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## Late-Stage Textualism

2022 Sup. Ct. Rev. \_\_ (forthcoming 2022)

Ryan D. Doerfler\*

### I. Introduction

Are “canons of construction” embarrassing?<sup>1</sup> For a long time, the answer was ‘yes.’ Exposed as “contradictory” by Karl Llewellyn, a generation of legal thinkers understood interpretive canons to be so malleable in their application as to operate mostly as pretext.<sup>2</sup> Rather than bring predictability to statutory cases, the availability of more than one interpretive canon in any given case meant that a canon’s invocation worked mostly to obscure the choice (conscious or no) by judges between legally permissible outcomes. Interpretive canons were thus tools of legal mystification, providing the appearance of law to what were, ultimately, acts of discretion.

This sort of skepticism about interpretive canons persisted at least until the “textualist revolution” of the late 1980s and early 1990s.<sup>3</sup> Partly a successful political project by elite conservative lawyers and elected officials, the elevation of a text-centric approach to statutory interpretation within the federal judiciary created a receptive environment for legal doctrines concerned mostly with sentence- and word-level inference. At the same time, legal theorists within the textualist movement helped to reconceive interpretive canons in ways that would insulate them from earlier critiques. In particular, these “modern” textualists incorporated insights from philosophers of language and linguists concerning language’s practical character and, correspondingly, the sensitivity of language to interpretive context.<sup>4</sup> Viewed through this linguistic pragmatist lens,<sup>5</sup> interpretive canons were not to be thought of as “mechanical[]” rules of the sort

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<sup>1</sup> LEGISLATION AND REGULATION 324 (John F. Manning & Matthew C. Stephenson, eds., 4th ed. 2021) (describing “canons of construction” as “interpretive principles, or presumptions that judges use to discern—or, at times, construct—statutory meaning”).

<sup>2</sup> Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 399 (1950).

<sup>3</sup> Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 5 (2006).

<sup>4</sup> John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2392–93 (2003) (“Even the strictest modern textualists properly emphasize that language is a social construct. They ask how a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context.”).

<sup>5</sup> Here and throughout the phrase “linguistic pragmatism” is used loosely to refer both to the broader idea that linguistic meaning depends upon social practice and, more narrowly, that linguistic utterances sometimes communicate content beyond what is said, strictly speaking. For skepticism that “pragmatics” in the narrow sense has significant relevance to statutory interpretation, see Andrei Marmor, *Can the Law Imply More Than It Says? On Some Pragmatic Aspects of Strategic Speech*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW (Andrei Marmor & Scott Soames, eds., 2011).

Llewellyn understandably ridiculed,<sup>6</sup> but rather as broad generalizations about how people use words, admitting of myriad exceptions.<sup>7</sup>

Coming to the present Term, the Supreme Court is now populated even more fully by textualists following multiple appointments by Republicans during the Donald Trump presidency. With all these appointments well-versed in the teachings of modern textualism (and some contributing to those teachings through their own scholarly writing<sup>8</sup>), one would thus expect the use of interpretive canons in this Court to be flexible and linguistically pragmatic. And yet, with great embarrassment, the opposite appears to be true. In numerous cases this Term, the Court's statutory analysis received derisive commentary from scholars and journalists, having displayed the very sort of "wooden[ness]" that textualism had been caricatured with by its opponents for so many years.<sup>9</sup> Such wooden interpretation was especially visible in the cases involving interpretive canons, in which the Court pretended to the sort of precision and determinacy that Llewellyn so effectively mocked.

So, what happened? As with the rise of textualism, the story has to do both with legal theory and politics.

In terms of theory, modern textualism always contained within it an argumentative tension. According to one line of reasoning, what distinguished modern textualism from its "plain meaning" predecessors was, as mentioned, its incorporation of linguistic pragmatism.<sup>10</sup> In recognizing that the meaning of words depended greatly upon the practical setting, modern textualists effectively abandoned the ideal (and caricature) of a "mechanical" jurisprudence by opening themselves to circumstances in which the meaning of a legal text would be reasonably contestable given the numerous considerations that go into what language means as *used*.<sup>11</sup> This sort of humility about statutory determinacy paired naturally with earlier observations by Legal Realists, including Llewellyn, concerning the limits of legal determinacy in the context of appellate adjudication. It was thus by incorporating (to varying degrees) Realist insights as well that textualism became thoroughly modern. This line of reasoning sat in tension, however,

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<sup>6</sup> Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1175 (2021) (Alito, J., concurring in the judgment).

<sup>7</sup> See, e.g., RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 646–47 (2012) (Scalia, J.) (recognizing that canons are not "absolute rule[s]," but "merely ... strong indication[s] of statutory meaning that can be overcome by textual indications that point in the other direction"); Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 228 (2008) (Thomas, J.) (observing that "interpretive canons must yield 'when the whole context dictates a different conclusion'" (quoting Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n, 499 U.S. 117, 129 (1991))).

<sup>8</sup> See, e.g., Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109 (2010); Brett M. Kavanaugh, *Fixing Statutory Interpretation Judging Statutes*, 129 HARV. L. REV. 2118 (2016).

<sup>9</sup> Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 23 (Amy Gutmann ed., 1997) [hereinafter Scalia, *Common-Law Courts in a Civil-Law System*].

<sup>10</sup> John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 108 (2001) [hereinafter Manning, *Textualism and the Equity of Statute*] ("Modern textualists, however, are not literalists."); Molot, *supra* note 3 at 2.

<sup>11</sup> Mitchell N. Berman, *Judge Posner's Simple Law*, 113 MICH. L. REV. 777, 789 (2015).

with continuing assurances by textualist judges and scholars that their method brought “predictability” and so determinacy to statutory cases.<sup>12</sup> In this way, modern textualists did continue to promise, at least implicitly, something like a mechanical jurisprudence despite its having explicitly been disavowed.

As this Essay explains, this tension between predictability and linguistic pragmatism was mediated for decades by a further theoretical commitment among modern textualists to judicial *non-intervention*. Insisting that the role of judges within our constitutional democracy was to find law rather than make it, modern textualists consistently if unevenly expressed support for the idea that judges should stay their hand in one way or another in the absence of “clear[ly]” identifiable law.<sup>13</sup> Practically speaking, this meant declining to alter the legal status quo (for instance, rejecting a challenge to an agency ruling or declining to impose criminal liability) or otherwise deferring to the policy judgments of more politically accountable actors—so long as the statutory language at issue was relevantly “ambiguous.”<sup>14</sup> Manifested in different doctrinal rules, textualist judges were thus at least sometimes able to resolve statutory cases without having to identify a single “best” reading of the language at issue, which is to say without having to act as if statutory language is more determinate than it is.<sup>15</sup>

Politically, conservatives were supportive of non-interventionist doctrines into the early 2000s. Sometime around 2015, however, the Republican Party reversed its position through official statements and, more consequentially, judicial appointments, celebrating intervention instead. Most visibly through its selection of judicial nominees who rejected the non-interventionist *Chevron* doctrine, conservative judges and justices, while still avowed textualists, now argued that a judge’s *failure* to intervene in many cases would be a violation of his or her constitutional duties. Functionally, this embrace of judicial intervention worked to empower a now firmly conservative federal judiciary, seizing discretion previously exercised by elected branch officials. As a matter of statutory interpretation, it meant that these ‘late-stage’ textualist judges were left to act as if statutory language admitted of only one plausible reading, with interpretive canons being used once again as contradictory rules of the sort Llewellyn derided.

This Essay proceeds as follows. In Part II, it describes the fall and rise of interpretive canons, moving from Llewellyn’s influential critique through modern textualism’s reconceptualization and rehabilitation of canons. In Part III, this Essay documents the embarrassing use of interpretive canons today, with special attention to

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<sup>12</sup> See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* xxix (2012) (“[T]extualism will provide greater certainty in the law, and hence greater predictability and greater respect for the rule of law.”).

<sup>13</sup> E.g., Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 544-45 (1983) [hereinafter Easterbrook, *Statutes’ Domains*]; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (1989) [hereinafter Scalia, *Judicial Deference*] (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

<sup>14</sup> Easterbrook, *Statutes’ Domains*, *supra* note 13, at 533; Scalia, *Judicial Deference*, *supra* note 13, at 511.

