodox agency theory of statutory interpretation is, in hard cases, untenable. The notion that one will always find an unambiguous text, a definitive intent, or a discernible purpose is, at best, naive. Judges who rely on these kinds of arguments are instead, all too often, masking, consciously or unconsciously, their own policy choices in the language of agency so as to retain their legitimacy.

B. The Problem with the "New Textualism" Response to the Futile Search for Intent

Theoretically sophisticated advocates of traditional statutory interpretation, such as Justice Antonin Scalia, recognize as wrongheaded the notion that, in answering statutory interpretation questions, judges should determine how the legislature intended to answer the question. In a recent essay, Justice Scalia distinguishes between inquiring into "subjective" and "objective" legislative intent.[42] By the former, he means the oft-stated notion that judges should analyze the text, legislative history, factual context, and any other available materials in order to find out what the enacting legislature thought, if anything, about the particular question.[43] The object of this inquiry into the subjective mind of the legislators is to determine how the legislature actually wanted this problem solved, if it said so, or how it would have wanted it solved if it did not.[44]

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[37] *Id.* at 28 (discussing United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979)).
[38] *Id.* at 29.
[39] *See* Macey, *supra* note 14, at 232–33.
[40] *Id.*
[41] *Id.*
[42] ANTONIN SCALIA, A MATTER OF INTERPRETATION 16–17 (1997).
[43] *Id.*
[44] *Id.* at 17.

Scalia is as critical as the legislation scholars discussed above of this search for the subjective intent of the legislature.[45] Indeed, his criticism of this inquiry is even harsher than that of the commentators. They merely believe that the search for legislative intent is often futile; Scalia believes it is illegitimate. He contends that "it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated."[46] Scalia reasons that what the legislature thought or said is not the law; the law is what the legislature *did*, pursuant to the authority granted to them by the constitution of the jurisdiction. The only evidence of what legislators did are the words of the statutes they passed.[47] If the legislature's view is not embodied in the statute, it never became law.

Judges, therefore, must be limited to finding the objective intent of the legislature as expressed in the text of the statute. In addition to the words of the statute, the judge may also look to the structure of the statute and related statutes.[48] Thus, the judge is permitted to read a statute in light of other statutes, so that the statute interpreted may be best fitted into the framework of existing law.[49] The judge is also permitted to use well-established textual canons of construction,[50] such as *ejusdem generis*, which states that the meaning of a general word listed with more specific terms should be limited to the category from which the specific terms are drawn.[51] By rooting one's interpretation in text and structure, rather than searching for clues regarding how the legislature in question wanted to solve a problem, the court determines the objective intent of the legislature, defined as "the intent that a reasonable person would gather from the text of the law."[52] By defining legitimate interpretation as this objective

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[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* at 16–17.

[49] *Id.* at 17. Allowing a judge to fit a statute into the existing statutory framework is consistent with the notion that the only valid law is that enacted by Congress, and is also consistent with the idea that we are seeking an objective, not subjective, intent because we assume that a reasonable Congress would legislate with the existing framework in mind. *Id.* at 16. *See also* ESKRIDGE, *supra* note 8, at 42 (discussing Justice Scalia's discussion of the importance of analyzing ambiguous statutes in light of current legal framework).

[50] Justice Scalia is hostile to the use of substantive canons of construction because he does not see how judges find the authority to protect values not found directly in the statute. SCALIA, *supra* note 42, at 27–29. While he acknowledges that some substantive canons, like the rule of lenity, are supported by long tradition, he speculates that some of the traditional substantive canons are just statements of what, from his perspective, legitimate interpretation would most likely produce in a case. *Id.* at 29.

[51] *Id.* at 26.

[52] *Id.* at 17.

meaning of the statute, the judge ensures that citizens, in conducting their lives, will be fairly apprised of and guided by the law as written.

Scalia responds to the argument that it is impossible to determine what the majority of legislators meant when they adopted particular textual language by arguing that it is unnecessary for judges to know the answer to that question.[53] Judges should not ask the subjective question of what the legislature meant by this sentence or word; they instead should ask what is the *reasonable meaning* of this text to an *ordinary* reader of English.[54] This inquiry is an objective one and, if followed faithfully, will constrain the judge from reading her policy preferences into the statute.

An essential premise of this argument is that the skepticism concerning human beings' ability to express themselves in precise, understandable language shared by so many legislation scholars and lawyers is excessive. These commentators, so influenced by hermeneutics or literary theory, argue that different words mean different things to different people.[55] We do not, however, read legal texts as we do a poem or a novel. As Francis Allen comments, "[t]he reader approaching a legal text does so, not to construct a personal world of his own making, but ordinarily to be able to make authentic statements about what the law is as it relates to a situation or a course of action."[56]

In order to make these authentic statements, citizens agree that they will be bound, not by their, or a judge's, personal view of what the words of a statute mean, but by the ordinary meaning of the words. If, then, interpreters are required to give words their ordinary meaning, most apparent ambiguities of language caused by human difference should be resolved. It is true, as critics of this method argue, that in some cases people will disagree about what is ordinary meaning. No interpretation method will yield determinate results in each and every case.[57] What matters, however, is not whether textualism is perfect, but the fact that a method that relies on the ordinary meaning of the text of the statute is

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[53]*Id.*

[54]*See, e.g.,* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring) ("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 ... most in accord with context and ordinary usage ....").

[55]ESKRIDGE, *supra* note 8, at 58.

[56]FRANCIS A. ALLEN, THE HABITS OF LEGALITY 12 (1996).

[57]One of the most frustrating aspects of Eskridge's otherwise superb book is his insistence that if an interpretive method does not produce determinate results in every case, any argument in favor of its superiority must be rejected. *See* ESKRIDGE, *supra* note 8, at 15–16, 23, 29, 42, 44. What lawyers search for is, of course, not a perfect method of interpretation, but a relatively superior one. As Aristotle first explained when he classified political science as a practical rather than theoretical science, we can never expect absolute certainty in human affairs. *See* Andrew C. Spiropoulos, *Aristotle and the Dilemmas of Feminism*, 18 OKLA. CITY U. L. REV. 1, 28 (1993).

more likely than other interpretive methods to produce predictable, understandable interpretations. Many people can disagree, for example, about the intent of the legislature regarding the solution to a particular problem, but, Scalia argues, far fewer can legitimately disagree regarding the ordinary meaning of words.[58]

Scalia's approach, then, at least in theory, indeed solves many of the problems of indeterminacy discussed by legislation scholars. It provides a methodology that does not rely on attempts to divine the intent or purpose of a collective body. By instructing judges to base their interpretations of statutes on the ordinary meaning of the words, use of this method ensures that citizens will receive the maximum amount of notice of their rights and obligations under the law, a core concept of the rule of law.[59] In the majority of cases, therefore, Scalia's method should both yield reasonably determinate results and ensure that judges do not go beyond their legitimate role as interpreters, not makers, of the law.

Concluding, however, that textualism is, in the average case, superior to other methods of interpretation cannot, as Justice Scalia would like, foreclose further inquiry into other theories of interpretation. We must continue to consider theories other than textualism because Scalia's critics are correct that there are some hard problems that a textualist approach cannot solve. There are times, first of all, where there simply is more than one reasonable interpretation of the words of a statute. But even if these times are few and far between, there are problems with legal texts that arise frequently and that a textualist cannot solve.

For example, the legislature may write a statute using general terms that, in effect, delegate to judges the job of applying the statute in a particular case. Take, for instance, as Cass Sunstein points out, the text of the Sherman Antitrust Act,[60] which instructs judges to prohibit "conspiracies in restraint of trade."[61] The ordinary meaning of this text provides judges very little guidance in how judges should enforce the act. Another statute that presents a similar problem is the provision of the Americans with Disabilities Act that requires employers to provide "reasonable accommodations" to disabled employees.[62] It is up to judges to fill this general concept with content. If we have no methodology other than textualism to guide judges in their implementation of these standards, they will be tempted to simply apply their own policy prescriptions and call it interpretation.

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[58]SCALIA, *supra* note 42, at 24 ("Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible.").

[59]*Id.* at 17; ALLEN, *supra* note 56, at 14–15.

[60]Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2000)).

[61]CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION 117 (1990).

[62]Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101–12213 (1994 & Supp. V)).

An additional, related problem arises when statutes do not include the necessary implementing rules for applying the statutory standards. Sunstein points out that the text of one of our most important civil rights statutes, Section 1983,[63] for example, does not tell judges what is the appropriate statute of limitations, what defenses to allow, and how to allocate the burdens of pleading and persuasion.[64] With such statutes, judges must look somewhere other than the text to answer these questions.

If, as Justice Scalia suggests, judges are restricted to a pure textualist approach, they will have to make the language of the text mean something it does not say. If, for example, there is more than one reasonable interpretation of the ordinary meaning of a text, the textualist judge must simply assert that one meaning is *the* reasonable and ordinary one. Similarly, if a judge is forced to show that the text answers questions the text does not really answer, she must force an artificial reading upon the text.[65]

When a judge asserts that her reading of the text is truly the ordinary meaning of the words despite the existence of equally plausible interpretations, or asserts that general words call for particular rules when they clearly do not, she is imposing her policy opinion on the citizenry just as much as a judge who relies on a fictional legislative intent or purpose. Thus, in hard cases, seeking the ordinary meaning of the text of the statute can, in the end, result in judges basing their decisions on a fiction.

Worse than this use of a fiction, however, is the fact that judges who sincerely seek to act as agents when the enacting legislature could not possibly have given sufficient thought to the problem at issue are often persuaded to render an interpretation with perverse policy results because they wrongly believe that the legislature intended such a result or the text commanded it.[66] Rather than

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[63]42 U.S.C. § 1983 (1994 & Supp. V).

[64]SUNSTEIN, *supra* note 61, at 117.

[65]The reasonable textualist would insist at this point that one could receive legitimate guidance from the established interpretations of similar statutes. This need to go outside of the text in question and look to the context of the law, however, demonstrates the weakness of textualism in hard cases. *See* ESKRIDGE, *supra* note 8, at 45–47.

[66]Lest this point be misunderstood, let me state that I do not agree with the critique of textualism made by commentators, such as Sunstein, that the problem with basing statutory interpretation on the ordinary meaning of the statute's words is that such interpretations may be undesirable as a matter of policy. SUNSTEIN, *supra* note 61, at 122, 133–37. In my view, if the ordinary meaning of the statute can reasonably be determined, it must be followed, even if some might not like the policy results. (I would make an exception, as does Justice Scalia, when the ordinary meaning of the words leads to a patently absurd result or demonstrates "scrivener's error." *See* SCALIA, *supra* note 42, at 20; Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527–39 (1989) (Scalia, J., concurring)). Deliberately ignoring an understandable text is judicial legislation, not interpretation. My argument is that there are times where even a faithful textualist approach cannot resolve the question involved. In those hard cases, a judge must have somewhere else to turn to

acting as a responsible partner in lawmaking, the judge who can only see herself as an agent is willing to simply place all the responsibility for the harmful policy on the legislature's instructions. In order to prevent statutes from leading to bad public policy, judges must be persuaded that they have more discretion in interpreting statutes than that afforded them by the pure agency view.

