TEXTUALIST CANONS: CABINING RULES OR PREDILECTIVE TOOLS

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Introduction

Justice Scalia proclaims homage to the “dead” Constitution. [FN1] Justice Brennan honors the “living” Constitution. [FN2] Others believe in “a partially living and partially dead Constitution.” [FN3] But, whichever moniker selected, constitutional analysis remains (to the interpreter) personal; however, personal does not necessarily mean irrational or even singular (i.e., that no one else agrees with the interpretation). Rather, personal means that no matter how narrow the interpretational method, an interpreter of the Constitution inevitably makes personal choices when using any interpretational method - choices not required by, or perhaps even inconsistent with, the chosen interpretational method.

*115 This Article uses canons of construction to demonstrate that textualism, [FN4] particularly plain language or plain meaning textualism, [FN5] cannot be applied without the use of non-textual personal choices. But, this Article does not seek to demonstrate that interpreting the Constitution requires ignoring the text of the Constitution; nor does this Article seek to demonstrate that textualist approaches lack relevance or value. Rather, this Article seeks to demonstrate that textualism cannot create rules that avoid personal predilections [FN6] and does not create neutral principles [FN7] or eliminate predilective interpretation. [FN8] In order to accomplish this *117 goal, this Article reviews a variety of canons of construction and applies them to the Takings Clause. [FN9]

II. Plain Meaning of the Takings Clause

This Article assumes, for discussion purposes, that the Takings Clause contains plain language, [FN10] thereby limiting its reach to claims arising from a government either taking possession of, [FN11] or title to, [FN12] property. Accordingly, this Article assumes that the plain language of the Takings Clause precludes all claims not arising from the government taking possession or title [FN13] (i.e., regulatory takings claims). Ideally, this *118 interpretational method prevents judges from allowing their personal predilections to control their interpretation of the Takings Clause. [FN14]
As noted, this Article applies a number of canons of constitutional interpretation in the context of the plain meaning of the Takings Clause. The canons chosen align with the ideals that plain language textualism implicitly, or sometimes explicitly, seeks to embrace. Ultimately, this review of interpretational canons aims to demonstrate that reliance on these canons undercuts textualists’ claims of greater objectivity. [FN15]

III. Textualist Canons

Constitutional interpreters often use tools known as canons of construction. [FN16] These canons have been grouped or labeled as descriptive canons, [FN17] traditional canons, [FN18] generic canons, [FN19] linguistic canons, [FN20] general canons, [FN21] substantive canons, [FN22] language canons, [FN23] normative canons, [FN24] extrinsic source canons, [FN25] and most importantly (at least for this Article) textualist [FN26] or textual [FN27] canons. The number of such canons probably depends on who is counting and who is defining. One set of authors identified thirteen textual canons, [FN28] while another article identified at least six textual canons. [FN29] However categorized, “[t]extual canons focus on the language of the statute itself and the relationships between statutory provisions.” [FN30] “[B]ased on logic and the use of language, [FN31] these “canons include rules of syntax” [FN32] and “seek to gage the most likely meaning of statutory language.” [FN33] Courts use these canons to “determin[e] ordinary meaning.” [FN34] But, the relationship between plain meaning and textual canons is, admittedly, murky. Some have suggested that plain meaning is a textual canon; [FN35] others have suggested that judges use textual canons to determine the “plain meaning.” [FN36]

The next section of this Article will explore the interrelationship between canons of construction and plain meaning. Ultimately, this Article will suggest a few canons of construction that seem intertwined with the idea of plain meaning and will apply these canons to the Takings Clause and related constitutional provisions.

IV. (Sometimes Used) Canons of Plain Meaning Textualism

A. Superfluity Canon

The first difficulty that the plain language textualist confronts when applying plain language textualism to the Takings Clause arises in regards to regulatory takings claims made by property owners against states and municipalities (as opposed to the United States). The problem begins with the understanding that the Takings Clause does not apply to the states or any of their subdivisions (at least not directly) because the Fifth Amendment does not apply to the states. [FN37] Since the time of Barron v. Baltimore, [FN38] most have accepted the conclusion that the Bill of Rights does not apply to the states. [FN39] Like the rest of the Bill of Rights, the Takings Clause applies against the states (if at all) through incorporation into the Due Process Clause of the Fourteenth Amendment. [FN40] However, this incorporation creates an interpretational conundrum for the plain language textualist, requiring the
plain *122 language textualist to contravene one of the textualist canons, often known as the “superfluity canon.” [FN41]

In interpreting any legal text, the textualist often turns to the “superfluity canon,” which was founded on the “conclusion that we shall not presume the legislature to waste words when enacting laws.” [FN42] Also referred to as the “textual integrity canon,” this maxim urges the interpreter of a text to “[a]void interpreting a provision in a way that would render other provision[s] of the [text] superfluous.” [FN43] Essentially, this “surplusage canon[]” [FN44] presumes that a statute will not contain “linguistic surplusage.” [FN45] This canon will apply with particular force in a textualist interpretation of the Constitution, “[s]ince a textualist strongly presumes that each word in the Constitution has meaning rather than being surplusage.” [FN46]

At this point, this Article assumes [FN47] that any one demanding that the Takings Clause be limited to “plain meaning” would subscribe to the *123 canons of textualist interpretation, such as the superfluity or surplusage canon. [FN48] Professor Gerhardt puts it in these terms: “For anyone who claims to be a textualist (and that ought to be all of us!), each word of the constitutional text is supposed to have meaning.” [FN49] Perhaps not all textualists agree, but at least some textualists urge that textualism requires [FN50] those who interpret the Constitution to follow the surplusage or superfluity canon whenever possible, as it is consistent with, or even required by, textualism. [FN51] According to one commentator, a constitutional interpretation that leads to surpluses “should be untenable to textualists.”[FN52] Put another way, “[t]extualists presume that each word has an ordinary, natural meaning.” [FN53] Not all agree that plain meaning requires using textualist canons; however, many suggest the link and tie the canons to plain meaning, explicitly or implicitly. [FN54] Thus, this Article presumes that a person relying on plain meaning would embrace (or perhaps*124 should be found to embrace) the surplusage canon inasmuch as the canon seems to rely on the notion that each word has meaning. [FN55]

Commentators and Supreme Court Justices use the superfluity canon to point out that one or more constitutional provisions become surplusage when other provisions of the Constitution are interpreted using a methodology other than (some form of) textualism. [FN56] Implicitly, this argument suggests that an interpretation of one constitutional provision must be incorrect if it causes another provision to become surplusage. [FN57] For example, Justice Thomas has argued that the current understanding of the Commerce Clause renders “superfluous” the Article I, Section Eight clauses “permitting Congress to enact bankruptcy laws, coin money, fix weight and measure standards, punish counterfeiters, establish post offices, or grant patents or copyrights.” [FN58] Despite the fact that the pertinent words of the Constitution have not changed since 1789, reliance on the superfluity canon, as used by Justice Thomas in his concurrence in United States v. Lopez,[FN59] had little support in journals and law reviews prior to that opinion. [FN60] After Justice Thomas' Lopez concurrence, *125 commentators published at least four dozen articles discussing the textualist superfluity canon, as related to the Commerce Clause. [FN61] But, Commerce Clause interpretation may also create surplusage as related to the Foreign Commerce Clause [FN62] and others have found surplusage in the Supreme Court's interpretation of the Fourteenth Amendment's grant of power to Congress. [FN63]
Quite plainly, the incorporation of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment and the reverse incorporation of the Equal Protection Clause into the Due Process Clause of the Fifth Amendment violates the superfluity canon, at least in the opinion of many authors. [FN64] At the same time, those who write about textualism suggest that textualism must abide by the superfluity canon when interpreting*126 the Constitution. [FN65] However, as noted, incorporation and reverse incorporation violate the textualist surplusage canon. [FN66]

Dean Treanor notes that when Professor Akhil Amar (a textualist of one variety or another) argues that the Fifth Amendment's Due Process Clause has a “core meaning that simply restates the Fifth Amendment's Grand Jury Clause,” Professor Amar creates a constitutional surplusage, which “logically leads to the question, why did the founders include a Due Process Clause?” [FN67] One of the most significant surplusages is that caused by incorporation of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment. As explained by one commentator, “[T]he Fifth Amendment's Due Process Clause, once incorporated into the Fourteenth Amendment, makes the Fourteenth Amendment's Due Process Clause surplusage.” [FN68] Going in the other direction, “equating due process [in the Fifth Amendment] with equal protection renders the latter phrase mere surplusage within section [one] of the Fourteenth Amendment.” [FN69] In fact, the entire Bill of Rights can be viewed as surplusage. [FN70] Dean Kanter explains as follows:

Sole reliance on the Due Process Clause for incorporation would seem to imply that due process itself must contain the content of the incorporated Bill of Rights clauses. If so, an objector could claim this would mean that Fifth Amendment due process also contains the content of the other Bill of Rights provisions leaving them technically as “mere surplusage,” a presumptively inadmissible interpretation. [FN71]

For the plain language (or any other) textualist, the incorporation of the Bill of Rights through the Due Process Clause must seem like being trapped in a room of mirrors, with various clauses reflecting, while at the same time containing, each other. The Fourteenth Amendment Due Process Clause incorporates most of the Bill of Rights, suggesting that the Due Process Clause of the Fifth Amendment must have contained *127 the Bill of Rights; so, when the Due Process Clause of the Fourteenth Amendment incorporated the Fifth Amendment Due Process Clause, it incorporated most of the Bill of Rights, including one clause (the Fifth Amendment Due Process Clause) which already contained most of the Bill of Rights; consequently, the Due Process Clause of the Fourteenth Amendment incorporated the Bill of Rights twice (or something like that). Little wonder that textualists, particularly plain language textualists, often have trouble accepting due process incorporation. The problem lies, however, with plain language textualism. Once an interpreter of the Constitution demands that a phrase or clause has plain meaning, then that interpreter should be held to answer for the absurd results required by following such a strict rule. The alternative, with regard to the Takings Clause would be to reject incorporation, because the Fourteenth Amendment Due Process Clause did not bring with it a Takings Clause, whereas the Fifth Amendment Due Process Clause has the “tag-along” Takings Clause. Ultimately, the examples above demonstrate that textualists, or at least some textualists, seek to avoid interpretations of one provision of the Constitution, which would make another provision surplusage.
The surplusage difficulty caused by incorporation of the Takings Clause through the Fourteenth Amendment Due Process Clause exists only if a Takings Clause claim is brought against a state or one of its subdivisions. The Due Process Clause surplusage does not exist where the Takings Clause applies against the United States. Likewise, it could be argued that the surplusage concern does not really exist inasmuch as the plain meaning of the Takings Clause can still be applied against the United States. [FN72] However, as with almost any constitutional right, returning*128 to the days of Baron v. Baltimore [FN73] is highly unlikely, so at least as to Takings Clause claims against the states and their subdivisions, the plain language textualist will be confronted with the surplusage created by incorporation of the Bill of Rights through the Fourteenth Amendment Due Process Clause.

Simply put, with regard to Takings Clause claims against a state or local government, the plain meaning textualist self-righteously declares that plain meaning textualism eliminates personal predilections and policy choices. Then, the plain language textualist uses that approach to declare a plain meaning to the Takings Clause, while at the same time ignoring (innocently or intentionally) that the Takings Clause only applies after first creating surplusage in the Constitution, in violation of a generally accepted canon of textualist interpretation. [FN74]

*129 Application of the Takings Clause to the federal government fails to eliminate the surplusage concern for the plain language textualist. When the federal government enacts a law limiting the use of land or other property or over regulates land, property or business, it likely has done so through the Commerce Clause (particularly since a regulatory takings claim concerns a regulation of property, as opposed to physical possession of property). For example, when Congress protects wetlands, it does so through the Commerce Clause. [FN75] This broad interpretation of the Commerce Clause, to regulate non-navigable wetlands, next to navigable water, strongly suggests the power to prohibit felonies on waters used for trade, including the high seas. Such an interpretation thus renders superfluous [FN76] the Article I, Section Eight, Clause Ten power to “punish Piracies and Felonies committed on the high seas.” [FN77]

*130 Admittedly, some federal laws regulate without resort to an over-expanded Commerce Clause (i.e., a Commerce Clause interpretation, which makes some of the rest of Article I, Section Eight superfluous). However, when Congress must resort to a superfluity-creating Commerce Clause, Congress should not be permitted to rely on plain meaning textualism to limit the meaning of the Takings Clause. Similarly, a state may rely on plain meaning textualism to urge that the plain meaning of the Constitution requires a holding that the Takings Clause does not apply to the states. However, once the state concedes that the Takings Clause applies to the states via incorporation through the Due Process Clause and (consequently) in violation of the superfluity canon, the state should not be heard to argue that it can now rely on some purported plain meaning of the Takings Clause.

Ultimately, the superfluity canon suggests that a drafter relying on the obviousness (plain existence) of words would not use redundant words, phrases or clauses. Plain meaning textualism suggests that when the author writes, “Do not violate due process,” the author means, “Do not violate due process.” Once written, the command need not be re-written, as the second writing of the same phrase adds nothing to the meaning of the document. Plain meaning textualism, which is based on the plainness and obviousness of the
meaning of words, may not require use of the superfluity canon, which is based on the obviousness and plainness of the existence of the black marks commonly referred to as the Constitution; [FN78] however, a person who chooses to demand a plain language meaning to the Takings Clause and purports to do so in the name of eliminating personal predilections in constitutional interpretation should, at a minimum, address the application of the superfluity canon.

B. Expressio Unius Est Exclusio Alterius
Another “textualist rule[] for interpreting statutes include[s] [the] canon of construction, . . . expressio unius est exclusio alterius.” [FN79] “This *131 Latin maxim can be translated roughly as ‘the express mention of one thing excludes anything else not mentioned.’” [FN80] As applied to legislation, this canon means that “[w]hen the legislature provide[s] a specific term or a list of specific terms, the implication is that the legislature intended to exclude others.” [FN81] This canon, sometimes referred to as a “negative implication canon,” [FN82] “rests on the familiar idea that the enumeration of specific matters in a statute logically [FN83] implies the exclusion of others.” [FN84] Using the expressio unius maxim when interpreting a statute does not, in and of itself, justify using the maxim as a guide to constitutional interpretation. Indeed, many years ago, Myres McDougal and Ashe Lans, relying on the Federalist No. 83 (Hamilton), stated, “The general view has been that the maxim of construction expressio unius est exclusio alterius has no validity as a canon of constitutional construction.” [FN85] As McDougal and Florentino explained a few years later, “innocent reliance upon the question-begging latinism inclusio unius est exclusio alterius [sic] . . . is assuredly not a compulsion of logic.” [FN86] As stated by Nicholas *132 Quinn Rosenkranz, “[N]owhere does the Constitution suggest anything like an immutable code of interpretive canons, and the Court has never implied that expression unius is a constitutional rule.” [FN87] Others have suggested that the rule should be applied where appropriate. For instance, Vasan Kesavan, who advocates that the “single, true method of constitutional interpretation is original, objective public meaning textualism,” [FN88] urges that “[a]rguments from expressio unius est exclusio alterius must be contextually and sensitively applied to avoid wooden readings of the Constitution.” [FN89] Put another way, “expressio unius est exclusio alterius . . . applies only when a reasonable person would justifiably infer a negative implication from reading the specific *133 text in context.” [FN90] In fact, Thomas B. McAfee and Calvin H. Johnson, in separate articles, discuss the “appropriate” use of the canon, [FN91] while Saikrishna Prakash labels some clauses “poor candidate[s] for the application of the expressio unius est exclusio alterius maxim.” [FN92] Whatever may be an appropriate or poor candidate for application of the canon, “[t]he [Supreme] Court has embraced this principle of expressio unius,” [FN93] but only “on a selective basis.” [FN94] Justice Stevens, writing for the Court, in U.S. Term Limits, Inc. v. Thornton, [FN95] expressly relied on the maxim to invalidate the Arkansas constitution’s prohibition on a person who had served two terms as a United States Senator or three terms as a United States Representative from running for re-election. [FN96] In Marbury*134 v. Madison, [FN97] Chief Justice Marshall applied the expressio unius principle to declare unconstitutional Congress’s grant of original
jurisdiction to the Supreme Court in excess of the grant made in Article III of the Constitution. [FN98] Other Justices who have advocated or used this canon include: Justice Scalia, [FN99] Justice Barbour, [FN100] Justice Thomas, [FN101] and Justice Story. [FN102] Additionally, the Court has used this principle in construing a number of state constitutions. [FN103] This occasional reliance on the expressio unius canon does not suggest even regular reliance, inasmuch as members of the Court, who often rely on some version of textualism and this canon, [FN104] have found this canon superseded by other principles. [FN105] However, the fact remains that despite how rarely the *135 Court uses this canon, the Court has never suggested that this canon should be completely discarded. [FN106]

While the question of whether to apply the expressio unius canon to constitutional adjudication may be debated among some, a plain language textualist has less room to complain about being saddled with the interpretive rule. Indeed, “[c]losely related to the idea of plain language as [a] primary interpretive device is the maxim “expressio unius est exclusio alterius.” [FN107] Use of the canon clearly comports with textualism, even plain meaning textualism. [FN108] Consider, for example, whether an ordinance for selling dogs in city parks applies to cats: [FN109]

What result? In this situation, the job of a literalist (or even a less narrowly focused textualist) is relatively easy: the text of the statute mentions dogs not cats. Case closed. Expressio unius est exclusio alterius: the mention of only one necessarily excludes others not mentioned. [FN110]

Charles Trefer describes the expressio unius canon as a “textual canon.” [FN111] while Eric Eagle explains, “The doctrine of expressio unius reinforces the plain meaning interpretation.” [FN112] Still another commentator, Jeffrey G. Miller, states, “The . . . expressio unius . . . canon [] . . . support[s] a plain reading meaning.”[FN113] This discussion does not prove that a *136 plain language textualist would generally, or even ever, support the exclusio unius canon. Instead, this discussion demonstrates that a person who claims to rely on what is plainly in the text cannot complain when asked to consider the meaning of plainly missing text.