<sup>15</sup> E.g., *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005)

this Term’s decision in *Facebook v. Duguid*.<sup>16</sup> In Part IV, it describes the political and theoretical developments that led to the embrace and then rejection by textualists of a principle of non-intervention and how doing so first obscured and then heightened that methodology’s basic tension. Finally, in Part V, this Essay shows how the rejection of non-intervention has made statutory interpretation more wooden and more inviting of ridicule even apart from interpretive canons, focusing specifically on two other cases from this past Term, *Niz-Chavez v. Garland*<sup>17</sup> and *Van Buren v. United States*.<sup>18</sup>

## II. The Fall and Rise of Interpretive Canons

### A. The Fall

Originally published in 1950, Llewellyn’s *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed* is regarded as one of the most causally significant pieces of scholarship in the history of the American legal academy. Though best known for its table of “dueling canons,” Llewellyn’s critique of interpretive canons was part of a broader effort to show that the norms of legal argumentation reliably underdetermine legal outcomes in the context of appellate litigation.<sup>19</sup> Just as appeals to precedent were inadequate to decide common law appellate disputes owing to the numerous ways in which past decisions can “correct[ly]” be read, so too, Llewellyn tried to show, with statutory cases and invocations of interpretive canons.<sup>20</sup> Mostly because of Congress’s limited foresight, Llewellyn explained, legislative bargains predictably fail to address, at least specifically, the full range of practical circumstances to which statutes will eventually be applied.<sup>21</sup> For that reason, it inevitably falls upon judges to make the best of a difficult circumstance, “quarr[ying]” sense out of the statute “in light of the new situation” in an admittedly “creative” and, ultimately, pragmatic endeavor.<sup>22</sup>

In offering his remarks, Llewellyn was careful not to fault judges for engaging in such artistic behavior. With common law decisions, for example, Llewellyn insisted that it was “silly” to think of judges’ using the available “leeway as involving ‘twisting’ of precedent.”<sup>23</sup> To characterize judicial behavior that way, after all, “presupposes that there was in the precedent under consideration some one and single meaning,” a presupposition the “whole experience of our case-law” shows to be “false.”<sup>24</sup> Similarly, given the unavoidable under-specification of legislative bargains, as well as, in Llewellyn’s

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<sup>16</sup> 141 S. Ct. 1163 (2021).

<sup>17</sup> 141 S. Ct. 1474 (2021).

<sup>18</sup> 141 S. Ct. 1648 (2021).

<sup>19</sup> Llewellyn, *supra* note 2, at 399.

<sup>20</sup> *Id.* at 395.

<sup>21</sup> *Id.* at 400 (“[I]ncreasingly as a statute gains in age ... its language is called upon to deal with circumstances utterly un contemplated at the time of its passage.”).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 399.

<sup>24</sup> *Id.*

view, the reality that legislatures, like past courts, can be both “skillful and unskillful, clear and unclear, wise and unwise,” courts must be allowed creative license in making sure that the statute at issue “make[s] sense” as applied to the present situation – within the permissible bounds of legal argumentation, of course.<sup>25</sup>

Though supportive of judges’ use of sociologically “legitimate” arguments to reach practically sensible outcomes, Llewellyn did nonetheless criticize the interpretive canons as judges employed them.<sup>26</sup> As with case law, Llewellyn contended, courts in statutory cases had continued to adhere to the “foolish pretense” that the interpretive questions presented in the context of appellate litigation admit of “only one single correct answer.”<sup>27</sup> Until judges “give up” that pretense, he continued, “there *must* be a set of mutually contradictory correct rules on How to Construe Statutes.”<sup>28</sup> It is at this point that Llewellyn set forth his now-famous table of “thrusts” and “parries.”<sup>29</sup> Assembled by research assistant Charles Driscoll, the table identified pairs of supposedly contradictory canons of construction, including what today we refer to as “substantive” canons like the presumption against retroactivity (paired with an authorization for judges to construe remedial statutes retroactively should doing so “promote the ends of justice”), but with much greater emphasis on what we call “linguistic” or “semantic” canons.<sup>30</sup> Llewellyn contrasted, for example, the *expressio unius est exclusio alterius* canon<sup>31</sup> with the interpretive maxim that statutory language “may fairly comprehend many different cases where some only are expressly mentioned by way of example,”<sup>32</sup> or, similarly, the presumption against surplusage<sup>33</sup> with the authorization to “reject[] as surplusage” language “inadvertently inserted or ... repugnant to the rest of the statute.”<sup>34</sup> (Of special relevance here, Llewellyn also paired the presumption that “[q]ualifying or limiting words of clauses are to be referred to the next preceding antecedent” with the qualification that said presumption has no application “when evident sense and meaning require a different construction.”<sup>35</sup>)

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<sup>25</sup> *Id.*

<sup>26</sup> Brian Leiter, *American Legal Realism*, in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 51 (Martin P. Golding & William A. Edmundson eds., 2005) (“Realist arguments for the rational indeterminacy of law generally focused on the existence of conflicting, but equally legitimate, canons of interpretation for precedents and statutes.”).

<sup>27</sup> Llewellyn, *supra* note 2, at 399.

<sup>28</sup> *Id.* (emphasis added).

<sup>29</sup> *Id.* at 401-06.

<sup>30</sup> *Id.* It is worth mentioning, though, that “semantic” canons is potentially a misnomer insofar as many of those canons (e.g., *expressio unius*) correspond to *pragmatic* rather than *semantic* inference, as that distinction is traditionally understood. See *generally* SEMANTICS VERSUS PRAGMATICS (Zoltán Gendler Szabó, ed., 2005).

<sup>31</sup> Llewellyn, *supra* note 2, at 405 (“Expression of one thing excludes another.”)

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 404 (“Every word and clause must be given effect.”)

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 405.

At least according to the popular narrative, Llewellyn's critique – and, in particular, his “chart” – was profoundly impactful.<sup>36</sup> John Manning, for example, remarked that “Karl Llewellyn largely persuaded two generations of academics that the canons of construction were not to be taken seriously.”<sup>37</sup> Similarly, Cass Sunstein said that, following Llewellyn's “demonstration[,] ... [a]lmost no one ... had a favorable word to say about the canons [for] many years.”<sup>38</sup> Courts too expressed greater skepticism towards interpretive canons during that period, though, in that instance, the causal significance of Llewellyn's arguments is far less certain as courts' hesitancy with respect to canons may have somewhat predated publication of his *Remarks*. In this respect, Llewellyn's critique may have merely captured a broader skepticism towards canons that was emerging at the time.<sup>39</sup>

More generally, the apparent success of Llewellyn's criticism of interpretive canons plausibly had as much to do with the force of his arguments than with the perceived availability of alternate interpretive tools. As Manning describes it, the loss of enthusiasm for interpretive canons coincided with the rise of the Legal Process school of statutory interpretation and, with it, a renewed enthusiasm for attention to legislative purpose.<sup>40</sup> Imagining legislators as “reasonable persons pursuing reasonable purposes reasonably,”<sup>41</sup> that school promised not only to imbue the law with moral content, critical with the rise of fascism abroad and its (wrongly<sup>42</sup>) perceived relationship with a thoroughgoing legal positivism, but also to allow judges to continue to act as faithful agents of Congress, “(at least putatively) implementing the goals that the democratically elected legislature had selected.”<sup>43</sup> More concretely, Manning argues, decreasing reliance on canons as an interpretive tool was offset by increasing reliance on legislative

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<sup>36</sup> John F. Manning, *Legal Realism & the Canons' Revival*, 5 GREEN BAG 2d 283, 283 (2002) [hereinafter Manning, *Legal Realism & the Canons' Revival*] (“With less impact, earlier realists had made similar claims. But Llewellyn made a chart.”).

<sup>37</sup> *Id.* at 283-84.

<sup>38</sup> Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 452 (1989). See also, e.g., Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 913 (2016) (noting “Llewellyn article's tremendous influence on statutory interpretation scholars”); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 593 (1992) (calling Llewellyn's essay “one of the most celebrated law review articles of all time”).

<sup>39</sup> While Llewellyn's argument depended largely upon its fit with the experience of its audience, contemporary legal scholars have offered more systematic evidence in support of the position that the applicability of individual canons is under-determined. See Krishnakumar, *supra* note 38, at 955 (conducting an empirical study of the Supreme Court's use of “dueling” interpretive canons in recent statutory cases, finding evidence “suggest[ing] that the canons do not constrain the Justices on the ... Court to vote against their policy preferences”).