C. The Problem with Excessively Dynamic Interpretation

In his always fascinating, but sometimes wrongheaded book, *Dynamic Statutory Interpretation*, William Eskridge, after demonstrating the problems with the agency theory of interpretation, contends that the only sensible theory of statutory interpretation is what he calls "dynamic interpretation." Dynamic interpretation accepts that judges do not, and should not, act as mere agents for the enacting legislature, and need not articulate a fixed, certain interpretation of the statute based on the original intent of the enactors.[67]

Judges should instead begin with the premise that because statutes are general and abstract statements of rules that are, under our system of government, hard to enact, they must last a long time.[68] To effectively serve a changing society, statutes must change as well.[69] As we cannot expect legislatures to change statutes whenever necessary,[70] judges, when applying these general, abstract norms to concrete cases, must see to it that the statutes work for present day society.[71] If this means that judges must make policy choices, we must accept that as a normal and socially beneficial part of their job. We must also accept that sometimes judges engaged in dynamic interpretation will interpret statutes in ways that are contrary to the original expectations of the enacting legislature.

When a statute is first passed, there is generally less need for judges to engage in dynamic interpretation. When the problem for which the statute was meant as a remedy is still fresh in everyone's mind, it is easier both to determine the intent or purpose of the legislature and to see how the text of the statute was designed to remedy that ill. Thus, in most cases, a new statute can be interpreted using the traditional approach to interpretation.

The agency approach will not work, even if the statute is relatively new, however, when the concrete case faced by the judge involves an issue that was

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resolve the interpretation problem.

[67]Eskridge, *Statutory Interpretation, supra* note 9, at 1480.

[68]ESKRIDGE, *supra* note 8, at 50.

[69]*Id.* at 52.

[70]Legislatures are hampered not merely by the formal constraints of the legislative process, but also by the influence of special interest groups in the legislative process. Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions,* 88 MICH. L. REV. 917, 930–31 (1990).

[71]Eskridge, *Statutory Interpretation, supra* note 9, at 1484.

overlooked or unresolved by the legislature.[72] In these cases, a judge may have to make policy choices that were avoided by the legislature.

More importantly, a judge, Eskridge argues, should interpret a statute dynamically when the factual or cultural assumptions underlying the original understanding of the statute have been undermined over time.[73] Eskridge discusses a federal immigration statute, passed in 1952, that originally stated that individuals diagnosed with a "psychopathic personality" should be excluded from the country.[74] The legislative history seemed to indicate, and the Supreme Court agreed, that Congress intended that this provision be interpreted to require the exclusion of homosexuals.[75]

Eskridge argues that as the years went on, however, and especially when it became clear the medical community did not consider homosexuality a pathological condition, a court could have justifiably interpreted this provision as not applying to homosexuality per se despite the expectations of the enacting legislature.[76] After all, the argument goes, we in the twenty-first century do not believe that all homosexuals are afflicted with a "psychopathic personality." A judge interpreting that language in the twenty-first century should not give it the meaning she thinks the 1952 Congress intended; she should instead give it the meaning we in the twenty-first century would expect it to have.

A statute's meaning may also change, Eskridge argues, when there is pressure from either the private individuals and government agencies affected by the law or by the current (as opposed to the enacting) Congress to change policy.[77] In the former circumstance, a government agency, such as the Public Health Service in the case discussed above, may decide that the assumptions supporting the former interpretation of the statute have changed sufficiently so that administrative policy should change. Alternatively, a new presidential administration may come to Washington and decide that certain statutes were previously over- or underenforced. In both cases, courts will be asked to consider modifying previous interpretations of the law in order to conform to current

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[72] *Id.* at 1490–91.

[73] *Id.* at 1481.

[74] ESKRIDGE, *supra* note 8, at 51–52.

[75] *Id.* at 52.

[76] *Id.* at 54–55. In 1979, after the statute was revised to make it even more clear that homosexuals should be excluded (by substituting the words "sexual deviation" for "psychopathic personality"), the Public Health Service, the federal agency responsible for performing medical examinations for the Immigration and Naturalization Service ("INS"), refused to carry out examinations in order to determine if someone was a homosexual. Once this policy, made on the basis of a shift of opinion in the medical community, changed, INS enforcement withered, and the exclusion was repealed in 1990. *Id.*

[77] Eskridge, *Statutory Interpretation, supra* note 9, at 1492–93.

administrative interpretations of the statute.[78] Given that the agency's argument will most likely be supported by reasoning its preferred interpretation serves current policy objectives or, in a case where a private party is urging the court to change its views, arguments that an industry has changed, a court will be pressured into rendering a dynamic interpretation. Supporters of dynamic interpretation argue that rather than stubbornly holding fast to an interpretation that has become outdated, a court should be unafraid to engineer a shift in statutory policy, even if the new policy would not have been approved by the enacting legislature or is not supported by the ordinary meaning of the text.[79]

Similarly, when the current legislature decides that a statute enacted by a previous legislature should be interpreted in a particular fashion, judges will have powerful incentives to render dynamic interpretations. If the judiciary does not agree to interpret a civil rights statute in line with the policy preferences of the current Congress, for example, as has happened several times in recent years,[80] it faces the prospect of having its decisions overruled by the current Congress. Partisans of dynamic interpretation argue that, considering the high costs of enacting a new statute, including the harm to those subject to the outdated policy in the time it takes to secure new legislation, it is more efficient and just for judges to update the statute in order to bring it in line with current policy preferences.

In sum, then, the dynamic interpretation approach responds to the inability of the agency theory to render coherent interpretations in hard cases.[81] Because of, among other things, the inherently ambiguous and context-dependent nature of language and the difficulty of identifying the locus of agreement of a legislative majority, inquiring into text, intent, and purpose will be futile in hard cases. Any decision in these hard cases that purports to rely on these sources of interpretation will only give the illusion of legitimacy at the cost of both honest judicial decisionmaking and, all too often, sound public policy. Rather than engaging in these fictions, advocates of dynamic interpretation argue that judges should honestly make policy choices and defend the proposition that there are

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[78]Indeed, the presumption in favor of approving administrative interpretations adopted in *Chevron, U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), if seriously followed, guarantees that at least some federal statutes will be interpreted dynamically, given the normal fluctuations in government policy. ESKRIDGE, *supra* note 8, at 161–73.

[79]*Id.* at 107–08.

[80]Congress, for example, with the Civil Rights Act of 1991, overruled a number of Supreme Court statutory interpretation cases, including: EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991); W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83 (1991); Patterson v. McLean Credit Union, 491 U.S. 164 (1989); Lorance v. AT&T Tech., Inc., 490 U.S. 900 (1989); Martin v. Wilks, 490 U.S. 755 (1989); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[81]ESKRIDGE, *supra* note 8, at 20.

circumstances that call for deciding against the original expectations of the enacting legislature.

This argument proves too much. One can accept the conclusions of the weighty scholarship demonstrating both that statutory text is sometimes ambiguous and that intent and purpose are often impossible to determine without accepting the kind of dynamic interpretation supported by Eskridge. It is possible, as I will demonstrate in the next section, to supply extrinsic legal principles to answer these difficult questions without engaging in extreme dynamic interpretation.

Where dynamic interpretation theory crosses the line from providing coherent answers for hard interpretive questions to illegitimate judicial activism is where the judge interprets statutes dynamically even in the face of clear evidence that either the ordinary meaning of the text commands a particular result or that, if one applies an intent approach, the enacting legislature would have opposed the result desired. It is one thing to rely on extrinsic legal principles where the enacting legislature left a gap; it is quite another to abandon the view of the original legislature in favor of our current policy preferences. A judge who supplies legal principles to answer a question left unaddressed by the legislature is simply doing what is necessary to make the legal system function. A judge who reaches out to reopen an already settled rule is acting as a legislator and will be breaching her duty as a judge.

In making their case that judges must be willing to modify the interpretation of statutes, the partisans of dynamic interpretation rely heavily on the idea that statutes are difficult to pass in our democracy. Our views on particular issues may have radically changed from that of the enacting legislature, and, because of the cumbersome nature of the legislative process, the statute will often not have changed. Take, for example, the statute concerning the immigration of people with pathological conditions.[82] The culture's view regarding whether homosexuality is a pathological condition may have changed as early as the 1970's, but it took until 1990 to repeal the offending statute.[83] Those subject to the injustice of the original statute should not have to wait for Congress to finally get around to repealing the statute when judges, supported by the dominant culture and the current legislature, can interpret the statute to eliminate the injustice immediately.

This view, however, places convenience before democracy. The spirit behind the separation of lawmaking and law interpretation requires that judges, if they can discover sufficient evidence, understand a statute as the drafters understood it. It is the enactor's approach to the problem, not that of the current Congress or of judges, that, if it can be identified, should rule. If the country's

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[82] *Id.* at 51–55.
[83] *Id.* at 55.

views have in fact changed, we must use the legislative process to incorporate those changed views into law. Indeed, it is the very necessity of constantly forcing ourselves to express our views of justice in law that instills the virtues necessary for a successful liberal democracy.[84]

When instead of modifying policy through new statutes, judges, with the connivance of members of the current legislature, institute a change of policy, we run the risk that our supposed neutral arbiters of the law are imposing a policy that a majority of the people, as expressed by their representatives, do not support. If, for example, the current legislature could not muster the votes to repeal an old statute, but could count on a judge to render a dynamic interpretation, the leaders of the legislature, through control of the gatekeeping functions (e.g., committees, the legislative agenda) could effect a change in policy by blocking any attempt by the majority to reinstate the old policy. It is this kind of maneuvering that produces the cynicism that is so prevalent in our times.

Thus, if we wish to maintain the legitimacy of judicial decisionmaking, we must find a way to both (1) allow judges to draw upon extrinsic legal principles to resolve ambiguities in statutes caused by the inability to find a definitive text, intent, or purpose; and (2) confine judges' discretion in defining and using these principles so that they do not act illegitimately by interpreting statutes contrary to the expressed views of the enacting legislature. In other words, when a legislature does advance an understandable text, an identifiable intent, or a discernable purpose, that text, intent, or purpose must be followed. I now turn to a solution to this problem that satisfies both of these criteria.

III. TOWARD NEW CANONS OF CONSTRUCTION

While the problems created by the deconstruction of the agency approach to statutory interpretation have been examined by recent scholarship, the source of the solution is of ancient vintage. By expanding on the old idea of the canons of construction, individual judges, drawing on their own jurisprudential understanding, can develop a comprehensive set of extrinsic legal principles that, clearly articulated and consistently applied, will fill the gaps left by the inevitable failure of agency approach sources in hard cases. By both articulating these principles as canons of construction, rather than embodying them in actual interpretations, and refusing to apply them when the intentions of the enacting legislature can be determined, judges will ensure that the views of the legislature will always

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[84] *Id.* at 289–90. *See also* Andrew C. Spiropoulos, *Natural Right and the Constitution: Principle as Purpose and Limit*, 13 ST. LOUIS U. PUB. L. REV. 285, 296–302 (1993) (discussing Abraham Lincoln's conviction that rights must be protected through constitutional process and not just by courts).

prevail over those of the judiciary, thus preserving the legitimacy of judicial decisionmaking.