With regard to the Takings Clause’s application to the states, the expressio unius canon strongly suggests that the Takings Clause does not apply to the states. The Fifth Amendment contains a Due Process Clause and a Takings Clause. [FN114] The Fourteenth Amendment contains a Due Process Clause, but plainly omits a Takings Clause. [FN115] Whatever argument may be made for incorporation of various provisions of the Bill of Rights through the Fourteenth Amendment Due Process Clause, it seems as though a person who asserts the plain meaning of a clause in the Fifth Amendment is hard pressed to assert that the Fourteenth Amendment gives life to that clause when that clause is plainly left out of the Fourteenth Amendment.

The omission of the Takings Clause from the Fourteenth Amendment can be explained in a variety of ways. Some of these explanations seem rational in light of different interpretive methodologies. However, none of them seem rational for a person claiming to rely on the plain meaning of words. One way to explain the absence of the Takings Clause from the Fourteenth Amendment follows: The drafters/framers [FN116] of the Fourteenth Amendment accidentally (unintentionally) failed to copy the entire Fifth Amendment; the framers/drafters of the Fourteenth Amendment intended to include both the Due Process Clause and the Takings Clause, but failed to do so; but, the failure to
include the Takings Clause should not bind the framers/drafters; and, the inclusion of one of the clauses of the Fifth Amendment should be interpreted to mean inclusion of all the clauses of the Fifth Amendment.

However, this approach creates three problems for the plain meaning textualist. First, the inclusion of the Takings Clause within the Fourteenth Amendment Due Process Clause forces the interpreter into the redundancy (superfluity canon) problem referred to previously. [FN117] Second, this approach forces the plain language textualist to admit that the meaning of words, particularly in the Constitution, is not really *137 plain; rather, the meaning of words must be based on the contexts of a variety of words. Third, it forces the plain language textualist to admit that the drafters of various provisions of the Constitution were not such skilled draftsmen after all, and while an interpreter might like to rely on the draftsmen's words, that interpreter certainly cannot claim reliance based on the skill of the draftsmen. The inescapable conclusion from this approach is that not only must the interpreter rely on context, rather than plain meaning, but also that such poor draftsmanship requires a skeptical reading of the words to interpret their meaning. An “accidental” failure to repeat the Takings Clause in the Fourteenth Amendment, followed by a judicial incorporation, cannot in any way support the idea of reliance on the plain meaning of words. [FN118] Whether the drafters of the Fourteenth Amendment intentionally or accidentally failed to include the Takings Clause in the Fourteenth Amendment, plain-language textualism leads to interpretational conundrums. Ultimately, in order to achieve their desired interpretation, those who purport to rely on the plain meaning of the Takings Clause must inevitably ignore the plain meaning suggested by the omission of the words from the Fourteenth Amendment - specifically that the Takings Clause does not apply to the states. [FN119]

Instead, the plain-language textualist can assert that the canon of expressio unius does not apply to constitutional interpretation; rather, the plain meaning of words, whatever they may be, must be given their meaning; and, plainly missing words will be irrelevant to constitutional interpretation. However, this approach cuts across the textualist goal of relying solely on the words (and presumptively the absence of words), [FN120] and permits the plain language textualist a power far removed from that permitted by the text - namely, the power to pick and choose when to apply what is often referred to as a textualist canon. [FN121]

*138 C. Canon of Consistent Meaning

For purposes of this section, this Article assumes that the meaning of at least some words, phrases or clauses of the Constitution can be plain. But, this raises the question of whether that “plain meaning” changes when the same word, phrase or clause occurs in a different part of the Constitution. At least occasionally (perhaps more often), the Supreme Court interprets words used in different contexts to have the same meaning. [FN112] According to Professor Turley, “The Supreme Court has emphasized in matters of statutory construction (and presumably in constitutional interpretation) that courts should ‘assume [] that identical words used in different parts of the same act are intended to have the same meaning.’” [FN113] Textualists, too, seem to agree with this “same word, same meaning,” principal. For example, Professor Amar may not be a plain language textualist, but according to Dean Treanor, “Professor Amar's textualism reflects a series of assumptions” including the assumption “that words used at different places in
the document should be construed to mean the same thing.” [FN124] Likewise, the
textualist argument[,] . . . that similar clauses in different parts of the Constitution
should be given the same meaning,” has been made by others. [FN125] In fact, “[a]n
implication of textualism is that a particular word or phrase retains *139 the same
meaning in different documents and, more generally, in different
contexts.” [FN126] Similarly, Professors Farber and McDonnell urge that according to a
classic textualist canon, “identical words in different parts of the same act should be
given the same meaning.” [FN127] Explained another way, “[T]extualists, like Justice
Scalia, embark on an analysis of statutes which entails examination of [among other
things]: (1) how the word or phrase is used elsewhere in the same statute [and] (2) how
the word or phrase is used in other statutes . . . .” [FN128]
Professor Seigel, in discussing statutory construction, explains that courts
usually [FN129] apply the “unitary principle” [FN130] - the principle “that courts
presume that a single term has a single meaning when it recurs multiple times within a
statute” [FN131] and “that a term occurring a single time in a single statutory provision
should have a single meaning.” [FN132] Professor Seigel then distinguishes the “weak
unitary principle” - where courts often use this principle merely as one important factor
of determining meaning [FN133] - from the “strong unitary principle” - where the unitary
principle is treated as an inviolable decree. [FN134] According to Professor Seigel, the
Supreme Court declared the inviolability of the unitary principle in Clark v.
Martinez. [FN135] The Court further declared that even the suggestion that a court not
follow the unitary principle would be a “‘novel’ and ‘dangerous’. . . . affront to the
separation of powers.” [FN136]
*140 This separation of powers concern may not exist when interpreting the Constitution,
but to the textualist, the canon continues to have tremendous force. Professor
Amar [FN137] suggests that any particular clause of the Constitution should be read
“against the backdrop of other clauses in the document that use the same or similar
words.” [FN138] According to Dean Treanor, Professor Amar “strong[ly] presum[es] that
the meaning of words is constant throughout the [Constitution].” [FN139] Professor
Amar's approach creates, or at least seeks to create, “a more holistic way of interpretation
in which recurring words or phrases in the same document - for his purposes, the
Constitution - are read as shedding light on meaning.” [FN140]
As noted by Professors Vermeule and Young, “Intratextualism has its roots in the
familiar principle of statutory construction that, ordinarily speaking, ‘identical words
used in different parts of the same act are intended to have the same
meaning.’” [FN141] While the subtleties and complexities of intratextualism go far
beyond the concept that the same word or phrase means the same thing in a different
location in the Constitution, [FN142] intratextualism generally strives to achieve the
ideals of the same word/same meaning canon. [FN143] Intratextualism provides an
example of how the same word/same meaning canon applies within a single document.
However, other textualists have used the same word/same meaning canon to determine
the meaning of a state constitution, which has the same words as the United States
Constitution. As noted by one commentator, “Presumably, the state constitutional
provision that is worded identically to its federal counterpart carries the same
meaning.” [FN144] This conclusion may be based on the traditional notion that a
legislative body will be presumed to understand the meaning of a term when it uses that term; so, when a state adopts a constitution in 1970 (for example) with “the phrase search and seizure,” that phrase “mean[s], in general, what th[at] same phrase means in the federal [C]onstitution.” [FN145] As explained, by one commentator, a state court may “assume, without deciding, that parallel state and federal constitutional provisions have identical meaning and then decide the case accordingly.” [FN146] When this occurs, “[t]he unexpressed presumption appears to be that a state constitutional provision framed in the same words as a federal provision was intended to apply exactly like its federal model.” [FN147]

This mirroring occurs in many states with regard to a number of provisions. As noted by Adam S. Cohen:

Even in a day when state constitutionalism is considered to have come of age, this sort of self-imposed limitation is fairly common. The Wisconsin state courts have held that their state constitution’s double-jeopardy clause is “identical in scope and purpose” to the [F]ifth [A]mendment’s provision and that Supreme Court precedent will therefore govern both state and federal double jeopardy claims. The Connecticut Supreme Court has determined that its state due process clause and the federal clause “have the same meanings and the same limits.” The double jeopardy provision of the Maine Constitution “afford[s] protection essentially like that guaranteed by the double jeopardy clause of the Fifth Amendment.” And the Washington Supreme Court has held that “where the language of the state and federal constitutions is similar, the interpretation given by the United States Supreme Court to the federal provision will be applied to the state provision.” [FN148]

*142 Under “lockstep” [FN149] interpretation, the same words have the same literal and interpreted meaning. [FN150] Likewise, another commentator, David B. Kopel, declared, “It is simply perverse to suggest that words which from century to century and from state to state have had such a widely-shared meaning in state constitutions, should have an entirely contrary meaning when the same words appear in the federal constitution.” [FN151]

Similarly, Professor Saikrishna Prakash urges “intrasentence uniformity.” [FN152] (i.e., uniformity “within clauses” [FN153]). While Professor Prakash recognizes that a word or phrase, in two or more different contexts within a document, may have different meanings, “[a]bsent some very strong reason to the contrary, [Professor Prakash would] conclude that a word or phrase in a particular clause or sentence has the same meaning throughout the clause or sentence.” [FN154] Professor Prakash describes this as an “appealing and intuitive” norm. [FN155] This narrower form of the uniformity canon indicates that the ideal of uniform meaning appeals to textualists, even if textualists do not always agree with the scope of its application.

Textualists, then, often assume that no matter how many times a word may be used in the Constitution, that word has only one meaning. [FN156] As with the other two canons, concluding that a plain language *143 textualist would (or perhaps should) be bound by the consistent meaning canon has some unfairness, because those who claim plain meaning of a word often have no need to look to other provisions of a text with the same word. [FN157] Consequently, a plain language textualist may not specifically embrace the canon. [FN158] On the other hand, when an interpreter of the Constitution declares that one word or phrase has a plain meaning - a meaning that apparently is not impacted...
by its context - concluding that such an interpreter should be bound by that same plain meaning, when that word or phrase is used elsewhere, seems justified. [FN159] Returning to the Takings Clause, as noted before, [FN160] a number of scholars have suggested that the Takings Clause has a plain meaning. [FN161] In so doing, these scholars often discuss the idea that the word “take” has a plain meaning that does not include the idea or term “over-regulate.” [FN162] As put by Professor Tunick, “The plain meaning of ‘do not take property’ is not ‘do not regulate unfairly’ . . . .” [FN163] These scholars often discuss the *144 plain meaning of “take,” but avoid any discussion of the meaning of “property.” [FN164] Some assert that “take” means “physical appropriation[],” [FN165] or to “grasp, seize, [or] lay hold of.” [FN166] While others state that “[t]o take property connotes to seize, expropriate, or confiscate some thing, that is, a discrete asset.” [FN167] In other words, in order to be “taken” there must be a “thing, that is, a discrete asset.” [FN168] This approach effectively uses the word “take” to define the meaning of “property.” [FN169] *145 Professor Thomas Merrill expressly and openly uses this approach to distinguish between the meaning of the word “property” in the Takings Clause and in the Due Process Clause. [FN170] Professor Merrill does not purport to be a plain language textualist, but he does demonstrate that the different words surrounding “property” in the two clauses impact the meaning of “property.” [FN171] Professor Merrill openly engages in “contextualism,” expressly using the word “take” to define the word “property.” [FN172] He notes that the Fifth Amendment uses both “take” and “deprived” in relation to “property.” [FN173] He argues, reasonably, that using “take” and “deprived” suggest that “property” has different meanings due to different contexts and that one word helps to define the other. [FN174] *146 However, a plain language textualist interpretation of the Takings Clause would follow Professor Merrill’s path in the other direction, declaring that “take” has a plain meaning, and then using that meaning (that context) to define “property,” if only implicitly. Dean Treanor, no advocate of textualism, [FN175] once argued, based on his use of evidence, that “the original understanding of the Takings Clause . . . . was consistent with what [he] ha[s] argued is the clauses' [sic] plain meaning.” [FN176] More recently, Dean Treanor extensively discussed the meaning of “take” as set forth in the Oxford English Dictionary and late eighteenth century dictionaries, concluding that he could not find “a usage of take consistent with diminution of a right.” [FN177] Dean Treanor makes this conclusion in an article that begins with a discussion of the multitude of meanings assigned to the word “property.” [FN178] Notwithstanding the start of the article, Dean Treanor focuses solely on the meaning of “take” to support his understanding of the Takings Clause. Those who proclaim a plain meaning to the Takings Clause consistently use this approach, searching for or declaring a meaning of “take,” and then using that meaning to define both the Takings Clause and, effectively, “property.” [FN179] This approach suggests, without clearly stating such, that “property” in the Takings Clause refers to that which has a physical existence or fee simple absolute (subject to eminent domain). [FN180] Admittedly, a person declaring a plain meaning of the Takings Clause based on the plain meaning of “take” or “taken” may not expressly state a definition of “property,” but that definition can, and necessarily must, be inferred. The plain language textualist can easily declare that a regulation neither takes possession nor title and therefore is not a compensable taking under the Takings Clause. [FN181] In the end, that
declaration works only if “property” is a physical thing or at least something to which title can attach and be passed or condemned. As with so many constitutional interpreters, the plain meaning textualist now seeks to walk away from the Constitution without any concern as to how the plain meaning interpretation fits into the rest of the Constitution. Because the textualist has declared that the Takings Clause has a plain meaning, the textualist need not confront the possibility that the drafters of the Constitution might have used two words, “deprived” and “taken,” to mean essentially the same thing. More importantly, the textualist does not have to deal with the reality of looking at the meaning of the word “property,” particularly since its meaning within the Due Process Clauses is very different from that required when the Takings Clause has a plain meaning. [FN182]

For the plain meaning textualist who follows the canon of consistent meaning, if a word has a plain meaning within the Takings Clause, it must have that same plain meaning when used within other clauses of the Constitution. This should be particularly true with regard to the Fifth Amendment. Undeniably, the Takings Clause and the Due Process Clauses of the Fifth and Fourteenth Amendments contain different words, but they also contain one word in common, “property.” Ultimately, the question raised here concerns the application of plain language textualism. Those who have argued for a plain language understanding*148 of the Takings Clause have not made significant reference to due process “property” when providing a plain language understanding of takings “property.” Given that due process “property” is not limited to physical things or title, the question remains, why limit takings “property” to physical things or title? In particular, if the government must provide Due Process Clause procedures before “depriving” a person of his or her “property,” must it also provide compensation when it takes that same “property”? Going further, would the plain language of the Constitution require or permit different meanings of the same word, particularly if the Constitution is to be interpreted via its plain language? It may be that there are reasons why due process “property” and takings “property” should be considered differently, but those reasons cannot possibly be based on the plain language of the Constitution.

V. Lessons Learned from Textualist Canons

By declaring that a word or phrase has plain meaning, the declarant obviously refers to an (as opposed to the) “obvious meaning,” rather than simply referring to the “simple meaning” of the word or phrase. Such a declarant rarely states the purpose or jurisprudential meaning behind choosing a plain meaning approach to interpretation. This plain meaning declarant does not usually discuss whether all words in the Constitution should be interpreted with a plain meaning approach, and perhaps, never discusses which canons of construction are consistent with taking a plain meaning approach. Consequently, it may not be fair to hold a plain meaning declarant to any particular canon of construction.

That said, this Article demonstrates that at least three canons of construction are consistent with plain meaning interpretation. These three canons are arguably required if a person claims to rely on this approach, which completely rejects any form of context or other principle of interpretation. Indeed, many textualists ascribe to these three canons.
However, these three canons, when used in conjunction with the plain meaning of the Takings Clause, create interpretational conundrums. A person cannot rely on both the plain meaning of the Takings Clause and the three textualist canons discussed. The interpreter must claim plain meaning and reject other plain meanings, or at least reject meanings that would exist with application of the textualist canons. But, the choice of when to declare plain meaning and reject a plain meaning canon of construction is not found within the text of the Constitution. One conclusion follows, that textualists who proclaim adherence to rules have no principles to rely upon when interpreting the Constitution. Rather, and perhaps more fairly, the plain language textualist uses unwritten,*149 unstated and undeniably personal principles and standards to decide when and whether to apply a plain meaning canon - a canon consistent with, and arguably demanded by, a belief that words and phrases in the Constitution should be given and have plain meanings.