<sup>40</sup> Manning, *Legal Realism & the Canons' Revival*, *supra* note 36 at 286.

<sup>41</sup> *Id.* (quoting William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems*, in THE MAKING AND APPLICATION OF LAW: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, 1378 (William N. Eskridge, Jr. & Philip P. Frickey, eds, 1994) (internal quotation marks omitted)).

<sup>42</sup> See HERLINDE PAUER-STUDER, JUSTIFYING INJUSTICE: LEGAL THEORY IN NAZI GERMANY 203-39 (2020) (arguing that Nazi law sought specifically to unify law and the morality of the Volk).

<sup>43</sup> *Id.* (citations omitted).

history, which, despite earlier Legal Realist critiques by those like Max Radin, was more and more viewed as reliable evidence of “what Congress was really trying to get at.”<sup>44</sup>

On Manning’s assessment, then, Llewellyn succeeded in discrediting interpretive canons largely because judges and scholars had identified other interpretive tools that allowed them to at least purport to be effectuating Congress’s aims rather than merely exercising judicial discretion. Those conditions of success were ironic, of course, insofar as the core of Llewellyn’s critique was that the exercise of discretion was unavoidable when interpreting statutes in the context of appellate litigation, and that it was, in turn, the “foolish” denial of this reality that motivated the embarrassing contradictions his table was intended to highlight.<sup>45</sup> Be that as it may, because a more candid Legal Realism had come to be viewed as both democratically and morally concerning, the legacy of Llewellyn’s critique was less the abandonment of the “pretense” that judges do not exercise substantial discretion in appellate decisionmaking, as Llewellyn urged, but rather the discrediting of one set of interpretive tools as inherently manipulable and so ultimately pretextual and the elevation of some other set of tools supposedly free of, or at least substantially less burdened by, those defects.<sup>46</sup>

## B. The Rise

Though “interred” for decades by Llewellyn’s criticism,<sup>47</sup> interpretive canons enjoyed a renaissance with the emergence of modern textualism in the 1980s. Widely understood today as the dominant method of statutory interpretation among judges, the success of modern textualism is as much a political story as it is an intellectual one. Beginning in the early 1980s under the leadership of Attorney General William French Smith and later Attorney General Edwin Meese, conservative lawyers within the Department of Justice (“DOJ”) began to emphasize the importance of adhering to text in both statutory and constitutional interpretation.<sup>48</sup> To some extent, this prioritization of statutory text was spillover from the ongoing project of popularizing and legitimizing constitutional originalism, which, as political scientist Calvin TerBeek has documented, was principally advanced by conservative political operatives as an alternative to the kind of “living constitutionalism” practiced by the Warren Court in cases like *Brown v. Board of*

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<sup>44</sup> *Id.* at 288 (discussing Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930)).

<sup>45</sup> Llewellyn, *supra* note 2, at 399.

<sup>46</sup> *Id.*

<sup>47</sup> David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 923 (1992)

<sup>48</sup> See, e.g., *Memorandum from Arnold I. Burns, Deputy Att’y Gen., et.al to Stephen J. Markman, Acting Assistant Att’y Gen.* (October 29, 1986) (on file with author) (“[C]onstitutional language should be construed as it was publicly understood at the time of its drafting and ratification and government attorneys should advance constitutional arguments based only on this “original meaning... As with constitutional adjudication, statutory adjudication starts from the proposition that the words of the statute have a meaning that constrains judgment; statutory language should be construed as it would have been publicly understood at the time of its enactment.”)



*Education*.<sup>49</sup> More generally, the belief among conservative lawyers within the DOJ was that a central problem of legal liberalism was its continuous straying from legal text, whether statutory or constitutional. In response to this perceived problem, DOJ lawyers deliberately presented textualism as a methodological alternative in both interpretive domains.<sup>50</sup> Meanwhile, within the legal academy, scholars like Frank Easterbrook and Antonin Scalia began to develop more theoretically sophisticated defenses and understandings of textualism, building partly on earlier Legal Realist arguments concerning the absence of shared intentions within multi-member legislative bodies as well as more recent work by public choice theorists, which offered both a more cynical picture of lawmaking than that associated with Legal Process as well as further resources for skepticism about (actual, historical) legislative purpose as an object of judicial inquiry.<sup>51</sup>

With the appointment of figures like Easterbrook and Scalia to the federal bench, along with DOJ alumni like Kenneth Starr, textualism began to settle as the preferred method of statutory interpretation among conservative judges. And as the Republican Party retained its commitment to textualism (and originalism) through subsequent presidential administrations, further appointments of both judges and justices with those methodological commitments permitted both earlier and more recent conservative appointees to exercise significant influence over judicial practice in statutory cases. Such influence was most visible at the level of the Supreme Court, where the elevation of Scalia and Clarence Thomas in particular afforded textualism significant institutional legitimacy and, more practically, permitted textualists to extract methodological concessions from their liberal colleagues – refusing, for example, to join (portions of) opinions relying upon legislative history, leading to its decreasing use.<sup>52</sup>

Following the success of this political project, it is unsurprising that newly appointed textualist judges would express greater enthusiasm than their Legal Process

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<sup>49</sup> Calvin TerBeek, “*Clocks Must Always Be Turned Back*”: *Brown v. Board of Education and the Racial Origins of Constitutional Originalism*, 115 AM. POL. SCI. REV. 3 (2021).

<sup>50</sup> See, e.g., *Intercircuit Panel: Hearing on S. 704 Before the Subcom. on Cts., S. Comm. on the Judiciary, 99th Cong.* 3 n.3 (1985) (statement of James M. Spears, Acting Assistant Att’y Gen.) (“The Court has contributed to the trend in which the role of judges is viewed less as one of interpreting the Constitution and statutes, guided principally by their text and the legislative intent of the Framers and Congress, and more as one of resolving public policy questions as guided by the perceived values of an enlightened society. This Administration has consistently challenged, and taken steps to reverse, this trend of moving from interpretivism to judicial activism.”).

<sup>51</sup> See, e.g., Easterbrook, *Statutes’ Domains*, *supra* note 13.

<sup>52</sup> As Thomas Merrill explains it:

A better explanation for the triumph of textualism, in my opinion, lies not so much in Justice Scalia’s persuasiveness as in his persistence. The critical factor here is Justice Scalia’s practice of refusing to join any part of another Justice’s opinion that relies on legislative history. This means that in any case in which another Justice needs the vote of Justice Scalia to form a majority or controlling opinion, the writing Justice knows that if legislative history is employed he or she will lose majority status with respect to at least a portion of the opinion. The arrival of Justice Thomas, who has taken up a similar stance, effectively doubles Justice Scalia’s voting clout in this regard.

Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 365 (1994).

predecessors for interpretive canons – in particular, linguistic or semantic canons – and thereby legitimize their use. With its attention to precise phrasing and grammatical nuance, interpretive canons that correspond to familiar linguistic subtleties like *expressio unius* or *ejusdem generis* fit naturally within a textualist approach to statutory interpretation. In turn, it makes sense that legal academics of all types would find new appreciation for interpretive canons given their professional interest in preserving relevance with an increasingly textualist judiciary. And find new appreciation they did, as scholars across the ideological spectrum began to suggest that perhaps interpretive canons could be a useful tool after all.

Even in this highly conducive political environment, though, developments in legal theory plausibly contributed to, or at least shaped, the reintroduction of interpretive canons. Part of this apparent contribution was negative, with theoretical arguments from textualist legal academics rendering alternatives to interpretive canons less available. Drawing upon earlier Legal Realist reasoning and more contemporary work in public choice theory, textualist scholars, and in turn judges, called into question specifically the value of legislative history as an interpretive aid.<sup>53</sup> The apparent probative value of legislative history had been important to the case that inquiries into legislative purpose amounted to something other than covert exercises of judicial discretion.<sup>54</sup> By making such appeals seem less obviously credible, textualist thinkers thus helped recreate – or, maybe better, re-reveal – the vacuum of legal determinacy in statutory cases that legislative history, and more generally legislative purpose, had purported to fill.