A. Understanding Substantive Canons of Construction

1. The Concept of Substantive Canons

Commentators have identified three types of canons of construction: (1) textual canons, which provide rules for the reading of statutory language; (2) extrinsic source canons, which govern how much deference a judge should give to other interpretations of the statute;[85] and (3) substantive canons, which establish policy rules and presumptions in interpreting statutes.[86]

Substantive canons can take various forms. They may be articulated as presumptions, and state that any doubt regarding the interpretation of a statute should be resolved in favor of a particular party or claim.[87] The classic example of both a traditional substantive canon and a presumption is the use of the rule of lenity in interpreting criminal statutes; if a criminal statute is subject to different interpretations, then a judge must choose the interpretation that is most lenient to the accused.[88] Another kind of substantive canon is a clear statement rule.[89] These rules require a legislature, in order to accomplish a particular policy goal, to state its intentions clearly; if the statute does not state the legislative objective clearly, the court will retain the status quo.[90] An example of a clear statement rule is the canon that waivers of the federal government's sovereign immunity must be clearly stated in the statutory text.[91]

Traditionally, the substantive canons have been the least numerous and, except in specific cases such as the rule of lenity, least influential set of canons.[92]

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[85]An example of this kind of canon is the rule requiring deference to an agency interpretation of a statute. ESKRIDGE, *supra* note 8, at 280.

[86]*Id.* at 276.

[87]*Id.* at 283.

[88]*See* John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules,* 1995 WIS. L. REV. 771, 801.

[89]David L. Shapiro, *Continuity and Change in Statutory Interpretation,* 67 N.Y.U. L. REV. 921, 940–41 (1992).

[90]*Id.*

[91]For a full discussion of the evolution and propriety of this canon, see Nagle, *supra* note 88, at 776–96.

[92]That honor, scholars maintain, goes to the textual canons. WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION 634–35 (2d ed. 1995) [hereinafter ESKRIDGE & FRICKEY, CASES AND MATERIALS]. In recent years, however, some commentators have argued that the Rehnquist Court has drawn heavily on the idea of substantive canons in both its constitutional and statutory interpretation cases. *See* ESKRIDGE, *supra* note 8, at 285–86. *See generally* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking,* 45 VAND. L. REV. 593 (1992) (discussing Rehnquist and Burger Courts' use of substantive canons). As one might gather, I heartily approve of this

This Article contends that the concept of the substantive canon should be revitalized and expanded far beyond its traditional purview. Judges ought to develop a set of substantive canons, based on their own jurisprudential view, for each significant doctrinal area with which they regularly deal. The development of these canons will provide legislators concrete guidance on how particular judges will interpret particular kinds of statutes and thus will enable legislators to write statutes in such a way as to produce the results the legislators desire. These canons will also serve as the source of the extrinsic legal principles needed to resolve problems of ambiguity in hard statutory interpretation cases. Thus, they will serve as the necessary default rules for the cases in which the traditional sources of statutory interpretation fail to yield a determinate answer.

One can illustrate the potential development of these substantive canons by examining how they might help resolve problems in federal civil rights law. Much of the debate over interpretation of Title VII of the Civil Rights Act of 1964, for instance, has centered on whether Congress's purpose in enacting the provision was to produce substantive gains for African Americans, thus justifying affirmative action programs, or whether its purpose was to set up a strong regime of non-discrimination.[93] In the latter case, approval of affirmative action would run counter to the purpose of the statute.

Assume for the sake of argument that we cannot authoritatively determine either what Congress intended regarding affirmative action or what Congress's purpose was in enacting the statutory scheme. Judges attempting to interpret Title VII would be faced with the hard reality that the agency approach would be ineffective. Rather than attribute a policy purpose to Congress that Congress did not actually have, a judge should instead state her theory on how to interpret civil rights laws. One judge might believe that all civil rights laws should be interpreted in order to produce substantive gains for disadvantaged groups. Another judge might instead believe that, given our nation's historic commitment to the principle of colorblindness, all civil rights statutes must be interpreted to establish the principle of formal, not substantive, equality, unless Congress says otherwise. If, for example, enough Justices on the Supreme Court announce their substantive civil rights laws canons, Congress will have a much better idea of how these laws will be interpreted than it had previously.

2. An Illustration of the Use of Substantive Canons

Perhaps the best recent illustration of the need for the articulation and application of substantive canons of construction to resolve difficult statutory

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development and wish to see it expanded.

[93]For a discussion of *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), see ESKRIDGE, *supra* note 8, at 28.

interpretation cases is the Supreme Court's opinion in *United States v. X-Citement Video, Inc.*[94] In this case, I will show, the Court confronted a statute whose ambiguity revealed the inability of the orthodox method of determining legislative intent—the agency approach—to provide persuasive answers to the most difficult interpretive questions. The Court, therefore, had to rely on background principles to decide the case. When closely examined, it is evident that these background understandings are in fact substantive canons of construction.

X-Citement Video concerned an appeal by a defendant convicted under the Protection of Children Against Exploitation Act of 1977.[95] The defendant, Rubin Gottesman, was convicted of violating and conspiring to violate 18 U.S.C. § 2252(a) by selling and shipping pornographic videos featuring a minor.[96] The defendant argued that the language of the statute provides that, to be convicted, a person must "knowingly" transport or ship or "knowingly" receive or distribute the offending material and also know that the individual depicted in the material is a minor.[97]

The interpretive problem arises because the subsections of the statute that discuss this depiction of a minor do not contain the word "knowingly"; indeed, these subsections do not speak of any required mens rea. The word "knowingly" only appears in those subsections discussing, for example, the transportation or shipment of pornographic material,[98] and the receipt or distribution of the

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[94]513 U.S. 64 (1994).

[95]Pub. L. No. 95-225, 92 Stat. 7 (1978) (codified as amended at 18 U.S.C. §§ 2251-2253, 2423 (2000)). At the time of the conviction, the statute provided, in pertinent part:

> (a) Any person who–
>
> (1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if–
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual depiction is of such conduct; or
>
> (2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if–
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual depiction is of such conduct;
>
> ... shall be punished as provided in subsection (b) of this section.

18 U.S.C. § 2252(a) (1988 & Supp. V).

[96]*X-Citement Video*, 513 U.S. at 66.

[97]*Id.* at 66–67.

[98]18 U.S.C. § 2252(a)(1) (2000).

material.[99] As the Court, speaking through Chief Justice Rehnquist, put it, "[t]he critical determination which we must make is whether the term 'knowingly' in subsections (1) and (2) modifies the phrase 'the use of a minor' in subsections (1)(A) and (2)(A)."[100]

Writing in dissent, Justice Scalia, consistent with his commitment to textualism, could not understand how anyone could possibly believe that the statute was ambiguous. He contended that the government's reading of the statute, which was that Congress purposely did not include language regarding mens rea, was obviously correct. Scalia insisted that

> [i]f one were to rack his brains for a way to express the thought that the knowledge requirement in subsection (a)(1) applied *only* to the transportation or shipment of visual depiction in interstate or foreign commerce, and *not* to the fact that that depiction was produced by use of a minor engaging in sexually explicit conduct, and was a depiction of that conduct, *it would be impossible* to construct a sentence structure that more clearly conveys that thought, and that thought alone.[101]

The clarity of the language comes from the use of "knowingly" "not merely in a distant phrase, but in an entirely separate clause from the one into which today's opinion inserts it."[102] The government's interpretation is not simply the best reading of the language; it is "*the only grammatical reading.*"[103] The Court's refusal to follow the grammatical imperative, Scalia concluded, led the Court into "contradicting the plain import of what Congress has specifically prescribed regarding criminal intent," thus rendering an "opinion ... without antecedent."[104]

Justice Stevens, in his concurrence, conceded that Justice Scalia's reading was the "most grammatically correct"; he concluded, however, that basing the Court's decision on this reading would have been "ridiculous."[105] Stevens drew a distinction between the grammatical reading of a statute and "the normal, commonsense reading" of a statute.[106] He argued that regardless of the arrangement of the clauses of the statute, it is more reasonable to read words of scienter or mens rea contained in one section of the statute as applying to sections identifying elements of the crime that contain no such words than to assume that

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[99] *Id.* § 2252(a)(2).
[100] *X-Citement Video*, 513 U.S. at 68.
[101] *Id.* at 81 (Scalia, J., dissenting).
[102] *Id.* (Scalia, J., dissenting).
[103] *Id.* (Scalia, J., dissenting).
[104] *Id.* at 80–81 (Scalia, J., dissenting).
[105] *Id.* at 79–80 (Stevens, J., concurring).
[106] *Id.* at 79 (Stevens, J., concurring).

no scienter was intended.[107] We cannot, therefore, equate the plain meaning of the text with its more grammatically correct reading.

In the opinion for the Court, Chief Justice Rehnquist also conceded that Scalia's reading was the "most natural grammatical reading."[108] But Rehnquist, like Stevens, did not equate the most natural grammatical reading with the plain meaning of the text. He instead concluded that the fact that clauses containing the word "knowingly" were "set forth in independent clauses separated by interruptive punctuation" was not "the end of the matter."[109] Once the matter is examined closely, the "anomalies" that result from the grammatically correct construction demonstrate that the "plain language reading of § 2252 is not so plain."[110] Regardless of the case's eventual resolution, it appeared clear at this point to a majority of the Court that the existence of a natural grammatical reading did not authoritatively establish that the statute was unambiguous.

One is sorely tempted to agree with Scalia that the Court simply ignored a text it found inconvenient. What the Court characterized as anomalies caused by a grammatical interpretation another person could see as the Court's disagreement with the policy results desired by Congress. It is certainly reasonable to argue that if all agree that one reading is the most grammatical one, then the text must plainly mean what the grammar suggests.

This view is reasonable, but wrong. Grammar does not determine statutory meaning, because human beings read statutes in more ways than just the grammatically correct. If Scalia is serious about his method of textualism, which requires judges to ascertain the reasonable meaning of the text to an ordinary reader of English, he must at least consider the possibility that such a person, as Stevens describes, would read a criminal statute to apply any words of mens rea to all the elements of the statute. The Model Penal Code, after all, employs precisely this interpretive rule, stating: "When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears."[111] In sum, the fact remains that the absence of any

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[107] *Id.* (Stevens, J., concurring).

[108] *Id.* at 68.