In the end, the plain meaning textualist can cry “foul,” asserting that it is one thing to apply plain meaning to words and phrases, and quite another to apply controversial canons of construction. Ultimately, this discussion merely suggests that a plain meaning interpretation of the Takings Clause conflicts with an application of the three canons of construction closely allied with the principles of plain meaning textualism.

VI. Conclusion

This Article reviewed three textualist canons of construction, in light of a plain meaning interpretation of the Takings Clause, to demonstrate the ultimate failure of each canon. To recap, plain language textualists assert a plain or obvious meaning to a word or words. The three canons chosen necessarily follow from the obviousness of words or their obvious non-existence. Using these canons creates an interpretational conundrum that a plain language textualist cannot solve using any form of plain meaning textualism. The text alone cannot explain how the two Due Process Clauses, with the exact same language, have vastly different meanings; nor can the text alone be used to explain why the use of the word “property” in the same constitutional amendment has two different meanings; nor can textualism explain how an amendment, whose words exclude the Takings Clause but include the Due Process Clause, still includes the Takings Clause. Ultimately, this Article does not assert that textualism and canons of construction cannot or should not be used to interpret the Constitution. Instead, this Article demonstrates that the purportedly facile interpretational methodology known as plain meaning textualism creates a facade of objectivity, concealing subjective predilections of the interpreter.

[FN1]. Professor of Law, Florida Coastal School of Law. I can never thank my family and friends enough.


[FN3]. See generally Christopher R. Green, Originalism and the Sense-Reference Distinction, 50 St. Louis U. L.J. 555, 559 (2006) (discussing the author's opinion that “we have a partially living and partially dead Constitution”).


[FN5]. See generally Stephen M. Durden, Plain Language Textualism: Some Personal Predilections Are More Equal Than Others, 26 Quinnipiac L. Rev. 337 (2008)(discussing the use and meaning of plain language or plain meaning textualism).

[FN6]. See Durden, supra note 4; Durden, supra note 5; see also Larry Cata ' Backer, From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems, 113 Penn St. L. Rev. 671, 710 (2009) (arguing that constitutionalism seeks to “avoid judicial despotism by forcing judicial discourse to privilege forms of analysis that reduce the ability of judges to substitute their personal predilections for that of the community”); Tom Levinson, Confrontation, Fidelity, Transformation: The “Fundamentalist” Judicial Persona of Justice Antonin Scalia, 26 Pace L. Rev. 445, 470 (2006) (discussing Justice Scalia's view that a judge's duty requires textualism, or at least some form of textualism, in order to “avoid importing [the judge's] own personal predilections into the text”).

based decision-making; and (3) a commitment to neutral principles, such as federalism, separation of powers, and textualism.”).


[FN9]. U.S. Const. amend. V.


[FN12]. Hart, supra note 11, at 1134 (defining “appropriating private property” as “depriving the owner of title or possession” and noting that “[r]eading the phrase ‘property ... taken’ to indicate appropriation was a conventional, plain meaning”).

[FN13]. See, e.g., Tunick, supra note 11, at 893-94 (“The words of the Takings Clause
are clear: [the] government may not take--that is, confiscate, appropriate, seize, remove, force one to relinquish or transfer title of--one's property, without providing just compensation.... The [Supreme] Court should limit the applicability of the Takings Clause to appropriations, seizures, and confiscations ....”); William Michael Treanor, Takings Law and the Regulatory State: A Response to R.S. Radford, 22 Fordham Urb. L.J. 453, 457-58 (1995) (opining that the original understanding of the Takings Clause and its state counterparts is consistent with the clause's plain meaning). Dean Treanor argued that the Takings Clause and similar state constitutional provisions were originally understood to apply only when the government physically took property. Treanor, supra at 457-58. Further, regulations, no matter how drastically they affected the price of property, did not trigger a compensation requirement. Id.

[FN14]. Tunick, supra note 13, at 897 (“The words of the Takings Clause themselves offer no guidance for anyone averse to relying on the plain meaning of “do not take property” and wanting to invoke the legal conception of property as a “bundle of rights” in order to decide how many sticks in this bundle must be relinquished for a regulation to amount to a taking.”). See generally Durden, supra note 5.

[FN15]. One of the points this Article seeks to make is that textualists must necessarily be selective in their use of canons of construction. But see Daniel K. Brough, Breaking Down the Misprision Walls: Looking Back on the Federal Sentencing Guidelines, After Booker, Through a Bloomian Lens, 82 N.D. L. Rev. 413, 433 n.80 (2006)(suggesting that the claim to objectivity is lost when textualists selectively use canons of constitutional construction).


- **Avoid rendering language superfluous.**
- **Ejusdem generis:** where general words follow specific words, the general words are construed to embrace only objects similar in nature to those enumerated by the preceding specific words. Where the opposite sequence is found (i.e., specific words following general ones) the doctrine is equally applicable and restricts application of the general term to things that are similar to those enumerated.
- **Expressio unius:** the enumeration of certain things in a statute suggests that the legislators did not intend to include things not listed.
- **Legislative drafting mistakes should be ignored.**
- **Nosciture a sociies:** the meaning of one term is “known by its associates” (i.e., understood in the context of other words in the list).
- **Placement of a section has no relevance.**
- **Placement of a section has relevance.**
- **Plain, ordinary meaning of the law: adherence to the common usage or common understanding of the words.**
Punctuation, grammar, syntax: the act of looking to punctuation, grammar, or syntax to decide meaning of the law.
Statutory headings have no relevance.
Statutory headings have relevance.
Technical meaning: interpret words in accordance with some background legal concept (like the category of employee) or in line with a judicially developed term of art.
Whole act rule: look to the context of the word or provision by looking to the other parts of the statute to ensure that the will of the legislature is executed.
Id. at 1933-34.

[FN29]. Lee Epstein, et. al., Judging Statutes: Thoughts on Statutory Interpretation and Notes for a Project on the Internal Revenue Code, 13 Wash. U. J. L. & Pol'y 305, 329 n.50 (2003) ("The textual canons ... include the plain meaning rule, noscitur a sociis, ejusdem generis, expressio unius est exclusio alterius, the whole act rule, and the effects of punctuation, headings, and the placement of the section within the statute.").


[FN32]. Id. at 74 n.139.


[FN35]. See, e.g., Staudt, supra note 28, at 1933.


[FN38]. Barron v. Baltimore, 32 U.S. 243 (1833). In the time surrounding the adoption of
the Bill of Rights, not all state courts to consider the application of the Bill of Rights to the states agreed with the United States Supreme Court's holding in Barron. See People v. Goodwin, 18 Johns. 187 (N.Y. Sup. Ct. 1820). As explained by Chief Justice Spencer, “I am, however, inclined to the opinion, that the [Fifth Amendment to the United States Constitution] does extend to all judicial tribunals in the U.S., whether constituted by the Congress of the U.S., or the states individually.” Id.

[FN39]. See, e.g., Jason Mazzone, The Bill of Rights in the Early State Courts, 92 Minn. L. Rev. 1, 55 (2007) (“[I]n Barron the United States Supreme Court held that states were not subject to the Takings Clause of the Fifth Amendment ....”).

[FN40]. See generally William Michael Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 Colum. L. Rev. 782, 860 n.369 (1995)(discussing the differing opinions of when the Takings Clause was first incorporated); Donna R. Christie, A Tale of Three Takings: Taking Analysis in Land Use Regulation in the United States, Australia, and Canada, 32 Brook. J. Intl L. 343 (2007) (recognizing that regulatory takings claims “did not become common ... until the 1970s”).


[FN42]. Schiff, supra note 41, at 1087 n.37.


[FN47]. Making arguments for others, or making assumptions about agreements others would make, has inherent unfairness. Given the number of authors who accept the tie
between textualism and the superfluity canon, the assumption seems fair. See, e.g.,
Jonathan R. Siegal, The Inexorable Radicalization of Textualism, 158 U. Pa. L. Rev. 117,
127-28 (2009) (“[T]extualists employ ... the presumption against statutory redundancy ... on
the ground that a legislature probably did not intend to include superfluous provisions.”); Treanor, supra note 46, at 532 (“[A] textualist strongly presumes that each
word in the Constitution has meaning rather than being surplusage.”); see also William
Michael Treanor, Against Textualism, 103 Nw. U. L. Rev. 983, 998 (2009); Ilya
Somin, Gonzalez v. Raich: Federalism as a Casualty of the War on Drugs, 15 Cornell J.

[FN48]. See, e.g., Laura Michelle Stewart, Comment, Take Flight by Cyber-Sight: The
Failure of Courts to Require the Americans With Disabilities Act Title III Public
Accommodations Provision to Govern Public Places Such as an Airline's Website, 30 U.
Dayton L. Rev. 275, 281 n.33 (2004) (“Textualists will usually allow these types of
canons to be used in order to determine the plain and ordinary meaning of a term or
phrase within a statute.”); Manning, supra note 45, at 98; Robert C. Power, TheFourth

[FN49]. Michael J. Gerhardt, Prelude to Armageddon, 8 Green Bag 2d 399, 401 (2005).