Building on this opportunity, textualist scholars and judges emphasized simultaneously the virtues of determinacy and constraint that their preferred method supposedly offered.<sup>55</sup> And with interpretive canons in particular, scholars of various ideological and methodological stripes contended that the use of such canons contributed to legal determinacy by making legal interpretation more predictable. Manning, for example, promised that the use of linguistic or semantic canons could “foster” common “linguistic and syntactic rules” for legislators and their various audiences.<sup>56</sup> Contributing to a shared legal language, the use of canons could thus help facilitate effective

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<sup>53</sup> See, e.g., *Blanchard v. Bergeron*, 489 U.S. 87, 97-100 (1989) (Scalia, J., concurring in part and concurring in the judgment); *Cont'l Can Co. v. Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund*, 916 F.2d 1154, 1157-60 (7th Cir. 1990) (Easterbrook, J.).

<sup>54</sup> See Manning, *Legal Realism & the Canons' Revival*, *supra* note 36, at 287-89.

<sup>55</sup> See, e.g., Scalia, *Common-Law Courts in a Civil-Law System*, *supra* note 9, at 17-18 (“The practical threat is that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities; from the common law to the statutory field.”); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 62 (1988) (“The use of original intent rather than an objective inquiry into the reasonable import of the language permits a series of moves. Each move greatly increases the discretion, and therefore the power, of the court.”); see also William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213

(2018) (discussing the legacy of “constraint” arguments by interpretive formalists in constitutional law, suggesting a decreasing reliance in that context).

<sup>56</sup> Manning, *Legal Realism & the Canons' Revival*, *supra* note 36 at 292.

“communication of legislative directions.”<sup>57</sup> More ambitiously, Sunstein, and later William Baude and Stephen Sachs, argued that appeal to both linguistic *and substantive* canons was mostly unavoidable because judges are frequently confronted with “textual silence” and so resort to “background principles” is necessary to fill legislative “gaps” in a legally determinate fashion.<sup>58</sup>

For textualists specifically, resort to ‘gap-filling’ talk was slightly awkward given that method’s emphasis on fidelity to congressional aims and, more importantly, the illegitimacy of judicial lawmaking.<sup>59</sup> Even Manning’s more modest thought that the use of canons might help generate – as opposed to merely reflect – shared interpretive norms faces difficulties in view of recent empirical work suggesting that legislative actors are largely inattentive to judicial cues concerning how to use statutory language. More immediately, though, these different arguments from “predictability” all depend upon a rejection of Llewellyn’s fundamental empirical claim that the interpretive canons themselves are contradictory. (Llewellyn’s basic argument, after all, was that the application of contradictory canons created the *illusion* of legal determinacy, not its reality.<sup>60</sup>) And while Sunstein and others made some effort to show that Llewellyn’s claim that the canons were contradictory and so unconstraining was “greatly overstated,” insisting, for example, that the principle that courts should construe statutes in derogation of the common law narrowly undoubtedly informs judges’ “sense” of the relevant statutory “situation[s],” the popularity of Llewellyn’s argument reflected less revelation to legal practitioners that their interpretive idols were false than resonance with lawyers’ ‘whole experience’ with statutory cases and the apparent manipulability of these supposed legal principles.<sup>61</sup> Against that pessimistic backdrop, it is somewhat difficult to imagine that assurances like those of Sunstein played a meaningful role in restoring interpretive canons as a legitimate interpretive tool.

Beyond determinacy and constraint, however, proponents of modern textualism also highlighted that method’s special attention to interpretive context. Contrasting their view with earlier “plain-meaning” textualists who placed emphasis on “literal meaning,” modern textualists purported to incorporate insights from philosophers of language such as Ludwig Wittgenstein and Paul Grice, recognizing that words only gather meaning in a context of use.<sup>62</sup> Easterbrook, for example, observed that “words are not born with

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<sup>57</sup> *Id.*

<sup>58</sup> Cass R. Sunstein, *supra* note 38, at 422; William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017).

<sup>59</sup> Baude and Sachs try to resolve this tension by characterizing interpretive canons as part of our “law of interpretation” and so rules of which members of Congress are presumed to be on notice. Baude & Sachs, *supra* note 58, at 1107-08.

<sup>60</sup> Llewellyn, *supra* note 2, at 399.

<sup>61</sup> Sunstein, *supra* note 38, at 452.

<sup>62</sup> See Manning, *Textualism and the Equity of Statute*, *supra* note 10, at 127 n. 64 (“Textualist theory thus incorporates the insights of modern language theory often associated with Ludwig Wittgenstein.”); *Cont'l Can Co. v. Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund*, 916 F.2d 1154, 1157 (7th Cir. 1990) (Easterbrook, J.). For an extended discussion of the importance of practical

meanings” but instead “take their meaning from contexts, of which there are many.”<sup>63</sup> (Easterbrook simultaneously disparages dictionaries as mere “museum[s] of words”.<sup>64</sup>) So too Scalia, who declared it a “fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.”<sup>65</sup> Rather than fetishize dictionary definitions and the like, modern textualists thus interpreted, or at least aspired to interpret, specific words or phrases in view of a statute’s subject matter, its internal coherence, or surrounding legislation, all with a view to understanding what a “reasonable user of words” would have taken that language to mean as used.<sup>66</sup> Such attention to linguistic nuance showed that modern textualists grasped that words were practical instruments used to “do things,”<sup>67</sup> with Easterbrook stating, for instance, that “we use [texts] purposively,” which is why “meaning ... will change with context, and over time” as do our practical ends.<sup>68</sup> Having adopted this sort of linguistic pragmatism (in the Wittgensteinian or Gricean sense, not the Posnerian), modern textualists positioned themselves to rebut criticisms like those of Llewellyn, who accused earlier plain-meaning textualists of “eviscerate[ing]” statutes through “wooden and literal reading.”<sup>69</sup> Far from ‘wooden,’ modern textualism promised to be nimble, sophisticated, and, most importantly, attentive to the practical interests at stake.

This embrace of context sensitivity was reflected specifically in the way modern textualists talked about interpretive canons. Having expressly rejected the use of “rigid” interpretive methods, modern textualists distanced themselves from the idea that the canons were rules that make statutory interpretation more mechanical.<sup>70</sup> To the contrary, Scalia insisted, “canons of interpretation ... are not ‘rules’ of interpretation in any strict sense,” but instead constitute interpretive “presumptions” that can be negated by context, often quite easily.<sup>71</sup> Thus, in his treatise with attorney and lexicographer Brian Garner, Scalia cataloged canons of all different types, from “semantic” to “syntactic” to “contextual,” underscoring again and again the “defeasible” nature of these various interpretive maxims.<sup>72</sup> Clarence Thomas, the other most powerful judicial proponent of textualism at the time, likewise remarked that “canons of construction” are mere “rules of

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context to textual analysis, see Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 986-99 (2017).

<sup>63</sup> Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 61 (1994) [hereinafter, Easterbrook, *History, and Structure in Statutory Interpretation*]. In this passage, Easterbrook appears to run together various senses of “context sensitivity,” as is typical of early modern textualist writing.

<sup>64</sup> *Id.* at 67.

<sup>65</sup> *Deal v. United States*, 508 U.S. 129, 132 (1993) (Scalia, J.).

<sup>66</sup> Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 65 (1988).

<sup>67</sup> HOW TO DO THINGS WITH WORDS, THE WILLIAM JAMES LECTURES BY J. L. AUSTIN (J. O. Urmson, ed., 1962).

<sup>68</sup> Easterbrook, *History, and Structure in Statutory Interpretation*, *supra* note 63, at 61.

<sup>69</sup> Llewellyn, *supra* note 2 at 400.

<sup>70</sup> Doerfler, *supra* note 62, at 1044 n.209.

<sup>71</sup> SCALIA & GARNER, *supra* note 12.

<sup>72</sup> *Id.* at 171.

thumb”<sup>73</sup> that “must yield ‘when the whole context dictates a different conclusion.’”<sup>74</sup> And so on, and so on.<sup>75</sup> By emphasizing so explicitly and so repeatedly the context sensitivity of interpretive canons, modern textualism thereby meaningfully defused Llewellyn’s criticism that those canons as used were contradictory. That criticism, after all, rested upon the premise that interpretive canons pretended to operate like rigid, determinate rules. By explicitly rejecting that premise, modern textualists were free to say without embarrassment that *sometimes* the expression of one thing excludes another while *other times* things are expressly mentioned only by way of example, that *usually* every word and clause should be given effect, but that *in some circumstances* it is appropriate to reject statutory language as inadvertent surplusage.