[109] *Id.*

[110] *Id.* at 68, 71. These anomalies, judging from a series of hypotheticals posed by Chief Justice Rehnquist, result from the possibility that individuals acting entirely innocently could be prosecuted for these actions under Justice Scalia's interpretation. For example, Chief Justice Rehnquist raised the question of the retail druggist who returns a developed roll of film that contains images of child pornography under the statute. *Id.* at 69. Without reading additional mens rea elements into the statute, the druggist could be charged with the knowing distribution of child pornography. *Id.*

[111] MODEL PENAL CODE § 2.02(4) (1985). Justice Scalia, of course, would argue that the grammar demonstrates that a contrary purpose plainly appears.

words of mens rea does not, particularly in the criminal law context, necessarily tell us that none were intended. Without an explicit statement by Congress that some elements of a crime do not require proof of intent, we must always find some ambiguity in a section of a criminal provision setting forth an element of the crime, but with no scienter or mens rea requirement to accompany it. The Court, therefore, was justified in concluding that the text of the statute was ambiguous.

The Court found the legislative history even less helpful than the text. The Court thoroughly examined the committee reports and floor debates concerning § 2252 and related statutes and found that the materials spoke "opaquely as to the desire of Congress for a scienter requirement with respect to the age of minority."[112] For example, during consideration of an earlier form of this legislation, one committee report explained that the United States Department of Justice, in its comments regarding the proposed legislation, recommended that no mens rea requirement be included with respect to the age of the minor, but this comment was directed at the precursor to 18 U.S.C. § 2251, not § 2252. As to § 2252, the Department urged Congress to *include* a scienter requirement regarding the pornographic nature of the material. The evidence from the reports, thus, cut both ways, and, in truth, did not directly address the question at issue. The floor debates were equally unhelpful. In one exchange, for example, a sponsor of a precursor to § 2252 assured a questioning colleague that those who knowingly peddle child pornography will be subject to prosecution.[113] This statement, however, was unclear as to whether the required scienter applies to the age of the performer or of the sexually explicit nature of the depicted acts.

Rehnquist concluded that the legislative history "persuasively indicates that Congress intended that the term 'knowingly' apply to the requirement that the depiction be of sexually explicit conduct; it is a good deal less clear from the Committee Reports and floor debates that Congress intended that the requirement extend also to the age of the performers."[114] Assuming the Court correctly determined the intent of Congress regarding the element of sexually explicit conduct, the legislative history does make it more difficult to accept Scalia's argument that Congress clearly spoke in the text. The sexually explicit conduct language of the statute, like the language concerning minors, was not contained in the independent clauses that contain the word "knowingly"; thus, following Scalia's argument, it should not have been understood to include a scienter requirement either. While this argument does help blunt Scalia's attacks, it does not answer the question of whether the defendant must know that the depicted individual is a minor.

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[112] *X-Citement Video*, 513 U.S. at 74.
[113] *Id.* at 76.
[114] *Id.* at 77.

It seems evident that one could not, with any degree of intellectual honesty, decide the *X-Citement Video* case using an agency approach. The text was ambiguous and the legislative history shed little light on the intent of Congress. What then is a judge to do? Rehnquist hinted at the answer when he explained that the Court's "reluctance to simply follow the most grammatical reading of the statute is heightened by our cases interpreting criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them."[115] These cases, I contend, articulate and apply a substantive canon of construction for the interpretation of federal criminal statutes.

Rehnquist recounted the genesis of this canon in the seminal case of *Morissette v. United States.*[116] In that case, the Court interpreted a statute that included a term of mens rea that, according to the natural grammatical reading of the statute, only applied to one element of the offense, and not the others. The Court, in Rehnquist's words, "used the background presumption of evil intent" to conclude that the mens rea that applied to one of the elements of the offense should also apply to the remaining elements.[117] In subsequent decisions such as *Liparota v. United States*[118] and *Staples v. United States,*[119] the Court developed this background presumption of evil intent into a rule—a canon—that where a defendant engages in conduct that, excepting the statute in question, would be innocent, a court should presume that "a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct."[120] The Court should apply this rule particularly in cases where, first, the offense charged is not a "public welfare" offense, but instead is more "akin to the common-law offenses against the 'state, the person, property, or public morals,'" and, second, where harsh penalties attach to the violation of the statute.[121] The application of this canon in cases of statutory ambiguity ensures that only morally culpable individuals are punished. Without applying a scienter or mens rea requirement in these circumstances, individuals engaging in activities they reasonably believe to be innocent will be subject to criminal prosecution and harsh penalties.

In *X-Citement Video* the Court concluded that all of these conditions applied. Except for the statute, the defendant possessed a legal right—indeed, a constitutionally protected one—to distribute non-obscene pornographic materials. The crime in question involved public morals, not a regulatory offense, and it was

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[115] *Id.* at 70.
[116] 342 U.S. 246 (1952).
[117] *X-Citement Video*, 513 U.S. at 70.
[118] 471 U.S. 419 (1985).
[119] 511 U.S. 600 (1994).
[120] *X-Citement Video*, 513 U.S. at 72.
[121] *Id.* at 71 (quoting *Morissette*, 342 U.S. at 255).

punishable by up to ten years in prison, as well as by fines and forfeiture. The Court thus held that, because the plain intent of Congress could not clearly be divined, it should err on the side of requiring proof of culpable intent.[122]

In sum, then, the Court in *X-Citement Video* and the cases that led to it recognized that there are cases in which the agency approach to statutory interpretation cannot provide an answer to difficult interpretive questions. Rather than simply willing a clear text where there is none, as did Scalia in *X-Citement Video*, or creating a fictional intent to cover their policy preferences, as courts too often do, the Court in these cases took precisely the approach this Article advocates. It created a substantive canon of construction, rooted both in a thoughtful understanding of the area of law in question and of the requirements of justice.[123]

This idea of judges systematically embodying their views in substantive canons of construction may sound like a radical expansion of judicial discretion, but it is not. In fact, it merely replaces, for modern times, the role played by the common law in traditional statutory interpretation. As perhaps the greatest expositor of the traditional American approach to legal reasoning, Justice Joseph Story wrote when describing the traditional canons of construction:

> The common law is also regarded, as it stood antecedently to the statute, not only to explain terms, but to point out the nature of the mischief, and the nature of the remedy, and thus to furnish a guide to assist in the interpretation. In all cases of a doubtful nature, the common law will prevail, and the statute will not be construed to repeal it.[124]

Thus, under the traditional common law approach to statutory construction, it was conceded that there would be instances in which it would be difficult to discover the intent or purpose of the legislature. In those instances, the principles embodied in the common law would supply the rules needed to decide these hard cases. While it is true, we no longer accept the authority of a monolithic, natural-law type common law, we can devise a modern approach that will serve the same function that reliance on the common law did for Story. We should ask judges to articulate a modern version of common law principles to provide guidance to

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[122]For a thorough, well-reasoned defense of this approach to the construction of federal criminal statutes, see John Shepard Wiley, Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021 (1999).

[123]The Court also relied on the canon of the avoidance of serious constitutional doubts. *X-Citement Video*, 513 U.S. at 78. For a critique of the use of this canon in *X-Citement Video*, see *The Supreme Court, 1994 Term—Leading Cases*, 109 HARV. L. REV. 111, 271–89 (1995).

[124]Story, *supra* note 19, at 362.

legislators and to end the fiction that judges simply implement the intent of the legislature in all cases.[125] While this approach may result, at first, in a variety of substantive canons operating in a particular doctrinal area, what is most important is that judges begin to develop and articulate consistent principles of construction. Clearly, before a judge's suggested interpretive principle becomes a canon of construction it must "have more support than merely a scholar's or judge's idea of how things should be."[126] Once these principles are articulated and relied upon in judicial opinions, however, some will be adopted by judges and others will not. Those principles which "become rooted in judicial acceptance" will be established as accepted canons of construction.[127] When these substantive canons are established, the legal system will reap great benefits, at little cost to legitimacy.

B. The Benefits to the Legal System of the Articulation and Application of Substantive Canons of Construction

1. Promotion of Rule-of-Law Values

The most obvious benefit to the legal system of judges developing rules of interpretation to resolve hard cases is that the articulation and implementation of these rules will increase the predictability and coherence of the law. In the words of F.A. Hayek, the essence of the rule of law is that the "government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge."[128] It is all too often impossible, however, for the average citizen, even with the assistance of an attorney, to divine the legal rules a statute has enacted. Statutes are frequently poorly drafted, resulting in ambiguous provisions or unexpected policy consequences.

Judicial attempts to rewrite statutes, however, often make things worse. If, for example, a statutory text is sufficiently clear so that one may understand the ordinary meaning of the words, then when a judge, citing the intent or purpose of the statute, sets aside the obvious textual meaning, citizens will be surprised at the interpretation of the law.[129] Many people will have relied on the ordinary

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[125]There is, to be sure, a great deal to be said for the traditional common law, both as providing substantive rules and as a process for further confining the discretion of judges. *See* Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 197–98.

[126]KENT GREENAWALT, LEGISLATION: STATUTORY INTERPRETATION 211 (1999).

[127]*Id.*

[128]FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 72 (1944).

[129]ALLEN, *supra* note 56, at 79.

meaning of the words in planning their affairs; a judicial decision overriding the text in favor of other sources that are much more difficult and expensive for the average citizen to consult will undermine the law's ability to guide the actions of citizens. The legitimacy and effectiveness of the law will thus be lessened.

The problem of lack of fair notice is exacerbated if the statutory text is ambiguous and the other traditional sources of interpretation do not succeed in making sense of the statute. A judge who hides behind the facade of a pure agency theory will claim that his decision is based on the intent or the purpose of the legislature when that cannot be true.[130] In reality, her decision is most often based on unarticulated, subjective value judgments. There is no way for citizens to confidently predict what the judge's views regarding the statute will be; this almost unlimited judicial discretion, hidden behind the masks of fictional textual readings, intents, and purposes, renders the requirements of the law extremely difficult to determine. Rather than seeing the law as a source of predictable, coherent norms, the citizen will see the law as simply the collection of a willful judge's ad hoc decisions.

The articulation and application of substantive canons of construction to serve as default rules when the traditional sources of interpretation fail to resolve the question at issue alleviates these rule of law concerns. If courts make clear the content of the interpretive principles they will apply in cases of ambiguity, those required to follow the law will have much more guidance regarding their legal obligations than they would if a judge could not consult extrinsic principles.[131] They will know, for example, that if there are interpretive doubts regarding a penal statute, the statute will be interpreted in favor of the defendant. In addition, the use of canons of construction will increase citizens' faith and belief in the legitimacy of the law because judges will not be forced to pretend that their decisions are based on the text, intent, or purpose of the legislature when they are not. Under this approach, judges may, when necessary, look to extrinsic legal principles to resolve hard cases, without opening themselves up to the charge that they are merely implementing their political preferences. They can, in sum, render honest, principled decisions that can be more easily predicted by those affected by a statute.