[FN50]. But see Damien Schiff, Nothing New Under the Sun: The Minimalism of Chief
Justice Roberts and the Supreme Court's Recent Environmental Law Jurisprudence, 15
Mo. Envtl. L. & Pol'y Rev. 1, 36 (2007) (“Although not strictly speaking part of a
textualist analysis, the use of canons [(e.g., the superfluity canon)] often goes hand in
hand with a plain meaning interpretation, and a judge's adherence to textualism
frequently accompanies an acceptance of canons in legal interpretation.”).

[FN51]. See, e.g., Robert J. Delahunty & John Yoo, Response, Making War, 93 Cornell
exploring constitutional structure, which should not tolerate the redundancies”); see also
Treanor, supra note 46, at 532 (“[A] textualist strongly presumes that each word in the
Constitution has meaning rather than being surplusage.”).

[FN52]. Power, supra note 47, at 1712 n.75.

[FN53]. Heidi A. Sorenson, A New Gay Rights Agenda? Dynamic Statutory
Interpretation and Sexual Orientation Discrimination, 81 Geo. L.J. 2105, 2108 (1993);
see also Treanor, supra note 46, at 532; Michael J. Gerhardt, Prelude to Armageddon, 8
Green Bag 2d 399, 401 (2007); Jack N. Rakove, The Second Amendment: The Highest
Stage of Originalism, 76 Chi. Kent L. Rev. 103, 124 (2000) (“[T]extualism, as practiced
by someone like Akhil Amar, seems to presuppose that each word has been exquisitely
chosen to fit a completely consistent constitutional vision.”).

[FN54]. See discussion supra Part III.

[FN55]. In the end, the author recognizes that he seeks to put up a plain meaning “straw
man” in order to knock it down. The author hopes, of course, that this conclusion is sufficiently justified by the argument made.


[FN57]. See A. Michael Froomkin, The Imperial Presidency's New Vestments, 88 Nw. U. L. Rev. 1346, 1365 (1994) (suggesting a similarity between “reducing several clauses of the Constitution to surplusage” and “making textual analysis of ... clauses of the Constitution irrelevant”)


[FN60]. While computerized databases of law review articles do not reflect all available scholarship, in general searches of these databases provide a fairly comprehensive overview. Here, searches of the “Journals and Law Reviews” database in Westlaw, using the search terms “superfluity,” “superfluous,” or “surplusage” along with “/s ‘commerce clause,’” reveal that Justice Thomas generally led the commentators, rather than the other way around. But see, Vincent A. Cirillo & Jay W. Eisenhofer, Reflections on the Congressional Commerce Power, 60 Temp. L. Q. 901, 906-07 (1987). Interestingly, of the approximately 150 articles (including student notes and comments) to mention “superfluous,” “superfluity,” or “surplusage” in the same paragraph with “commerce clause” only two even mention the Cirillo and Eisenhofer article. Russell L. Weaver, Lopez and the Federalization of Criminal Law, 98 W. Va. L. Rev. 815, 818 n.17 (1996) and Michael J. Trapp, Casenote, A Small Step Towards Restoring the Balance of Federalism: A Limit to Federal Power Under the Commerce Clause, 64 U. Cin. L. Rev. 1471, 1477 n.38 (1996). However, Justice Thomas did not cite to the Cirillo and Eisenhofer article either, which raises another question commentators may ask themselves, “If I publish a law review article and no one reads it, is it still an article?” Undeniably, commentators pay attention to the writings of Supreme Court Justices (note the number of post-Lopez commerce clause/superfluity articles). But, do Supreme Court Justices read articles by commentators, and should they?


[FN67]. Treanor, supra note 46, at 532.

[FN68]. Rosenthal, supra note 66, at 28 n.113; Chen, supra note 66, at 1209-10.


[FN72]. One might justifiably wonder how takings law could have developed if the Supreme Court heard only takings claims against the United States. Hence, a vast

Another difficulty with applying plain language textualism concerns another aspect of incorporating the Bill of Rights. The plain meaning textualist (indeed no textualist) can argue that the actual textual meaning of the Due Process Clause is that no state (or its subdivision) shall violate one of the Bill of Rights. First, if this is the textual meaning of the Fourteenth Amendment Due Process Clause, then what would be the textual meaning of the identically worded Fifth Amendment Due Process Clause? Second, if the Fifth Amendment Due Process Clause does carry the same meaning as the Fourteenth Amendment Due Process Clause, then Barron was wrongly decided.


See, e.g., Steven K. Balman, Constitutional Irony: Gonzales v. Raich, Federalism and Congressional Regulation of Intrastate Activities under the Commerce Clause, 41 Tulsa L. Rev. 125, 160-61 (2005) (quoting United States v. Lopez, 514 U.S. 549, 588 (1995) (Thomas, J., concurring)); Thomas B. Nachbar, Intellectual Property and Constitutional Norms, 104 Colum. L. Rev. 272, 350 (2004); Brett Boyce, Originalism and the Fourteenth Amendment, 33 Wake Forest L. Rev. 909, 1030 n.670 (1998). A holding that the Commerce Clause grants Congress power over wetlands virtually demands a holding that the Commerce Clause grants power to Congress to punish piracy and felonies on the high seas, i.e., (1) Congress has Commerce Power over wetlands that adjoin rivers and harbors that flow in to the high seas; (2) This wetland power flows from Congressional Commerce Clause power over rivers and harbors; (3) This power over river and harbors includes power over vessels; (4) This power over vessels includes not only vessels within a harbor but also vessels as they travel the high seas from harbor to harbor. Put another way, power over the wetlands and harbors is far more attenuated than power over vessels on the high seas (vessels that are actually engaged in transport tied to interstate commerce). See, e.g., Gibbons v. Ogden, 22 U.S. 1 (1824). Regulation of wetlands or the use of land in general may also make superfluous Article I, Section Eight, Clause Seventeen of the Constitution, which states, “The Congress shall have power ... to exercise exclusive Legislation in all cases whatsoever, ... over all Places purchased by the Consent of the Legislature of the State in which the same shall be for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful buildings.” U.S. Const. art. I, §8, cl. 17. Perhaps this superfluity argument is a bit of a stretch, but the argument would be: assuming that commerce clause grants power to regulate use of land, and that the Supremacy Clause makes federal law supreme, then Congress does not need extra power to regulate land, and exclusive power is superfluous when federal power is supreme. Indeed, Article I, Section Eight, Clause Seventeen suggests that Congress should not have the power to regulate land and buildings unless Congress takes the land with the consent of the states. This interpretation is consistent with the textualist argument (which the Supreme Court rejected in Kelo) that the government could not take land, unless it took the land for a public use.

U.S. Const. art. I, § 8, cl. 10.


[FN80]. Mullins, supra note 79, at 23; see also Peter M. Tiersma, A Message in a Bottle: Text, Autonomy, and Statutory Interpretation, 76 Tul. L. Rev. 431, 458 (2001)(“[T]he expression of one thing implies the exclusion of the other ....”).


[FN83]. However, not all commentators agree that logic requires the canon to be followed. As put by Yale professor Myres S. McDougal and his co-author Yale instructor Florentino P. Feliciano, the “implication” demanded by the canon “is assuredly not a compulsion of logic.” Myres S. McDougal & Florentino P. Feliciano, Legal Regulation of Resort to International Coercion: Aggression and Self-Defense in Policy Perspective, 68 Yale L.J. 1057, 1147 n.261 (1959). See also William N. Eskridge, Jr., The New Textualism, 37 UCLA L. Rev. 621, 664 (1990).


[FN86]. McDougal & Feliciano, supra note 83, at 1147 n.261. The careful reader would notice two interesting aspects of the McDougal and Feliciano quotes. The first one is that their version of the maxim begins with “inclusio unius” rather than “exclusio unius.” McDougal and Feliciano are not the only ones to make that choice. Numerous writers choose the “inclusio” version of the maxim. See, e.g., William N. Eskridge, Jr., & Lauren E. Baer, The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan, 96 Geo. L.J. 1083, 1222 (2008); Frank B.