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To recap, while the readmission of interpretive canons into polite legal society was substantially a political story, developments within legal theory plausibly informed that readmission in two ways. First, by playing up the constraint canons supposedly bring to the interpretive process, proponents of interpretive canons promised that their use could help bring additional determinacy to statutory interpretation, which was especially important given recent criticisms concerning the use of legislative history, often by those same individuals. Second, building on more general insights concerning the sensitivity of language to context, proponents of interpretive canons took care to explain that such canons were mere generalizations about usage, and that evidence specific to a given case could always render them inapplicable. In so arguing, proponents of interpretive canons largely undercut Llewellyn’s critique that such canons are contradictory, a critique that depended, again, on the idea that interpretive canons operate like legal rules, determinate and with clear conditions of application.

Importantly, there is an apparent tension between these two lines of argument, as discussed more fully below. The core of Llewellyn’s critique was that it was a “foolish” belief in legal determinacy in statutory cases at the appellate stage that led judges to act as if interpretive canons are (inevitably contradictory) rules.<sup>76</sup> By insisting that interpretive canons are *not* rules but instead defeasible presumptions, modern textualists were mostly able to explain away Llewellyn’s critique, but only by conceding that interpretive canons

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<sup>73</sup> *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253 (1992) (Thomas, J.).

<sup>74</sup> *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228 (2008) (quoting *Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass’n*, 499 U.S. 117, 129 (1991) (Thomas, J.)).

<sup>75</sup> See, e.g., *Connecticut Nat. Bank*, 503 U.S. at 254 (“When the words of a statute are unambiguous, then, this first canon is also the last”) (Thomas, J.); *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 381 (2013) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002) (“[The *expressio unius*] canon can be overcome by ‘contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion,’”)) (Thomas, J.); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002) (“This statute does not contain conflicting provisions or ambiguous language. Nor does it require a narrowing construction or application of any other canon or interpretative tool.”) (Thomas, J.).

<sup>76</sup> Again, “rules” in the sense of legal norms with clear conditions of application and that purport to dictate (as opposed to permit) a specific legal outcome.

are less conducive to legal determinacy – which is just the same as saying less “wooden” – than one might have otherwise hoped. By contrast, arguments to the effect that interpretive canons are a source of constraint and, in turn, legal determinacy seem to depend on one’s imagining that interpretive canons operate more *like rules*. As this Essay discusses below, other resources within modern textualism partially obscured this tension. With judges (and to some extent scholars) increasingly transitioning, however, from modern to what one might call ‘late-stage’ textualism, that tension has very much come to the fore.

### III. Canons of Interpretation Today

Fast forward now to October Term 2020. In *Facebook, Inc. v. Duguid*,<sup>77</sup> the Supreme Court was presented with a discrete question of statutory interpretation. Under the Telephone Consumer Protection Act of 1991 (“TCPA”),<sup>78</sup> it is unlawful to make any non-emergency call (including text message) to any cellular number using an “automatic telephone dialing system” without the express consent of the recipient.<sup>79</sup> The Act, in turn, defines “automatic telephone dialing system” as equipment having the “capacity” to “store or produce telephone numbers to be called, using a random or sequential number generator,” and to “dial such numbers.”<sup>80</sup> Here, Noah Duguid had received multiple text messages from Facebook alerting him that his account had been accessed from an unrecognized device or browser, a security measure Facebook provides to help prevent unauthorized access. The problem was that Duguid had no Facebook account and so had never consented to receiving such messages. After repeated, unsuccessful attempts to unsubscribe from this service, Duguid filed suit under the TCPA, alleging that Facebook’s unsolicited text messages were in violation of the Act’s “robocall” prohibition described above.<sup>81</sup>

In *Duguid*, the specific interpretive question was whether Facebook’s unsolicited messages were in violation of the TCPA even though the Facebook computers used to send those messages neither stored nor produced the phone numbers dialed *using a random or sequential number generator*. According to Duguid, that Facebook had dialed only numbers entered into its system by Facebook users was beside the point because the limiting phrase “using a random or sequential number generator” as used in the statute modifies only the second of the two verbs in the preceding clause, “produce.” In other words, as construed by Duguid, so long as Facebook had automatically text messaged numbers “stored” in its system without the recipients’ consent, that was enough to violate the anti-robocalling provision.<sup>82</sup> (On Duguid’s reading, the other way to violate the statute was to automatically message numbers “produce[d] ... using a random

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<sup>77</sup> 141 S. Ct. 1163 (2021).

<sup>78</sup> 42 U.S.C. § 227 et seq.

<sup>79</sup> *Id.* at § 227(b)(1)(A). The statute also specifically exempted unsolicited calls for the purpose of debt collection. *But see* Barr v. Am. Ass’n of Pol. Consultants, Inc., 140 S. Ct. 2335 (2020) (declaring the exemption in violation of the First Amendment).

<sup>80</sup> *Id.* at § 227(a)(1).

<sup>81</sup> *Duguid*, 141 S. Ct. at 1167.

<sup>82</sup> *Id.* at 1169.

or sequential number generator.”) In response, Facebook argued that the phrase “using a random or sequential number generator” modified *both* verbs in the preceding clause, “store” and “produce,” such that a caller would have to use a device that could either “store ... numbers ... using a random or sequential number generator” or “produce ... numbers ... using a random or sequential number generator” to be in violation of the statute.<sup>83</sup>

By a unanimous vote, the Supreme Court sided with Facebook. Writing for eight justices, Justice Sonya Sotomayor “beg[an],” as justices do, “with the text.”<sup>84</sup> The statute’s “definition,” Sotomayor noted, “uses a familiar structure: a list of verbs followed by a modifying clause.” “Under conventional rules of grammar,” she explained, “[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series,’ a modifier at the end of the list ‘normally applies to the entire series.’”<sup>85</sup> This “series-qualifier” canon was straightforwardly applicable, Sotomayor continued, since “the modifier at issue immediately follows a concise, integrated clause: ‘store or produce telephone numbers to be called.’” Because this “clause ‘hangs together as a unified whole,’” with the word ‘or’ ... connect[ing] two verbs that share a common direct object, ‘telephone numbers to be called,’” it would be “odd to apply the modifier (‘using a random or sequential number generator’) to only a portion of this cohesive preceding clause.”<sup>86</sup> Sotomayor contrasted the series-qualifier canon with the inapplicable “rule of the last antecedent,” invoked by Duguid.<sup>87</sup> Under that rule, “a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows.”<sup>88</sup> The rule of the last antecedent, Sotomayor clarified, was “context dependent,” and one the Court had declined to apply “where, like here, the modifying clause appears after an integrated list.”<sup>89</sup> Worse still for Duguid, the “last antecedent before ‘using a random or sequential number generator’” was “not ‘produce,’ ... but rather ‘telephone numbers to be called,’” thus depriving Duguid of any “grammatical basis” for his otherwise “arbitrar[y]” reading.<sup>90</sup> Sotomayor similarly rejected Duguid’s appeal to the “distributive” canon, according to which a “sentence contain[ing] several antecedents and several consequents,” should be read “distributively ... apply[ing] the words to the subjects which, by context, they seem most properly to relate.”<sup>91</sup> That canon was of “highly questionable” application, Sotomayor insisted, “given there are two antecedents (store and produce) but only one consequent modifier (using a random or sequential number generator),” and

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* (quoting SCALIA & GARNER, *supra* note 12, at 147).

<sup>86</sup> *Id.* (quoting *Cyan, Inc. v. Beaver County Employees Retirement Fund*, 138 S. Ct. 1061, 1077 (2018)).

<sup>87</sup> *Id.* at 1170.

<sup>88</sup> *Id.* (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (internal quotation marks and alteration omitted)).

<sup>89</sup> *Id.* (citing *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 344, n. 4 (2005)).

<sup>90</sup> *Id.* (quoting *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1077 (2018)) (internal quotation marks omitted).