2. Improving the Quality of Legislation Through Legislative-Judicial Dialogue

Over ten years ago, Jonathan Macey began an article on statutory interpretation by commenting that "[w]e live in a time of widespread dissatisfaction with the legislative outcomes generated by the political process."[132] Nothing has

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[130]ESKRIDGE, *supra* note 8, at 20, 29.
[131]ALLEN, *supra* note 56, at 82.
[132]Macey, *supra* note 14, at 223.

changed since those words were written. We are still concerned, as was Macey, with the phenomenon of private interest groups using the legislative process to benefit themselves at the expense of their fellow citizens.[133] We are also concerned with the lack of drafting skill all too often exhibited by American legislatures, resulting in statutes that are ambiguous or ineffective statements of legislative policy.[134]

By developing and applying substantive canons of construction, courts can help remedy the defects of our troubled legislative process. The interpretation of statutes against a background of articulated normative principles establishes a dialogue between the legislature, which seeks to implement its will, and the judges, who, lacking sufficient guidance from the legislature, will continue to uphold the values they consider worth preserving.[135] This dialogue, by facilitating the judicial injection of public, rather than private, values into the legislative process, results in improved legislation.[136]

The most important hurdle preventing the enactment of legislation that serves the public interest is the success of private interest groups in manipulating the legislative process to their benefit.[137] These groups are successful in obtaining beneficial legislation because small, well-organized groups are more effective in obtaining access to the political process than large, unorganized groups of citizens such as taxpayers.[138] These small groups use their access to control the flow of information to legislators.[139] They wish either to persuade legislators to sponsor legislation that will grant them their special benefits in exchange for favors to these legislators or to camouflage their special interest legislation in public interest rhetoric so that legislators will be misled into voting for these bills.[140]

Whether the legislature consciously or unconsciously pursues the objectives of special interest groups in its legislation, the statutes that provide these benefits will often be written ambiguously in order to cloak the special interest goals of the law.[141] There are two reasons for this deliberate ambiguity. First, the law must

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[133]ESKRIDGE & FRICKEY, CASES AND MATERIALS, *supra* note 92, at 52–57. This concern, of course, is at least as old as the Constitution. *See* RALPH LERNER, THE THINKING REVOLUTIONARY 135 (1987) ("The first justices of the Supreme Court acted in such a way as to counter the habit of mind that insisted that 'there is no right principle of action but *self-interest*' and to inculcate civil virtue.") (citations omitted).

[134]ALLEN, *supra* note 56, at 80.

[135]SUNSTEIN, *supra* note 61, at 191–92.

[136]*Id.* at 158–59.

[137]Macey, *supra* note 14, at 230.

[138]*Id.* at 230–31.

[139]*Id.*

[140]*Id.*

[141]*Id.* at 232–33.

conceal its true purpose in order to ensure that the large group of unorganized citizens that will bear the costs of providing the benefit to the favored faction will not discover that they have been hurt until it is too late to react. Second, in those instances in which many legislators are unaware that they are assisting private interest groups, the law must be written so that these duped legislators remain ignorant of what they are doing.

For the same reasons that a special interest statute is more likely to be written ambiguously, it is likely that there will be little evidence regarding the legislative intent or purpose. Most legislators, even if they consciously are attempting to help a particular interest group, will not articulate that objective during the legislative process; they will keep their true motives hidden.[142]

Thus, if a judge applies a pure agency approach to the interpretation of these special interest statutes, she faces a real danger of basing her decision not on an accurate understanding of text, intent, or purpose, but rather on a fictional version of one of these sources. She faces this danger because the statute has been designed by the involved group and legislators to conceal the true intent behind the law.[143] If she attempts to base her decision on the text or the intent of the legislature, she will, more likely than not, simply be reading her own policy views into the statute. Worse than basing one's interpretation on a fiction, however, is the fact that if a court gives a generous interpretation of these kinds of statutes, it will be benefitting the very special interest groups that created the interpretive problem in the first place.

Rather than trying to divine a textual meaning or an intent that does not exist, judges should instead apply substantive canons of construction to ambiguous statutes. The application of the judicial default rules will frustrate the special interest project because rather than give the statute the interpretation that the special interest groups desired, the court will interpret the law according to its own articulated legal norms.

Because these legal norms are developed and applied by judges, they are more likely to reflect public, rather than private, values.[144] Judges, at least in the federal system, because they are appointed and have life tenure, are independent of the political process. They therefore are in a better position to articulate rules that are based on normative principles, rather than political interests.[145] In

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[142]*Id.* at 251–53.

[143]*Id.* at 251.

[144]*See* LERNER, *supra* note 133, at 124 (commenting that authors of *The Federalist* believed that because "[t]he judiciary is the only branch of the government whose members require special training and competence, and one of the effects of that training is to set those individuals apart from the populace," the courts "would stand in a closer relation to the deliberate will of the people as expressed in the Constitution than would the representatives of the people").

[145]These ideas, of course, constitute the heart of the modern defense of judicial review. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 23–33 (2d ed. 1986).

addition, all judges, no matter how they reach the bench or the length of their term, are more likely to rely on public values in their decisions because of the institutional framework in which they work. Unlike legislators, judges are required to publicly explain their decisions. These decisions should be, as is traditionally understood, based on reason, analytical coherence, and principled judgment.[146] A judge who attempts to adhere to these norms, as most do, is more likely to make decisions rooted in principle than an average legislator.

It is true, however, that representative government requires that judges recognize the legislature's authority to override judicial decisions regarding statutory interpretation.[147] If a judge decides that the traditional sources of statutory interpretation do not supply an answer in a particular case, therefore calling for the application of a substantive canon of construction, and the application of that canon deprives a special interest group of a benefit it sought, the legislature may respond and revise the statute in order to explicitly grant the benefit.[148] Even such action by the legislature, however, does not negate the positive effects of the court's establishment of a dialogue with the legislature.

To understand this point, consider the changed legal and political terrain after the court renders its initial legal ruling. Once the court signals that it will not permit the legislature to grant a special interest benefit by passing an ambiguous statute, the legislature is forced to be more explicit in legislating its desires. This need for more direct action makes the special interest project more difficult to conceal from both the members of large, disorganized groups who are hurt by the law and the legislators who originally did not realize that the bill in question was designed to help a particular faction. Because the original judicial decision and the attempt to revise the statute will attract attention to the bill, it is much more likely to be opposed the second time around.[149] Thus, by using the application of substantive canons of construction to enter into a dialogue with the legislature (in which the legislature concededly has the last word), the courts can improve the product of the legislative process.

The dialogue engendered by judicial application of substantive canons of construction can also encourage other kinds of positive law reform. If a legislature, for example, finds that it repeatedly resists the substantive canons of construction applied by judges to particular kinds of statutes, it can pass statutes that mandate the application of legislatively articulated principles of statutory interpretation. The statutory interpretation principles of the Model Penal Code[150] are a fine example of the kind of comprehensive, coherent interpretative

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[146]*See* Macey, *supra* note 14, at 253–54.
[147]*See* ESKRIDGE, *supra* note 8, at 286.
[148]*Id.* at 151.
[149]Macey, *supra* note 14, at 254–55.
[150]MODEL PENAL CODE § 2.02 (1985).

framework legislatures may provide if they are so inclined.[151] If judges systematically fill legislative gaps with their own substantive canons of construction, legislatures will likely respond in some way, preferably by establishing these interpretive frameworks.

In sum, the articulation and application of canons of construction founded on public values adhered to by the judiciary, while not a guarantee that justice and reason will prevail, will "giv[e] justice and rationality the benefit of the doubt."[152] By establishing default rules that will apply whenever the traditional sources of statutory interpretation do not dictate a particular result, this reliance on substantive canons of construction will force legislatures to consider directly the legal principle articulated by the judge, making it more likely that laws will be based on principle, rather than on the interests of particular individuals.

We can demonstrate how this increased reliance on principle is produced by examining how a legislature may respond to a judicial interpretation relying on substantive canons of construction. In some cases, it is reasonable to believe that the legislature will not have considered the legal principle stated by the judge, but upon becoming aware of it, will allow it to prevail. In other cases, the legislature may be aware of the principle but desire another legal principle, equally based on sincere effort to advance the public good, to govern the case. Finally, in some cases, the legislature may be aware of the principle but prefer instead to favor some private group. The legislature may still help its friends, but it must do so in the light of day. This light is often enough to kill the deal. In all these cases, the use of substantive canons of construction increases the probability that legal decisions will be based on articulated legal principles, rather than speculation regarding legislative intent or special interest dealing. It is difficult to ask much more from a judicial method.

3. Response to the Judicial Restraint Critique of Substantive Canons of Construction

Justice Scalia is unimpressed by arguments in favor of substantive canons of construction, apparently believing them to be just another manifestation of the judicial activism he battles in the constitutional law realm. Those who advocate for the application of such canons are merely asking judges to substitute their own views in place of the statute adopted by the legislature. In Scalia's words, to "the honest textualist" these canons "are a lot of trouble."[153] These "dice loading" rules make it difficult, if not impossible, for a judge to objectively interpret the

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[151] ALLEN, *supra* note 56, at 82–83.
[152] SUNSTEIN, *supra* note 61, at 192.
[153] SCALIA, *supra* note 42, at 28.

meaning of a statute because these canons lead her to favor one interpretation over another.[154]

A rule, for example, that instructs a judge to interpret an ambiguous statute in favor of a criminal defendant does not tell a judge how ambiguous a statute must be before the rule is applied.[155] All statutes that are the subject of litigation, Scalia argues, are to some degree ambiguous—otherwise there would be no case to decide.[156] If there is no concrete rule regarding when the presumption in favor of the defendant can apply, the judge can arbitrarily decide when the statute is sufficiently ambiguous to trigger the presumption. The judge, therefore, may impose her own desired result in the case by choosing a substantive canon that favors her preferred party and simply declare that the trigger to the presumption, whether it be an ambiguous statute or the failure of the legislature to make a clear statement, exists. Individuals subject to the statute expect that judges interpreting the statute will seek the objective meaning of the statute; instead, if judges decide that the statute contains some unmeasurable quantum of ambiguity, the search for the objective meaning is discarded and a value outside the statute is imposed by the judge. Thus, under this approach, statutory interpretation decisions are both unpredictable and arbitrary,[157] undermining two of the fundamental values of the rule of law.

Even if judges could apply these substantive canons in a predictable and objective manner, Scalia would still oppose their use.[158] These canons instruct judges to favor certain values over others when making decisions. For example, the canon stating that statutes in derogation of the common law should be construed narrowly is founded on the principle that because the common law is "the most legitimate and reliable source of law," judges should make it difficult for legislators to change the rules emanating from that source of law.[159] The canon, then, empowers judges to favor the values of the common law over those that might have been favored by the legislature. Thus, judges who rely on substantive canons are not implementing values selected by the democratic branches of government; they are implementing their own. Judges who use the power of statutory interpretation to impose their preferred values violate the

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[154]*Id.*

[155]*Id.*

[156]*Id.* at 28.

[157]Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 536 (1997) [hereinafter Sunstein, *Democratic Formalism*].

[158]SCALIA, *supra* note 42, at 29.