[FN89]. Vasan Kesavan & J. Gregory Sidak, The Legislator-in-Chief, 44 Wm. & Mary L. Rev. 1, 12 (2002). Kesavan's personal opposition to a "wooden" interpretation conflicts with the opinion in his article that the text of the Constitution requires the use of textualism as the sole interpretive methodology. Kesavan does not assert that the text of the Constitution somehow forbids “wooden” interpretations. Kesavan's choice may be an outstanding choice, with which many would agree, but it remains personal in that it is not required by, well, anything or anyone, even the Constitution. Avoiding “wooden” constitutional interpretation conflicts with the assertion that constitutional interpretation must follow rules, i.e., Kesavan's “rule” that the Constitution demands textualism. Textualism seeks to avoid personal preferences. Assuming that the words of the Constitution create a “wooden” result, the textualist should explain what other part of the text or what part of textualism permits or requires the interpreter to find a “non-wooden” meaning. As with this entire Article, the point is that all constitutional interpretation is personal, because no method of constitutional interpretation avoids personal choice (choice outside the bounds of the preferred or chosen method).

[FN90]. Manning, supra note 84, at 1671.


[FN96]. Id. at 793 n.9. On the other hand, in that same case, Justice Thomas, dissenting, with Chief Justice Rehnquist and Justices O'Connor and Scalia concurring in dissent, expressly rejected the application of the maxim as inconsistent with federalism. Id. at 868-69. Justice Thomas' rejection of the maxim, in deference for an apparently (to Justice Thomas) superior principle (neither of which is actually in the text of the Constitution), illustrates the general premise of this Article - that neutral (or other principles) of constitutional law neither limit discretion nor personal choice as to how to interpret the Constitution. Only in a world of fantasy would someone argue that Justice Thomas (or any concurring Justice) was unaware that choosing federalism over expressio unius would result in validating the Arkansas provision. The Constitution does not mention either constitutional principle (and, obviously, does not state which principle is superior to the other). Consequently, since no transcript exists of Justice Thomas' ruling process, nor does Justice Thomas state that federalism always trumps expressio unius (or all other canons of construction), it may be that Justice Thomas picked a result and then rationalized it. Justice Thomas thus demonstrates the unprincipled nature of reliance on “neutral” principles.


[FN99]. See, e.g., J. Richard Broughton, The Jurisprudence of Tradition and Justice Scalia's Unwritten Constitution, 103 W. Va. L. Rev. 19, 68 (2000) (suggesting that Scalia makes a type of expressio unius argument in support of his view that the Constitution does not protect the right to an abortion); David C. Gray, Why Justice Scalia Should be a Constitutional Comparativist ... Sometimes, 59 Stan. L. Rev. 1249, 1265 (2007) (suggesting that Justice Scalia would use the expressio unius canon when interpreting the Eighth Amendment); Milani, supra note 79, at 146 n.216 (noting that Justice Scalia has defended the use of the expressio unius canon); Lawrence Lessig & Cass R. Sunstein, The President and The Administration, 94 Colum. L. Rev. 1, 50 n.207 (1994); David Sosa, The Unintentional Fallacy, 86 Cal. L. Rev. 919, 928 (1998).

[FN100]. Spencer, supra note 94, at 1133 n.220.


[FN103]. See, e.g., United States v. Macon County, 99 U.S. 582, 590 (1878); Pine Grove TP v. Talcott, 86 U.S. 666, 674-75 (1873).

[FN104]. See Milani, supra note 79, at 146 n.216.

[FN105]. See discussion supra Part IV.B.


[FN108]. Lee, supra note 94, at 1820 (characterizing the author's expressio unius application to interpreting the Eleventh Amendment as essentially a plain-language argument); see also Dominick Vetri, Communicating Between Planets: Law Reform for the Twenty-First Century, 34 Willamette L. Rev. 169, 211-12 (1998).

[FN110]. Id.


[FN114]. U.S. Const. amend. V.

[FN115]. U.S. Const. amend. XIV.

[FN116]. The terms “drafter/framers” and “framer/drafters” encompass the ideas of both “the framers” and “the drafters” (those usually unnamed people given credit for bringing the country and the Constitution into existence). The use of the term is simply a matter of convention, but not necessarily conviction.

[FN117]. See discussion supra Part IV.A.

[FN118]. Of course, another approach to the omission of the Takings Clause is to apply the exclusio unius canon to demonstrate that the omission was intentional, leading inevitably to the conclusion that the framers/drafters of the Fourteenth Amendment intended to protect states from the burdens of the Takings Clause.

[FN119]. See Spencer, supra note 94, at 1133 (discussing how, of course, the same violation of the expressio unius canon follows from the incorporation of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment).


[FN122]. Jack Balkin, Original Meaning and Constitutional Redemption, 24 Const. Comment. 427, 431 n.11 (2007) (noting that Chief Justice Marshall essentially made this point in Gibbons v. Ogden by stating that the word “commerce” “must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it” (quoting Gibbons v. Ogden, 22 U.S. 1, 194 (1824)). Professor Balkin also references a debate between Professors Prakash and Vermeule as to whether Chief Justice Marshall correctly concluded that “commerce,” used three times in one sentence, would have only one meaning. Id. (citing Saikrishna Prakash, Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity, 55 Ark. L. Rev. 1149 (2003); Adrian Vermeule, Three Commerce Clauses? No Problem, 55 Ark. L. Rev. 1175 (2003)). While this debate is tangential to this Article, one thing that the debate clearly shows is that Professor Vermeule avoids claiming allegiance to textualism of any sort. For example, Professor Vermeule concludes that “[t]he scope of the three commerce clauses differ because of alternative constitutional sources authorizing congressional power over foreign commerce and Indian commerce.” Vermeule, supra at 1177.


[FN128]. Christopher F. Tate, Note, Getting out of “Harm's” Way: Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 5 Geo. Mason L. Rev. 101, 126 (1996); see also Karen M. Gebbia-Pinetti, Statutory Interpretation, Democratic Legitimacy and Legal-System Values, 21 Seton Hall Legis. J. 233, 273 n.115 (1997)(collecting authorities supporting the proposition that textualists view the meaning of words as consistent throughout the text).


[FN130]. Id.

[FN131]. Id.
[FN132]. Id.

[FN133]. See id. at 343-46.

[FN134]. Id. at 346.


[FN136]. Siegel, supra note 129. Professor Seigel goes on to explain why the Supreme Court erred in its declaration that when a court fails to follow the unitary principle, it engages in a novel and dangerous affront to separation of powers. Id. While Professor Seigel clearly does not support the use of the strong unitary principle, he accurately describes it. See id.

[FN137]. Treanor, supra note 46, at 491 (citing Akhil Reed Amar, The Supreme Court 1999 Term, Foreword: The Document and the Doctrine, 114 Harv. L. Rev. 26, 29 (2000); Amar, supra note 82, at 747) (“Amar has written more extensively on textualism and has worked out its methodology and implications far more fully than anyone else, including Justice Scalia. His Harvard Law Review Foreword The Document and the Doctrine and his article Intratextualism develop his approach and discuss the various textualist techniques he applies.”).


[FN139]. Treanor, supra note 46, at 518.

[FN140]. Alex Glashausser, What We Must Never Forget When It Is a Treaty We Are Expounding, 73 U. Cin. L. Rev. 1243, 1323 (2005).


[FN142]. See, e.g., Amar, Intratextualism, supra note 82.

[FN143]. Vermeule & Young, supra note 141, at 733 (“The same words, conversely, ought generally to mean the same thing to an intratextualist.”).


[FN145]. Michele M. Jochner, Survey of Illinois Law: Search and Seizure Cases, 30 S.


[FN153]. See Vermeule, supra note 122, at 1179.

[FN154]. Prakash, supra note 152, at 1150. Professor Prakash does not really state that “he would” embrace intrasentence uniformity (although he does so in his article). Instead, Professor Prakash states that “we should” make that embrace. Presumably, “we should” (make that embrace) because he does.

[FN155]. Id. at 1149. Professor Vermeule finds this norm neither intuitive nor appealing. See Vermeule, supra note 122, at 1178. Professor Vermeule is also at a loss as to why intrasentence uniformity should have more value than “uniformity of usage across clauses.” Id. at 1179-80.

[FN156]. However, not all who study law agree. As one commentator put it, “[w]hether the exact same language should be given the same meaning is a matter of intense debate.” Diehm, supra note 150, at 245 n.114. See, e.g., Erik Luna, The .22 Caliber Rorschach Test, 39 Hous. L. Rev. 53, 108 (2002) (“The Framers were fallible humans who could very well have had different meanings for the same words in different textual locations.”); Thomas W. Merrill, The Landscape of Constitutional Property, 86 Va. L. Rev. 885, 956 (2000) ( “[T]here is precedent for adopting different meanings of the same...
word for purposes of different clauses of the Constitution.”); Golove, supra note 98, at 1909 n.360 (“Chief Justice Marshall noted that in construing the Constitution ‘the same words have not necessarily the same meaning attached to them, when found in different parts of the same instrument their meaning is controlled by the context.’” (quoting Cherokee Nation v. Georgia, 30 U.S. 1, 19 (1831))).