<sup>91</sup> *Id.* at 1172 (quoting SHAMBIE SINGER, *SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION* 448 (2018)).

besides, “the consequent ‘using a random or sequential number generator’ properly relates to both antecedents.”<sup>92</sup>

As Justice Samuel Alito observed in his separate concurrence, Sotomayor’s (along with seven other justices’) use of canons in *Duguid* is almost comically “mechanical[.]”<sup>93</sup> Notions like “concise, integrated clause[s]” or some clause having “only one consequent modifier” as opposed to two (or three or four) are presented as determinative of legal outcomes – offered as “a series of if-then computations,” to use Alito’s phrasing.<sup>94</sup> More generally, the series-qualifier canon upon which Sotomayor places so much weight is characterized explicitly as a “rule[.] of grammar,” with narrow and specifically defined exceptions, Sotomayor suggests.<sup>95</sup> This picture of interpretive canons as rules is, needless to say, directly at odds with the teachings of modern textualism, which emphasized again and again that canons are “highly sensitive to context” and the application of which requires the sort of holistic and ultimately practical engagement with text, a type of engagement natural language competency so plainly involves.<sup>96</sup> Rather than conceive of them as “limit[ed]” and heavily “caveat[ed]” generalizations about linguistic usage, however, the Court here was opting, as in so many recent cases, to treat interpretive canons as “rigid” and “inflexible rules,” precisely the conception of canons that Llewellyn successfully ridiculed.<sup>97</sup>

So how did we get here? Five years earlier, the pair of interpretive canons that feature most prominently in *Duguid* – the series-qualifier canon and the rule of the last antecedent – took on contemporary relevance in *Lockhart v. United States*.<sup>98</sup> In that case, the provision at issue imposed a 10-year mandatory minimum sentence enhancement for persons convicted of possessing child pornography if they have a “prior conviction ... under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward.”<sup>99</sup> The defendant in *Lockhart* had a prior state-court conviction for first-degree sexual abuse of an adult, raising the question whether the qualifying phrase “involving a minor or ward” modified only the adjacent “abusive sexual conduct” or also the earlier offenses in the list.<sup>100</sup> The Supreme Court divided six to two in favor of the government. Writing for the majority, Sotomayor assured that here the applicable canon was the rule of the last antecedent, which, she explained, “reflects the basic intuition that when a modifier appears at the end of a list, it is easier to apply that modifier only to the item directly before it.”<sup>101</sup> In support of this intuition, Sotomayor relied substantially on ordinary language examples, observing, for instance, that if the general

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<sup>92</sup> *Id.* (citing *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018)).

<sup>93</sup> *Id.* at 1175 (Alito, J., concurring).

<sup>94</sup> *Id.* (Alito, J., concurring).

<sup>95</sup> *Id.* at 1169.

<sup>96</sup> SCALIA & GARNER, *supra* note 12, at 150.

<sup>97</sup> *Duguid*, 141 S. Ct. at 1175 (Alito, J., concurring).

<sup>98</sup> 577 U.S. 347 (2016).

<sup>99</sup> 18 U.S.C. § 2252(b)(2).

<sup>100</sup> *Lockhart*, 577 U.S. at 349.

<sup>101</sup> *Id.* at 351.



manager of the New York Yankees were to instruct her scouts “to find a defensive catcher, a quick-footed shortstop, or a pitcher from last year’s World Champion Kansas City Royals,” it would be “natural” for the scouts to limit their search for a pitcher to members of last year’s Royals but to look more broadly for a catcher or shortstop.<sup>102</sup> In dissent, Justice Elena Kagan countered Sotomayor’s rule-of-the-last-antecedent “thrust” with a “parry” of the series-qualifier canon.<sup>103</sup> Like Sotomayor, Kagan’s argument depended significantly on ordinary language examples, offering that a real estate agent who promises “to find a client ‘a house, condo, or apartment in New York’” is unlikely to send “information about condos in Maryland or California.”<sup>104</sup>

Returning to *Duguid*, there, too, Sotomayor supplemented her more schematic arguments for the applicability of the series-qualifier canon with yet another ordinary language example, this time asking the reader to imagine a teacher announcing that “students must not complete or check any homework to be turned in for a grade, using online homework-help websites.”<sup>105</sup> In that instance, Sotomayor observed (correctly<sup>106</sup>) it would make no sense to regard the teacher as prohibiting students from completing their homework generally. And yet, as Alito objected in his concurrence, and as the back and forth between Sotomayor and Kagan in *Lockhart* makes clear, the availability of examples like this shows very little insofar as one could easily conjure an example with the same superficial grammatical structure generating the opposite linguistic intuition.<sup>107</sup> (For his part, Alito offers several, including, “It is illegal to hunt rhinos and giraffes with necks longer than three feet.”)<sup>108</sup> What the availability of such competing examples suggests, of course, is that the same orderings of words and punctuations can be used to different practical effects, precisely the lesson of modern textualism and its insistence upon the importance of attending to interpretive context. And so (yet?), with arguments by example having been revealed as under-determinate – in part, by her having offered contrary examples in her earlier *Lockhart* opinion – it makes some sense that Sotomayor would rely more heavily on more abstract argumentation by the time of *Duguid*. By appealing to concepts like “concise, integrated clause[s]” and the like, her *Duguid* opinion achieves a tone of formality, of “technical[ity],” that creates, for some at least, the impression of law.<sup>109</sup>

Or does it really? As discussed more fully below, the reasoning in *Duguid* and other, similarly textually oriented opinions from this Term were met with widespread derision, with legal commentators coming close to (or even outright) mocking the justices

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<sup>102</sup> *Id.* at 351-52.

<sup>103</sup> *Id.* at 364 (Kagan, J., dissenting).

<sup>104</sup> *Id.* at 362 (Kagan, J., dissenting).

<sup>105</sup> *Duguid*, 141 S. Ct. at 1169.

<sup>106</sup> Absent more information, at least.

<sup>107</sup> Emphasis on *superficial* since in these cases specifically the interpretive task is to identify based on context the actual syntactic structure of the clause.

<sup>108</sup> *Id.* at 1174 (Alito, J., concurring in the judgment).

<sup>109</sup> *Id.* at 1175 (Alito, J., concurring in the judgment). See also Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 884 (2014) (arguing that appeal to technical interpretive arguments can provide “camouflage” for policy-driven outcomes).

for discussing at length the placement of punctuations, the use of certain grammatical articles, and the like to explain judgments affecting matters as important as the right to an immigration hearing or potential criminal liability for workplace misconduct. Such frustration among legal scholars and journalists should hardly come as a surprise. As much as “we” may all be “textualists now,”<sup>110</sup> we are also all now, at least to some extent, Legal Realists. As such, efforts at mystification and appeal to “arcane rules” are less likely to succeed with legally sophisticated audiences, whose ‘whole experience’ with the law has shown them that such technicalities rarely determine outcomes in cases litigated before the Supreme Court.<sup>111</sup> With *Duguid* in particular, Sotomayor and the other justices could not help that legal commentators were reading their canon-centric opinion in a post-Llewellyn world.

Whatever the success of her efforts, the claim in this Part is that Sotomayor’s treatment of interpretive canons in *Duguid* as legal rules is an illustration of a broader trend among the justices not only of relying upon canons in statutory cases but of portraying those canons as ‘mechanical’ and so outcome determinative. This portrayal is, again, directly at odds with efforts by modern textualists to defuse Llewellyn’s critique of modern canons as contradictory by emphasizing that canons are *not* legal rules but are instead generalizations about ordinary linguistic practice the application of which involves careful attention to the specifics of the practical setting in which the legal text at issue was authored and intended to be read. This tendency to portray interpretive canons as rules reflects, at the same time, another line of argument within modern textualism, which promises that the use of canons brings greater predictability and so greater determinacy to judicial decision-making in statutory cases. As cases like *Duguid* bring out, these two lines of argument for modern textualists are inherently in tension insofar as emphasizing the context-sensitive nature of interpretive canons is just the same as saying that canons are insufficiently “rigid” to decide cases in a predictable, “if-then” fashion. By resolving that tension in favor of legal determinacy, the current Court has thus given new life to Llewellyn’s “dueling canons” critique. It has also contributed to what this Essay calls ‘late’ textualism looking increasingly foolish, with grammatical pedantry (or, really, sophistry) offered as legal justification in cases with real human stakes.<sup>112</sup>

#### IV. Late-Stage Textualism and Legal Determinacy

If the embarrassing use of interpretive canons in cases like *Duguid* is attributable partly to the belief that canons add predictability and so determinacy to statutory

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<sup>110</sup> Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015) <https://www.youtube.com/watch?v=dpEtszFT0Tg>.