[159]McConnell, *supra* note 125, at 196. *See also* James R. Stoner, Jr., *The Idiom of Common Law in the Formation of Judicial Power*, *in* THE SUPREME COURT AND AMERICAN CONSTITUTIONALISM 47, 57–58 (Bradford P. Wilson & Ken Masugi eds., 1998) (explaining that there is no reason to believe Framers meant for Constitution to be interpreted any differently than existing common law).

separation of powers; in Scalia's words, they are guilty of a "sheer judicial power-grab."[160]

This critique of the use of substantive canons of construction, grounded in the vision that judges act legitimately only when they implement the objective intent of the legislature as expressed in the text, consists, therefore, of two related arguments. First, reliance on substantive canons of construction results in unpredictable, arbitrary decisions. It follows from this argument that the critics of the use of substantive canons aver that their preferred interpretive methods (textualism, in the case of Scalia) produce more determinate results.[161] Second, and most important, the judicial imposition of values violates the fundamental tenets of democratic self-government. Democracy requires that elected lawmakers select the values embodied in legislation. The only role of the judiciary is to determine and implement the values which the legislators chose to embody in the text of the legislation; if the ordinary meaning of the words does not provide for the vindication of important public values, it is illegitimate for judges to vindicate these values themselves.[162] When judges arbitrarily dispense with the values of the people's representatives, they cease to act as judges.

(a) The Indeterminacy Critique

Before answering the argument that use of the substantive canons of construction produces unpredictable and indeterminate results, it is important to understand that no theory of interpretation, including the agency approach or one that embraces substantive canons, will provide such answers in every case. The notion that we can find determinate answers to questions involving human affairs is founded on a misunderstanding both of human nature and the practical science of governing human beings, of which law is a part.[163] As Aristotle demonstrated long ago, unlike physics or mathematics, political science cannot provide definitive, unchanging answers to thorny questions; the variety and mutability of human natures, motivations, and actions precludes such precision. It follows that a demonstration that a particular interpretative theory will not produce determinate answers in every case cannot refute that theory.

It is clear, for example, that a reliance on substantive canons of construction will not always produce determinate answers in hard cases. There may, after all, be more than one substantive canon, each pointing to a different result, that

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[160]SCALIA, *supra* note 42, at 29. *See* Sunstein, *Democratic Formalism, supra* note 157, at 536.
[161]Sunstein, *Democratic Formalism, supra* note 157, at 545.
[162]*See* Nagle, *supra* note 88, at 808–09.
[163]*See* Spiropoulos, *supra* note 57, at 28.

applies in a particular case.[164] Certainly, such a case is a difficult one, without any clear answer. If the application of substantive canons resulted in this conflict most of the time, it would be a damning indictment of their utility. The occasional appearance of such conflicts only proves that, like all other theories of political judgment, there are times when use of substantive canons will not clearly answer the question at hand.

Given the reality of the difficulty of governing human affairs, the real question is which interpretive theory will provide comparatively more determinate answers. Justice Scalia relies on the idea that there is less argument—and hence less uncertainty—about the meaning of words than there is about any other source of interpretation.[165] But, as Scalia admits, hard cases are precisely ones in which the parties disagree about the meaning of the text.[166] This conflict is the starting point for the interpretive enterprise. If the meaning of a text was as determinate as Scalia would lead us to believe, we would not face such difficulty in interpretation. Instead, as all lawyers know from hard experience, parties can argue just as easily about the meaning of words as they can about the purpose of the legislation. In one particularly difficult case that recently came before the Court, for example, one party engaged a group of linguistic experts to write an amicus brief in favor of their textualist arguments.[167]

Recurring disputes over the meaning of language should not surprise us; legal scholars have long understood that there are inherent limits to the language's capacity to communicate clearly.[168] This insight is often, with some justice, credited to Wittgenstein, but it truly follows from the Aristotelian principle that human reason is limited. Just as there are limits on humans' ability to provide answers to hard questions, the same inability to predict the course of either future events or human reaction to these events can render it impossible to

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[164]ESKRIDGE, *supra* note 8, at 150 (discussing Bob Jones Univ. v. United States, 461 U.S. 574 (1983)).

[165]*Id.* at 42 ("Scalia's goal in statutory interpretation is to produce text-based interpretive closure even when the statutory provision being interpreted is itself ambiguous."). In the context of constitutional interpretation, Justice Scalia has explained why his textualist method is superior to a dynamic approach in reaching determinate results. He writes, "the difficulties and uncertainties of determining original meaning and applying it to modern circumstances are negligible compared with the difficulties and uncertainties of the philosophy which says that [the meaning of the text] changes .... The originalist, if he does not have all the answers, has many of them." SCALIA, *supra* note 42, at 45–46.

[166]See ESKRIDGE, supra note 8, at 226 ("Scalia is aware of the familiar precepts that words do not interpret themselves and that their meaning depends on context. He probably would agree that a dictionary definition will not always answer the difficult interpretive questions, and would admit context is necessary.") (citations omitted).

[167]Adrian Vermeule, *Interpretation, Empiricism, and the Closure Problem*, 66 U. CHI. L. REV. 698, 702 (1999).

[168]Sunstein, *Democratic Formalism, supra* note 157, at 544.

choose words that will not seem ambiguous to later listeners or readers. Human beings, in short, need the context of a communication to understand even the simplest words.[169]

In articulating his interpretive method, Scalia himself recognizes the need to place words in context by using sources of interpretation other than the text of the statute at issue. For example, a judge may examine what Scalia calls "the surrounding body of law into which the provision must be integrated."[170] This body of law includes both other provisions of the statute being interpreted and related statutes. This choice, however, to interpret a statute so that it best fits into the existing body of law, demonstrates that Scalia cannot believe that the ordinary meaning of the text provides a conclusive answer; he would not otherwise need to go outside the four corners of the text and consult the other provisions. Examining the structure of both the particular statutory scheme and of the law as a whole does not cure the problems of a pure textualist approach and lead to determinate results. Looking to other statutory provisions raises the same interpretive problems that arise with the text at issue. Parties to a litigation, after all, can reasonably differ over which policies both the statute at issue in the case and the related statutes mainly pursue. The parties may, for example, agree that the statutes pursue two separate policy goals but disagree over which one takes priority when the two are in conflict. Thus, while "holistic" analysis can, and does, help the judge to better understand the meaning of the text at issue, it cannot eliminate every shred of textual ambiguity.[171]

Indeed, the failure of this holistic analysis to reach determinate results may be what leads Justice Scalia to go even further, despite his professed textualism, in his use of external aids to interpretation. Scalia is an advocate of the doctrine established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,[172] in which the Court held that if a statute is ambiguous, courts should defer to a reasonable interpretation by the agency charged with the interpretation of the statute.[173] Scalia's acceptance of, and indeed enthusiasm for, *Chevron* demonstrates that even the most forceful proponent of textualism must concede two points vital to the argument for a canons approach: (1) there are times where the statutory text is ambiguous; and (2) when the text is ambiguous, judges, to avoid acting illegitimately, need some background principle to resolve these difficult

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[169]ESKRIDGE, *supra* note 8, at 40.

[170]Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1988) (Scalia, J., concurring). *See also* SCALIA, *supra* note 42, at 16 (stating that "ambiguities in a newly enacted statute are to be resolved in such a fashion as to make the statute, not only internally consistent, but also compatible with previously enacted laws").

[171]ESKRIDGE, *supra* note 8, at 44.

[172]467 U.S. 837 (1984).

[173]Sunstein, *Democratic Formalism, supra* note 157, at 550–51.

interpretation cases. The only matter, then, separating Scalia from the approach this Article advocates is which background rules judges may legitimately apply.

Recent empirical studies of the Court's statutory interpretation jurisprudence confirm that the Court continues, despite Scalia's apparently successful efforts to convince his colleagues to make the text the beginning of their interpretive efforts,[174] to rely heavily on non-textualist arguments in their statutory interpretation opinions. Jane Schacter's exhaustive study, for example, of the Court's 1996 term found that while every opinion examined began with the text, the Justices used a wide variety of non-text sources of interpretation, including: precedent (in 100% of the majority opinions), legislative history (49%), administrative materials (49%), and secondary sources such as treatises and law review articles (51%).[175] More significantly for the purposes of this Article, Schacter found that in majority opinions (56%), the Court used canons of construction, both textual and substantive.[176]

Even more significantly, and especially harmful to Scalia's argument, is the Court's use, in almost three quarters (73%) of its majority opinions, of what Schacter calls "judicially-selected policy norms."[177] Justices using these norms often argue, for example, that "a particular interpretation should be embraced or rejected because of the potential policy consequences that would be produced."[178] Schacter describes these norms as "nonoriginalist" because they reflect "policy values that are grounded in neither the text of the statute nor the legislative history nor any other claim about intended legislative design."[179] In sum, while the Court accepts the originalist premise that any legitimate interpretation of a statute must start with the text, in most cases, the Court relies on its own policy norms to decide hard cases.

This is not to say that courts are authorized to use any conceivable source when interpreting statutes. To the contrary, judges ought to be limited in their application of external policy norms in statutory interpretation cases to articulating and applying substantive canons of construction. Despite the Court's increased attention to careful textual argument and use of textual sources such as

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[174]*See* Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 19 (1998) (concluding that "statutory language is plainly a dominant source" and "consistent point of departure"); *see also* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 Wash. U. L.Q. 351, 351, 357 (1994) (arguing that "major transformation" has taken place in how Court interprets statutes and that there is "no doubt that textualism has asserted a powerful hold over the Supreme Court's statutory interpretation jurisprudence").

[175]Schacter, *supra* note 174, at 4, 18.

[176]*Id.* at 18.

[177]*Id.*

[178]*Id.* at 12.

[179]*Id.*

the dictionary, the Court has not found reliance on textualist arguments results in determinate answers to hard cases. Were it otherwise, the Justices, including Scalia, would not so frequently turn to external aids such as legislative history or administrative interpretations. Thus, one cannot plausibly reject the use of substantive canons of construction because they produce an inordinate amount of indeterminacy in statutory interpretation cases.[180]

(b) The Abuse of Judicial Power Critique

Because the indeterminacy critique of the use of substantive canons of construction collapses upon close examination, the true objection to the employment of these canons must lie elsewhere. The key to understanding the actual ground of this objection is to understand the foundational premises of the critics' judicial philosophy. Taking, once more, Justice Scalia as the most representative and articulate of these critics, we first see that this judicial philosophy, as that of any judge, arises from the judge's conception of the core principles of our regime.[181] Scalia believes that the heart of the American regime is the commitment to democratic rule. As he puts it, the center of our regime is "the principle that laws should be made not by a ruler, or his ministers, or his appointed judges, but by representatives of the people."[182] The success of this system of representative democracy depends on the structural mechanisms the Framers devised to protect citizens against tyrannical majorities.[183] One of the most important of these mechanisms is the separation of powers; in the context of statutory interpretation, this principle requires that judges do not usurp the legislators' power to make law. The primary threat to the constitutional framework arises from the tendency of judges, "under the guise or even the self-delusion of pursuing unexpressed legislative intents," to "pursue their own

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[180]Indeed, as I argue above, use of substantive canons will strengthen the rule of law by making law more predictable and coherent. *See supra* text accompanying notes 128–31; *see also* William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 679 (1999) (arguing that most likely value of canons of construction is that they "work together as an interpretive regime yielding more consistent results than would exist in its absence").