[FN157]. Arguably such a search is inconsistent with a plain meaning. A person who declares a word to have a plain meaning need not look to other provisions of the same document to “prove” what is already plain.

[FN158]. Daniel J. Oates, Comment, HIPPA Hypocrisy And The Case For Enforcing Federal Privacy Standards Under State Law, 30 Seattle U. L. Rev. 745, 758 (2007)(noting that it would be “absurd” to conclude that “Congress intended a plain word ... to have two completely different definitions in the span of a few intervening words”).

[FN159]. This conclusion seems, to the author, to follow from the meaning of plain language textualism - that a word or phrase has one meaning. It does not seem possible that a word or phrase with more than one meaning could have “a” (as in “a single”) plain meaning. Of course, it could be argued that a word has a “plain meaning” in context. However, that argument would create more discussion as to what contexts are relevant - from context within a document to context within history - and that path leads away from a plain meaning.

[FN160]. See discussion supra Part II.

[FN161]. See, e.g., Echeverria, supra note 10, at 876.

[FN162]. See, e.g., Span, supra note 10, at 96 n.373.

[FN163]. Mark Tunick, Constitutional Protections of Private Property: Decoupling the Takings and Due Process Clauses, 3 U. Pa. J. Const. L. 885, 886 & n.10 (2001); see also Echeverria, supra note 10, at 860-61 & n.66 (noting that “[j]urists and academics of virtually all ideological persuasions recognize that the Takings Clause was originally intended to address only direct appropriations of private property”). Professor Echeverria “borrow[s] Dean Bill Treanor's metaphor to explain the Takings Clause’s plain meaning ....” John D. Echeverria, From a “Darkling Plain” to What?: The Regulatory Takings Issue in U.S. Law and Policy, 30 Vt. L. Rev. 969, 975 (2006). Treanor likens property to a noisy, bouncing ball. Id. According to the metaphor, if the ball is removed from the “owner” (a child) it has been taken. Id. If the child is told not to bounce it, the use has been regulated and the ball was not taken. Id. This metaphor implicitly suggests that all property has a physical shape that can be held and controlled. This is certainly not the only possible meaning for property. Just as important, the metaphor ignores the fact that the possessor of the noisy, bouncy ball (the child) purchased (or at least “owned”) a noisy, bouncy sphere, and not a spherical stone of the same size. If the “regulator” had sold the bouncy round sphere, it likely would have sold it for the inherent value of a noisily bouncing ball. If the ball did not noisily bounce, the sale would have been a fraud.
If the seller later makes it illegal to noisily bounce the ball, the sale might as well have been a fraud. Certainly, the typical child who possesses the noisy, bouncy ball cannot really distinguish between, “thou shalt not possess the ball” and “thou shalt not bounce the ball.” To the child, the result is the same: the ball might as well have been taken. Presumably Dean Treanor (as the parent) would ask the child to find value in the act of silently possessing (holding) the orb. Dean Treanor suggests by his analogy that the parent (the regulator) has not “taken” the ball because he does not possess the ball. Perhaps this is one insight into the “plain meaning” of the Takings Clause. From the perspective of the parent, no possession (by the parent) means no taking (by the parent). From the perspective of the child, the ONLY purpose of the ball was to noisily bounce it. Thus, no noisy bouncing equates to a taking of the noise, the bounce, the fun, and to the child, the ball. From the perspective of the child, why pay a dollar to purchase the orb if the only use is to look at it?


[FN165]. See Thomas, supra note 164, at 541; accord Hart, supra note 10, at 1134; Echeverria, supra note 10, at 860.

[FN166]. Tunick, supra note 163, at 886.


[FN168]. Merrill, supra note 156, at 983-84.

[FN169]. One acceptable method of determining the meaning of a word includes looking at other words in the same sentence. Indeed, the Oxford English Dictionary, with seventeen pages of definitions and examples for understanding the word “take,” states that “take” “is one of the elemental words of the language, of which the only direct explanation is to show the thing or action to which they are applied.” Durden, supra note 4, at 382 (internal citations omitted). Perceiving the meaning of words using sentence context may be appropriate for a contextualist, see Kent Greenawalt, Propter Honoris Respectum: The Nature of Rules and the Meaning of Meaning, 72 Notre Dame L. Rev. 1449, 1466 (1997) (“A contextualist maintains that the meaning of any word or sentence cannot be determined apart from context.”); see also Craig Allen Nard, Legitimacy and the Useful Arts, 10 Harv. J.L. & Tech 515, 524 n.43 (1997), but seems out of place for a plain language textualist. See Jonathan R. Siegel, Textualism and Contextualism in Administrative Law, 78 B.U. L. Rev. 1023 (1988) (discussing the distinction between
contextual interpretation and plain meaning textualism); see also Juliet P. Kostritsky, Judicial Incorporation of Trade Usages: A Functional Solution to the Opportunism Problem, 39 Conn. L. Rev. 451 (2006)(discussing why contextual interpretation rather than insistence on plain meaning will often reduce moral hazard in the negotiation of contracts). Notwithstanding the very strong likelihood that using the word “take” to define “property” suggests an interpretational method inconsistent with plain meaning textualism, this Article posits that the plain language textualist properly limits the meaning of “property” to “things” and “title.”

[FN170]. Merrill, supra note 156, at 983-84 (“[T]he contrast between ‘take’ and ‘deprive’ may support the conclusion that the Due Process Clause is concerned with property in a broader sense that includes the protection of wealth against government-imposed liabilities as well as the protection of things from expropriation.”). This note is not intended to suggest that Professor Merrill is a textualist. Instead, this note intends to show that some expressly use the word “take” to define “property,” while textualists may do so only sub silentio. Professor Andrew Gold seems to use the opposite approach. Gold looks at the meaning of the word “property” to help determine the meaning of the word “take.” Andrew S. Gold, The Diminishing Equivalence Between Regulatory Takings and Physical Takings, 107 Dick. L. Rev. 571, 589-90 (2003). As Professor Gold suggests, the word “taken” does not determine the meaning of the word “property,” but rather, “property” determines the meaning of the word “taken.” See id. at 579-80 & nn.53-54.

[FN171]. Merrill, supra note 156, at 983-84.

[FN172]. Id.

[FN173]. Id.

[FN174]. Id.


[FN177]. William Michael Treanor, Take-ings, 45 San Diego L. Rev. 633, 639 (2008). It is not clear whether Dean Treanor still embraces the idea that the Takings Clause has a plain meaning or whether some (or all) aspects of regulatory takings jurisprudence must be rejected.

[FN178]. Id. at 633.

[FN179]. As noted before, Professor Merrill openly takes this approach. Merrill, supra note 156, at 983-84.
[FN180]. One of the multitudes of questions raised by this approach concerns the implicit conclusion that the plain meaning of “take” should provide the definition of property.

[FN181]. See, e.g., Douglas T. Kendall & Charles P. Lord, The Takings Project: A Critical Analysis and Assessment of the Progress So Far, 25 B. C. Envtl. Aff. L. Rev. 509, 524 (1998); see also Mark Tunick, Constitutional Protections of Private Property: Decoupling the Takings and Due Process Clauses, 3 U. Pa. J. Const. L. 885, 886 (2001) (“The plain meaning of ‘do not take property’ is not ‘do not regulate unfairly’ ....”). Another question not often discussed by plain language textualists concerns the concept of property being akin to a bundle of rights. But see Tunick, supra, at 893-97. Professor Tunick, as an exception, asks, “[H]ow many sticks in this bundle must be relinquished for a regulation to amount to a taking[?]” Id. at 897. The other question might be, why doesn’t a taking occur when one stick is taken? In the end, Kendall and Lord, as well as Professor Tunick, approach the regulatory takings problem the same way - if fee simple absolute is not completely destroyed (as opposed to only some sticks being taken or a mere diminution in value), there is no taking. Interestingly, their plain meaning approach would find a compensable taking if the government took title to, or possession of, an easement, but no compensable taking if the government destroyed the easement, because such destruction is only one of many sticks (a mere diminution in value of the fee simple). See Treanor, supra note 168, at 639 (“[A] government regulation that diminish(es) the value of property [does] not take that property.”). For a discussion of applying the Takings Clause to each stick, see, e.g., Kristine Tardiff, Analyzing Every Stick in the Bundle: Why Examination of a Claimant's Property Interest is the Most Important Inquiry in Every Fifth Amendment Takings Case, 54 Fed. Lawyer 30, passim (2007).

[FN182]. The plain meaning approach to the Takings Clause might permit the interpreter to square the meaning of the Takings Clause with the accepted meanings of the Due Process Clauses, but the current meaning of property in one of the two Clauses would need to change.