<sup>111</sup> *Duguid*, 141 S. Ct. at 1175 (Alito, J., concurring in the judgment).

<sup>112</sup> Though different in her prescription, Abbe Gluck offers a similar diagnosis of the problem in her characterization of textualism as a failed effort at interpretive “formalism.” Abbe R. Gluck, *Justice Scalia’s Unfinished Business in Statutory Interpretation: Where Textualism’s Formalism Gave Up*, 92 NOTRE DAME L. REV. 2053, 2071 (2017) (observing that textualist judges often select arbitrarily among myriad interpretive rules because “text cannot answer every question”).

interpretation, an immediate question is why this would be a problem only recently. Modern textualism, after all, has been extolling these purported virtues of interpretive canons for decades, and textualism has been the principal method of statutory interpretation among federal judges for almost as long. And to be sure, treatments of canons as ‘if-then’ devices are scattered throughout the Supreme Court and Federal Reporters in decisions from the 1990s and early 2000s. Still, the use of interpretive canons does appear more frequent in recent years, and, as Alito observed in his *Duguid* concurrence, canons seem to play an especially “prominent” role in statutory interpretation cases today.<sup>113</sup>

So, what might explain this placing of greater weight on interpretive canons? As before, part of the story is political. Though textualism has been an influential method of statutory interpretation among Supreme Court justices since the appointment of Scalia in 1986, the recent appointments of Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett, all avowed textualists, has made it all but impossible to assemble a majority in a statutory case without heavy reliance on textual arguments. (Here, Kagan’s appointment is also significant in that it marked the acceptance of textualism as a *bipartisan* method of interpretation among the justices.) Under these conditions, it makes sense that a justice like Sotomayor, though not obviously committed to textualism as a philosophical matter, would nonetheless phrase her arguments in terms of interpretive canons (and linguistic terminology more generally) rather than relying on, say, legislative history.

Beyond that narrowly political explanation, though, shifts in textualist thinking also plausibly contributed to treatment of interpretive canons as legal rules. As described at various places, there is, or better was, a tension between modern textualism’s insistence that interpretive canons are highly sensitive to context and its claim that the use of canons increases predictability and so determinacy in statutory cases. At the same time, modern textualism contained resources reducing the practical significance of that tension. Specifically, textualists like Easterbrook and Scalia articulated a commitment (or at least aspiration) to judicial non-intervention in the absence of ‘clearly’ identifiable law. Though voiced sometimes concerning constitutional cases, a principle of non-intervention was more comprehensively theorized and adhered to at least somewhat more reliably by textualists in the context of statutory interpretation.<sup>114</sup>

## A. Legal Theory

Within legal theory, probably the canonical statement of a principle of non-intervention in statutory cases is Easterbrook’s 1983 article, *Statutes’ Domains*. In that paper, Easterbrook offered a defense of a text-centric approach to statutory interpretation grounded substantially in public choice theory. Advancing the idea that it is “difficult” if not

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<sup>113</sup> *Duguid*, 141 S. Ct. at 1173 (Alito, J., concurring).

<sup>114</sup> For a notable exception, see John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939 (2011).

“impossible” to aggregate the preferences of individual legislators into a “coherent collective choice,” Easterbrook reasoned that features of the legislative process like agenda control and “logrolling” made it the case that judicial “predictions” of how legislatures would have resolved unanticipated cases were “bound to be little more than wild guesses.”<sup>115</sup> Construing statutory language in any case in which Congress’s written instruction was less than “clear” was, accordingly, an unavoidably “creative” endeavor.<sup>116</sup> The question for Easterbrook, then, was whether or when judges should exercise this sort of discretion. In some instances, Congress “plainly” delegates authority to federal courts to shape statutes, “creat[ing] and revis[ing] a form of common law”—with the Sherman Act, in Easterbrook’s view, the most uncontroversial example.<sup>117</sup> In the absence of such unmistakable delegation, though, Easterbrook concluded that judges should refrain from construing a statute to resolve a case that its language does not specifically settle. Without a sense of what faithful construction would involve, courts should instead declare that the case falls “outside the statute’s domain,” leaving the legal status quo unchanged.<sup>118</sup>

Even as they moved away from public choice, modern textualists continued to urge non-intervention. Beginning in the mid-1990s and early 2000s, textualists placed greater emphasis on the more prosaic observation that compromise and tradeoffs are inherent to the legislative process because legislators are always pursuing multiple goals. Even a Congress earnestly committed to confronting climate change, for example, would need to balance its interest in a rapid reduction of carbon emissions with its desire to equitably distribute the burdens of transitioning from fossil fuels, its commitment to preserving biodiversity, and so on. Addressing such choices, members of Congress sometimes settle upon specific compromises, prohibiting, say, the licensing of new nuclear power plants or a federal job guarantee for displaced fossil fuel workers. Other times, though, members opt merely to identify their various goals, leaving it to some other actor, most often an agency, to work out the specifics. Against this backdrop, theorists like Manning argued that attending carefully to statutory language, and in particular to the level of generality at which Congress speaks, was critical to respecting and facilitating such legislative “bargains.”<sup>119</sup> Adhering to the specifics of legislative language would both increase fidelity to Congress and decrease judicial discretion, these theorists argued, contrasting modern textualism with the “strong” purposivism associated with cases like *Church of the Holy Trinity v United States*.<sup>120</sup>

Alongside this discussion of tradeoff, modern textualists emphasized increasingly the importantly limited role of the federal judiciary within our constitutional system. In his

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<sup>115</sup> Easterbrook, *Statutes’ Domains*, *supra* note 13, at 547-48.

<sup>116</sup> *Id.* at 534.

<sup>117</sup> *Id.* at 544. *But see* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175 (2021) (contesting the status of the Sherman Act as a “common law” statute); Daniel A. Farber & Brett H. McDonnell, “Is There a Text in This Class?” *The Conflict Between Textualism and Antitrust*, 14 J. CONTEMP. LEGAL ISSUES 619, 641 (2005) (same).

<sup>118</sup> Easterbrook, *Statutes’ Domains*, *supra* note 13, at 544.

<sup>119</sup> Manning, *Textualism and the Equity of the Statute*, *supra* note 10, at 18.

<sup>120</sup> *Id.* at 15-16.

canonical *A Matter of Interpretation*, published in 1997, Scalia noted the “uncomfortable relationship of common-law lawmaking to democracy,” reasoning that “the *attitude* of a common-law judge,” which aimed at achieving “desirable” outcomes, was inappropriate in an “age of legislation” and “regulation.”<sup>121</sup> Similarly, Easterbrook insisted in 1994 that judges were “faithful agents, not independent principals,” and that earlier methods of interpretation that “liberate[d]” judges were “objectionable on grounds of democratic theory as well as on grounds of predictability.”<sup>122</sup> As Manning observed, arguments concerning the limited authority of judges within our democracy were partly legal and partly normative, with emphasis on the *constitutional* assignment of policymaking authority to the political branches. More broadly, though, the picture that emerged, especially in more public settings, was one of judges as faithful agents, tasked, *appropriately* within a democracy, with identifying law rather than making it.<sup>123</sup> This picture of judging was captured most famously by Chief Justice John Roberts’s analogizing of judges to “umpires.”<sup>124</sup> (Irony, given Roberts’ comparative lack of commitment to interpretive formalism.<sup>125</sup>) Even in more sophisticated writings, though, the continuing suggestion was that judges were to abstain from asserting their own policy preferences, especially under the guise of ‘discovering’ law where there was none.