[181]*See* John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. 685, 697 (1999) (concluding that "[i]n the absence of legislative prescription, the fundamental norms of interpretation are judge-made rules that necessarily affect the allocation of power among the branches of government. In our system of government, the Constitution determines that allocation."); *see also* Robert Post, *Justice for Scalia*, N.Y. REV. BOOKS, June 11, 1998, at 62 ("Without any text to guide his opinion, Scalia ... decided the case on the basis of Constitutional values he was able to discern in the structure of federalism.").

[182]Antonin Scalia, *How Democracy Swept the World*, WALL ST. J., Sept. 7, 1999, at A24.

[183]*Id.*

objectives and desires, extending their lawmaking proclivities from the common law to the statutory field."[184]

Thus, to Scalia, our central jurisprudential problem is the distressing tendency of judges to displace the rules made by the democratic process and, instead, substitute their own views for those of the people's agents. He warns that "[i]t is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is."[185] To Scalia, then, any theory of judicial interpretation, to be legitimate, must provide effective limits on judicial discretion.[186] Scalia believes that effective judicial restraint, and thus preservation of our constitutional democracy, is rooted in a judge's commitment to textualist interpretation, or what Cass Sunstein calls "democratic formalism."[187] This commitment, by limiting "the policymaking authority and decisional discretion of the judiciary," will "ensure that judgments are made by those with a superior democratic pedigree."[188]

It is easy to see why a judge who adheres to this understanding of the regime and the judicial philosophy that follows from it would oppose the use of substantive canons of construction. While it may be appropriate for judges deciding cases under the common law to articulate and apply substantive principles of law, a judge interpreting a statute (or, for that matter, a constitution) has no business bringing to bear her views of what is substantively just or unjust. To be legitimate, a method of statutory interpretation must therefore prohibit judges from deciding cases on principles that do not clearly manifest themselves in the text or the structure of duly enacted laws; a decision made on any other basis would be "simply incompatible with democratic government"[189] and a "usurpation."[190] Hence, a judge who, by relying on judge-made substantive canons of construction, makes decisions using a source of interpretation beyond the text and structure of enacted statutes, abuses her constitutionally granted—and limited—powers and usurps those of the legislature.

This critique is a powerful one, but it is fundamentally flawed for the following three reasons.

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[184]SCALIA, *supra* note 42, at 17–18.

[185]*Id.* at 22.

[186]Post, *supra* note 181, at 58 (arguing that Justice Scalia's position regarding legislative history "does not flow from his theory of legislation; it springs instead from his mistrust of judges").

[187]Sunstein, *Democratic Formalism, supra* note 157, at 530.

[188]*Id.*

[189]SCALIA, *supra* note 42, at 17.

[190]*Id.* at 14.

(i) Historical Inaccuracy

Scalia's argument against the substantive canons of construction is grounded in his argument that the Framers of the Constitution intended for judges, when interpreting statutes, to act as agents of the people by restricting themselves to interpretation of the text, thereby refraining from injecting their own legal principles into decisions. This approach to judging was most colorfully and, probably best, expressed by Justice Holmes: "If my fellow citizens want to go to hell, I will help them. It's my job."[191]

The problem with this argument, however, is that there is little reason to think that the Framers were as relentlessly majoritarian as Scalia seems to believe. Rather, the historical evidence demonstrates that the Framers did not intend to establish a purely majoritarian system; had they wished to do so they would have established either a direct democracy, or a simpler representative democracy in which the people would directly elect those who wield the power of government.[192] Instead, the Framers created a system in which neither the President nor the Senate were directly elected by the people and the judiciary is appointed by the elected branches.[193] The reason the Framers rejected direct democracy in favor of representative democracy was, according to Madison, because it is likely that "the public voice, pronounced by representatives of the people, will be more consonant to the public good than if pronounced by the people themselves."[194] Thus, the Framers believed a government should be judged not by how efficiently it implements the views of the majority, but instead by how well the laws made serve the common good.[195]

The Framers also understood that judges cannot interpret laws, whether they be statutes or constitutions, without understanding them in the context of the fundamental principles of the polity. Judges need background understandings that can supply answers to difficult interpretive questions. The Framers expected judges to find these background principles in the common law they inherited from England and, as suitably modified, transplanted here. The common law, for example, was adopted by each state as the basis of its jurisprudence and the Constitution is replete with common law concepts.[196] As Michael McConnell

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[191]Letter from Oliver Wendell Holmes, Jr. to Harold Laski (Mar. 4, 1920), *in* 1 HOLMES-LASKI LETTERS 249 (Mark de Wolfe Howe ed. 1953).

[192]ESKRIDGE, *supra* note 8, at 156.

[193]Walter Berns, *The Supreme Court as Republican Schoolmaster: Constitutional Interpretation and the "Genius of the People,"* *in* THE SUPREME COURT AND AMERICAN CONSTITUTIONALISM, *supra* note 159, at 3–4.

[194]THE FEDERALIST No. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961).

[195]Sunstein, *Democractic Formalism, supra* note 157, at 533.

[196]Stoner, *supra* note 159, at 53, 56–61.

states, Americans defined common law "as the rights and obligations that ordinary, informed individuals would expect to apply to their relations and transactions in the absence of specific legislation."[197] This body of common law rights, rooted in longstanding practice and experience, constituted "the most legitimate and reliable source of law."[198]

Americans expected that these common law rights would be protected against thoughtless invasion by legislatures. Indeed, consistent with the idea that these common law rights were the civil embodiment of one's natural rights, the Framers believed that the central task of government is to protect this preexisting body of rights and obligations.[199] Modifications of these rights "should be permitted only by the clearly expressed will of the people, in a process that promotes careful deliberation."[200] Our legal system, in other words, should be structured so that the common law rule will be preferred against any contrary principle. Courts made it more difficult to change common law rules by presuming that, unless the legislature spoke clearly, the common law right would prevail.[201] We know this rule as the canon that statutes in derogation of the common law shall be construed narrowly.

There is strong evidence that the Framers intended that judges employ precisely such an interpretive approach in order to protect common law rights. In *The Federalist*, for example, in a discussion separate from that justifying judicial review, Hamilton advocates such a jurisprudence. He argues that judges "may be an essential safeguard against the effects of occasional ill humors in society."[202] Some of the effects of these "ill humors" include "the injury of the private rights of particular classes of citizens, by unjust and partial laws."[203] In these circumstances, the decisions of judges are of "vast importance in mitigating the severity and confining the operation of such laws."[204] By interpreting the laws in this fashion, judges not only prevent the short-term deprivation of rights, but they also force the legislature to seriously deliberate the propriety of the laws in question. According to Gordon Wood, American judges made full use of this approach; shortly after ratification of the Constitution they "interpreted the common law flexibly in order mitigate and correct the harm done by the profusion of conflicting statutes passed by unstable democratic legislatures."[205]

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[197]McConnell, *supra* note 125, at 197.

[198]*Id.* at 198.

[199]*Id.*

[200]*Id.*

[201]*Id.*

[202]THE FEDERALIST No. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[203]*Id.*

[204]*Id.*

[205]Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421, 1444 (1999).

Agreement with a canons-based approach to statutory interpretation does not require that one adopt the common law background understanding of the American polity. It is quite possible that we as a society have either decided on a different set of fundamental principles or cannot agree on such principles. What does matter to my argument is that contrary to Scalia, the Framers, from the establishment of the regime, anticipated that judges would not merely confine themselves to implementing majority preferences. From the very beginning, judges understood that their role as interpreters required them to consult substantive legal principles beyond those contained in the statute and to mold their interpretations so that the statutes fit into the body of these legal principles.[206]

In addition to fostering thoughtful legislative deliberation by applying a presumption in favor of background rights, the Framers expected, and indeed relied upon, judges to articulate the background principles underlying the regime in order to educate the American people in the content and meaning of these principles. In the words of Ralph Lerner, the judges, particularly those on the Supreme Court of the United States, were called upon to act as "republican schoolmaster[s]."[207]

The Framers, Lerner shows, believed that federal judges, because of their manner of appointment, permanent tenure,[208] and special training, possess a degree of independence from and elevation above the populace that allows the courts to "stand in a closer relation to the deliberate will of the people" than the legislature.[209] In other words, they can articulate the will of the people abstracted from "an overpowering absorption in self-interest"[210] unfortunately characteristic of popular government.

Lerner demonstrates that in particular, the early Justices of the Court "acted in such a way as to counter the habit of mind that insisted that 'there is no right principle of action but *self-interest*' and to inculcate civic virtue."[211] They accepted this task of teaching virtue because "[t]eaching a people how to be good republicans meant more than making judicial power secure. It would have the far greater effect of making the republicans safe for the republic."[212]

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[206]Indeed, there is evidence that Justice Scalia concedes that judges must refer to these principles in hard cases. In his response to the arguments of Gordon Wood, for example, Scalia acknowledges that judges may construe ambiguous statutes consistently with the common law. SCALIA, *supra* note 42, at 130.

[207]*See* LERNER, *supra* note 133, at 91–136.

[208]*Id.* at 130.

[209]*Id.* at 124.

[210]*Id.* at 122.

[211]*Id.* at 135 (citations omitted).

[212]*Id.* at 134.

The vehicle first used by the early Justices for their education in republican principles was the grand jury charge, issued by the Justices in the course of their circuit riding.[213] With the ascendance of John Marshall to the position of Chief Justice, however, the Court, by "explicitly taking the higher role of guarding of the principles of the regime and by speaking through one voice through opinions of the [C]ourt,"[214] was able to effectively articulate its understanding of the foundations of the regime. This allowed the Court to "transfer to the minds of the citizens the modes of thought lying behind legal language and the notions of right fundamental to the regime."[215] To this day, all courts must, in order to serve in their role as "politically acceptable counterweights to popular impatience and injustice," continue to educate the people in the principles and habits of mind that sustain republican government.[216]

One of the most important ways judges may fulfill this function of "republican schoolmaster" is through the interpretation of ambiguous statutes. When faced with an unclear directive from the legislature, judges should, as the Framers expected, articulate which of the regime's background principles are relevant to the case. If the statute is unclear, judges should decide the case consistent with these principles. Explicit reliance on these background understandings, as expressed by the adoption of substantive canons of construction, not only helps resolve difficult cases, but it also has the salutary effect of educating the citizenry in our fundamental principles of law. Scalia's approach to interpretation, which forbids judges from referring to any legal principles not contained in the text of the statute, makes it difficult for the judges to act as the fount of republican principle that the Framers appeared to believe they should be. Consequently, it is difficult to accept Scalia's argument that the use of substantive canons of construction is somehow contrary to the underlying structure of the regime.

(ii) Democratic Legitimacy

The heart of Scalia's argument against use of the substantive canons of construction is that it is illegitimate for unelected judges to usurp the power of the legislature to make law by interpreting statutes, according to principles of law external to the statute. In other words, the principles of democracy are violated when unelected, unaccountable judges make law.

The first problem with this argument is that the Framers did not share Scalia's view that there is a fundamental difference between elected officials and

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[213] *Id.* at 94.
[214] *Id.* at 135.
[215] *Id.* at 136.
[216] *Id.* at 92.

judges with regard to their popular authority. Instead, the Framers believed that the authority of judges was also founded on the consent of the governed. In *The Federalist*, for example, Madison defends the republican character of the Constitution, arguing that the authority of each of the offices created by the Constitution can be traced to the consent of the people. In particular, he defends the democratic legitimacy of judicial authority, concluding that "the judges with all other officers of the Union, will, as in the several States, be the choice, though a remote choice, of the people themselves."[217] Judges, just as legislators or the executive, are agents of the people with an equal responsibility to carry out the will of the people and with this responsibility comes the independent authority to articulate and apply principles of law.[218] Thus, the Framers' construction of a judiciary based on popular, rather than royal, authority gave judges an independent—and legitimate—authority to participate in the lawmaking process that justifies their power to construct substantive canons of construction.

The second and most important reason why the judicial employment of substantive canons of construction does not violate principles of democratic legitimacy is that if the judges do not follow the will of the elected branches, the legislature may simply override the judicial decision.[219] Substantive canons of construction should be used only when statutes are ambiguous; if the legislature does not approve of the result of this application, it may remove the ambiguity.[220] While the courts, then, possess the authority to interpret ambiguous laws in accordance with background rules they articulate and apply, the jurisprudence of substantive canons of construction recognizes that the ultimate authority to make law must rest with those branches closest to the people. In the words of James Stoner, "To be a guardian is not the same as being a sovereign."[221]

(iii) Effective Judicial Restraint

The final reply against Justice Scalia's attack on the legitimacy of judicial reliance upon substantive canons of construction is that the use of these canons is not only consistent with the principles of judicial restraint, but, in fact, is required to preserve effective limits on judicial activism. The central problem with Scalia's attempt to restrict judges to implementing the will of the legislature,

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[217]THE FEDERALIST No. 39, at 242 (James Madison) (Clinton Rossiter ed., 1961).

[218]Gordon S. Wood, *Comment, in* SCALIA, *supra* note 42, at 52–53. Wood also correctly points out that recognition of this independent authority has led many states to elect judges. *Id.* at 54.

[219]ESKRIDGE & FRICKEY, CASES AND MATERIALS, *supra* note 92, at 628. *See also* ESKRIDGE, *supra* note 8, at 151 ("[D]ynamic statutory interpretation is ... subject to override by the legislature and ... may even be a stimulus to legislative deliberation.").

[220]Recent scholarship demonstrates that legislative override is a realistic possibility. ESKRIDGE, *supra* note 8, at 151.

[221]JAMES R. STONER, JR., COMMON LAW AND LIBERAL THEORY 210 (1992).

as expressed in statutory text, is that particular readings of that text may lead to injustice. Scalia's response is that it is not the business of the judge to worry about justice; it is the job of the legislature to change the law if it leads to unjust results.[222]

Scalia is correct that the judge has no discretion if she is dealing with an unambiguous text. It is certainly a fundamental requirement of judicial restraint that a judge must follow a clear statutory text. If the text is not clear, however, judges should concern themselves with background principles of justice in addition to determining the most literal reading of the text. They must do so for a simple reason: if textualism is not leavened with moral principle, the people will reject textualism and, with it, judicial restraint. As Madison explained, "[j]ustice is the end of government" and "of civil society," and, therefore, "[i]t ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit."[223] If Madison is right, the people will reject any interpretive method that appears to impede justice and will support methods that promise justice, even if they are illegitimate under the structural principles of the regime. Reliance upon substantive canons of construction provides judges a way to consider principles of justice without destroying their commitment to judicial restraint. The alternate approaches to incorporating principles of justice in the process of statutory interpretation are far more detrimental to the goal of judicial restraint than the substantive canons approach.

Jane Schacter's empirical study of the Court's recent statutory interpretation cases provides compelling evidence of what most judges will do if substantive canons of construction are not available to them. While beginning with the text and precedent in each case, in 73% of the opinions studied, the Court relied upon what Schacter calls "judicially-selected policy norms."[224] Some of these norms do not necessarily trouble an advocate of judicial restraint. For example, several of the Court's opinions rely upon what Schacter describes "as systemic norms like certainty, predictability, efficiency, administrability, and avoidance of policy anomalies."[225] Schacter sensibly speculates that the "Justices may regard overarching values like these as appropriate for judicial enforcement because they reflect what are taken to be 'common sense' ideas or the sort of background norms that may be reasonably imputed to Congress."[226] While it is true that these norms can, and probably often are, manipulated to achieve particular policy

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[222]SCALIA, *supra* note 42, at 20.
[223]THE FEDERALIST No. 51, at 324 (James Madison) (Clinton Rossiter ed., 1961).
[224]Schacter, *supra* note 174, at 18.
[225]*Id.* at 22.
[226]*Id.*

results,[227] the fact remains that at least the form of these background norms is policy-neutral.

The same cannot be said of two other types of norms identified by Schacter. First, in some cases, the opinions "argue that desirable or adverse policy consequences are likely to flow from a particular reading of the statute, but do not explicitly link those consequences to the legislative language or design," giving these arguments "a strong flavor of unabashed Posnerian consequentialism."[228] Second, some opinions rely on what Schacter calls "value-laden interpretive baselines against which the meaning of disputed language is measured and assessed."[229] These baselines, often constructed by the Justices using secondary materials such as policy reports, law review articles, and treatises,[230] articulate a substantive policy norm and judge the meaning of the statute against it. For example, in one securities case, Justice Ginsburg, in finding that the securities laws recognized the misappropriation theory of insider trading, relied on the policy baseline that the use of misappropriated information corrodes the securities markets.[231] While superficially this use of a baseline may resemble a canon of construction, unlike the substantive canons, these norms "do not appear as general rules or default principles."[232] Rather, creation and use of these norms is "ad hoc, judicial policymaking" in which judges select one interpretation over another on the basis of their own policy norms.[233]

Judicial reliance on both of these sets of norms constitutes plain and simple judicial legislation. These norms are not established as background rules that the legislature is invited to override, and they certainly are not treated as rules that will be followed in the next case. Instead, they are the product of result-oriented policy analysis that seeks to find the best result in the instant case, a kind of reasoning that is the antithesis of that required by judicial restraint.

Why would judges engage in this type of illegitimate reasoning? Judges turn to policy making, I propose, because textual analysis alone is not sufficient to resolve difficult interpretation cases. It is insufficient because the text is too often ambiguous and because a pure textual analysis does not ask what is just. It stands to reason that if the text does not supply an authoritative answer, judges will ask themselves, given that the ambiguity affords some discretion, what is the just answer to the question presented.

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[227] *Id.* at 23 ("[T]he Justices have substantial discretion in selecting from among competing systemic norms and, in fact, often disagree about which norm is appropriate for interpreting the statute at issue.").

[228] *Id.* at 21.

[229] *Id.* at 24.

[230] *Id.* at 27.

[231] *Id.* at 28 (discussing United States v. O'Hagan, 521 U.S. 642 (1997)).

[232] *Id.* at 25.

[233] *Id.*

If one believes in judicial restraint, it is far preferable for a judge faced with an interpretive impasse to turn to a substantive canon of construction, rather than some free-floating, ad hoc policy norm constructed by the judge to resolve the case. Reliance on canons supplies the principle of justice needed to both decide the case and, as much as possible, interpret the law in accordance with what is right. Substantive canons are rules and therefore serve as precedent to constrain judges in future cases. Consequently, if a judge chooses not to apply an established canon in an appropriate case, she must explain why. In addition, unlike ad hoc policy reasoning, substantive canons can be known to both the legislature and the citizens; both groups may adjust their actions to it. In short, when judges must think about justice in hard cases, judicial restraint is much better served if judges adhere to rules, rather than rely on their own personal notions of what justice requires in a particular case.

Finally, even if judges recognize the illegitimacy of this kind of policy analysis, if given no other alternative, judges who care about whether the laws are just will do something even more destructive to the principles of judicial restraint than rely upon judicially-constructed policy norms. They will find questionable statutes unconstitutional. Reliance on substantive canons of construction provides a method for enforcing typically underenforced constitutional and political norms that does not require the Court to use judicial review, a power that should only be employed when it is absolutely necessary to vindicate the Constitution.[234] As Mary Ann Glendon explains, "a freewheeling approach to constitutional interpretation" is far more destructive to the American polity than one dealing with statutes because "as judicial lawmaking expands, the democratic elements in our republican experiment atrophy."[235] The canons-based approach promises a revival, not continued atrophy, of republican government. Our polity is strengthened when the people enter a dialogue with the judiciary; it withers when the judges rule by decree.

III. CONCLUSION

Judges play a central, and difficult, role in our regime. The difficulty arises from our expectations for them. Judges, we demand, should both ensure that justice is done and be neutral arbiters of the laws enacted by the people. These two responsibilities are in constant tension, and it is all too easy for judges to emphasize one responsibility at the expense of the other. Judges should be neither

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[234]ESKRIDGE, *supra* note 8, at 286. Eskridge documents how the Rehnquist Court has used substantive canons to enforce constitutional norms. *Id.* at 286–88.

[235]Mary Ann Glendon, *Comment, in* SCALIA, *supra* note 42, at 109.

mere minions of the legislature nor our Platonic Guardians.[236] We do not need enlightened despots to impose justice upon us or to trick us into doing justice by pretending that they are implementing the popular will when they are really doing what they think is right.

We do, however, need teachers of justice. Judges can best manage the tension between the need to do justice and the need to enforce the law by engaging in a dialogue with those responsible for lawmaking—the people and their representatives. Because of judges' education and independence, they are in a better position to understand the public values that underlie a just polity. Because they are judges, however, they must find a way to persuade, but not coerce, the people to adhere to these values. Judges undermine their authority to teach these values when they pretend that the values they are relying upon to resolve a particular case derive from the legislative intent when a reasonable observer can see that the legislature never considered the particular question or did so unclearly. Judges have too often lapsed into this pretense when interpreting statutes.

Rather than attempt to mask their reliance on values found outside the statute, judges should openly explain why difficult cases require them to bring extra-textual values to the interpretive task. If judges dedicate themselves to the project of developing and applying substantive canons of construction, they will produce a set of principles, rooted in notions of justice, that legislators and citizens know will govern hard cases unless the legislature says otherwise. The consistent application of these principles, so that they become rules, will inform the people of principles that at least the judges believe are central to our regime, thus creating a better informed dialogue on what is justice. When our laws are the result of a dialogue based on principle, rather than mere command or opinion, it is more likely the people will afford the laws the reverence they need and deserve.

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[236] LEARNED HAND, THE BILL OF RIGHTS 73 (1958) ("For myself it would be most irksome to be ruled by a bevy of Platonic Guardians ....").