As the previous comment suggests, this picture of judging as law identification was meant to be appropriately modern, incorporating to varying degrees insights from Legal Realists concerning the widespread indeterminacy of the law. Easterbrook, as noted above, conceded even in 1983 that the legal content of statutes often runs out in the context of appellate litigation.<sup>126</sup> Two decades later, Manning allowed similarly that “all legal texts ... produce ambiguities,” and that such ambiguities can be “‘liquidated’ only through practice.”<sup>127</sup> And even Scalia, though much more modest in this regard (more on this below), confessed that in the “vast majority of cases” in which judges would deem a statute “ambiguous” Congress did not “intend[] a single result.”<sup>128</sup> This sort of humility about legal determinacy led, predictably, to a discussion of official discretion. And while textualist writers conceded that judicial discretion was, to some degree, unavoidable, the presumption within our constitutional scheme was, again, that such discretion rests with more democratically accountable actors. As discussed below, this presumption had specific doctrinal manifestations, with judges declining to intervene in one way or another in the absence of ‘clearly’ identifiable law. Here, though, it is worth highlighting the broad

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<sup>121</sup> Scalia, *Common-Law Courts in a Civil-Law System*, *supra* note 9, at 13.

<sup>122</sup> Easterbrook, *Text, History, and Structure in Statutory Interpretation*, *supra* note 63 at 63.

<sup>123</sup> See generally Manning, *Textualism and the Equity of Statute*, *supra* note 10.

<sup>124</sup> *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary, 109th Cong. 55* (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

<sup>125</sup> See Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2d 407 (2015).

<sup>126</sup> Easterbrook, *Statutes’ Domains*, *supra* note 13, at 533.

<sup>127</sup> Manning, *Textualism and the Equity of Statute*, *supra* note 10, at 88 (quoting THE FEDERALIST NO. 37 229 (James Madison) (Clinton Rossiter ed., 1961)).

<sup>128</sup> Scalia, *Judicial Deference*, *supra* note 13, at 517.

sentiment among textualists that both legally and normatively, policymaking was better left to officials with a democratic constituency, whether direct or indirect.

Moving ahead to the 2010s and beyond, textualists continue to adhere, for the most part, to the idea that judges can and do find law rather than make it. At the same time, there has been a notable distancing from the Legal Realist premise that the law is frequently indeterminate, especially in the context of appellate adjudication. As discussed below, this trend has been most striking within judicial reasoning. Also within the legal academy, though, confidence in the determinacy of the law is on the rise among interpretive formalists. Most prominently, Baude and Sachs have argued, in a much-cited 2017 piece, that although the communicative content of statutory language often runs out, background legal principles determine systematically how judges ought to rule in such cases.<sup>129</sup> Even more strikingly, Sachs writing separately has argued that prevailing skepticism about judges “finding” common law is unwarranted, arguing that discovering unwritten legal rules was no more mysterious than identifying norms of fashion or etiquette.<sup>130</sup> Baude and Sachs’s confidence in the determinacy of this sort of ‘background’ law contrasts somewhat with the trend among formalist judges to insist upon the determinacy of legal texts. Regardless, both of these trends reflect a distancing from Legal Realism and so non-intervention. Even if judges should decline to intervene in the absence of clearly identifiable law, that conditional becomes trivially satisfied if the law is always clear upon closer inspection.<sup>131</sup>

## B. Doctrine

Though always more aspiration than real commitment, textualist judges also endorsed legal doctrines that were non-interventionist in both rationale and effect. Most visible among them was the *Chevron* doctrine, which, up until very recently, was regarded as one of the most important legal doctrines of the past half-century. It was articulated first in a 1984 opinion by Justice John Paul Stevens, decidedly not a member of the textualist vanguard but aligned ideologically with conservatives at the time. According to *Chevron*, a reviewing court was to uphold an agency’s interpretation of a statute that it administered so long as the statute did not “clear[ly]” preclude the agency’s reading.<sup>132</sup> Relevant in our context is the explicit justification of the doctrine in terms of legal indeterminacy. To construe an unclear statute, Stevens reasoned, was to “fill” a “gap” in the law left by Congress, and because courts, comparatively speaking, lacked both technical expertise and democratic legitimacy, it made sense to defer to an agency’s

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<sup>129</sup> Baude & Sachs, *supra* note 58, at 1082-83.

<sup>130</sup> Stephen E. Sachs, *Finding Law*, 107 CAL. L. REV. 527 (2019).

<sup>131</sup> Baude and Sachs, notably, consider whether *Chevron* fits within their account as part of our law of interpretation. Baude & Sachs, *supra* note 58, at 1127. Though expressing some skepticism, the more fundamental concern is that Baude and Sachs allow for so many *other* background interpretive principles, with little basis for choosing among them, as to invite the sort of indeterminacy that their account is meant to dispel.

<sup>132</sup> *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

construction in cases of statutory “silen[ce]” or “ambigu[ity].”<sup>133</sup> To select among “reasonable” constructions, Stevens explained, involved the sort of “policy choices” the “responsibilit[y]” for which our Constitution “vests” not in the judiciary but instead “in the political branches.”<sup>134</sup>

Despite having been authored by an adherent to the Legal Process school, textualist judges and scholars quickly became *Chevron*’s strongest proponents – and continued to be into the 2010s. Sparring with liberal colleagues like Justice Stephen Breyer, Justice Scalia, for instance, vocally supported the doctrine for nearly all his judicial career. Beginning with his 1989 law review article on the subject, Scalia explained his support for *Chevron* mostly in the language of rules.<sup>135</sup> A categorical instruction that courts defer to an agency if the law is ambiguous, Scalia insisted, was superior to a case-by-case inquiry.<sup>136</sup> Other textualists grounded their defenses of *Chevron* in a commitment to democracy and, more specifically, the idea that policy determinations by judges should not substitute for those of more democratically accountable officials. Manning, for instance, reasoned that “because it is now generally accepted that the interpretation of an ambiguous text will involve policymaking,” *Chevron* reflected “constitutional commitments to electoral accountability” by presuming that Congress would prefer agencies rather than courts to fill in statutory gaps.<sup>137</sup> Similarly, D.C. Circuit Judge Laurence Silberman explained that “*Chevron* rests on the sound premise that agencies enjoy a comparative institutional advantage as a matter of legitimacy,” and that, while not constitutionally compelled, “policy making should be eschewed by the federal judiciary whenever possible.”<sup>138</sup>

While mostly uniform in their support of the doctrine, it is important not to overstate textualists’ reluctance to displace agency readings. Scalia, for example, opined that accepting *Chevron* was easier for textualist judges given their relative disposition to identify ‘clear’ statutory meaning. Those “willing to permit the apparent meaning of a statute to be impeached by the legislative history,” Scalia explained, “will more frequently find agency-liberating ambiguity, and will discern a much broader range of ‘reasonable’ interpretation that the agency may adopt.”<sup>139</sup> For a “‘strict constructionist’ of statutes,” by contrast, the “meaning of a statute” is more often “apparent from its text and from its relationship with other laws.”<sup>140</sup> (Though using it approvingly here, Scalia would later disavow the label “strict constructionist.”) Whatever the validity of Scalia’s empirical premise, his comment indicates a continuing promise that textualism means greater legal

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<sup>133</sup> *Id.* at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

<sup>134</sup> *Id.* at 866 (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)) (internal quotation marks omitted).

<sup>135</sup> Scalia, *Judicial Deference*, *supra* note 13.

<sup>136</sup> *Id.* at 516.

<sup>137</sup> John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 626 (1996)

<sup>138</sup> Laurence H. Silberman, *Chevron-the Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 824 (1990).

<sup>139</sup> Scalia, *Judicial Deference*, *supra* note 13, at 521.

<sup>140</sup> *Id.*

determinacy.<sup>141</sup> As such, the core tension persisted between greater attending to context and making interpretation more predictable.

Enthusiasm for *Chevron* continued until sometime during President Barack Obama's second term. In the upper echelons of the federal judiciary, the turn against *Chevron* began in earnest in 2015.<sup>142</sup> That year, in a trio of concurring opinions, Justice Thomas, previously a *Chevron* defender, argued for the first time that "the judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws," and that this "power was understood to include the power to resolve [statutory] ambiguities over time."<sup>143</sup> (In so arguing, Thomas relied heavily upon historical work by Philip Hamburger, published in 2008—that is, almost a decade prior.<sup>144</sup>) Thomas was joined shortly thereafter by Gorsuch, then still a circuit court judge, in a concurring opinion to his own majority opinion in *Gutierrez-Brizuela v. Lynch*, in a seeming audition for a Supreme Court appointment.<sup>145</sup> And though less vocal than either Thomas or Gorsuch, even Scalia began to express reservations, though notably not on constitutional but statutory grounds. In a concurring opinion, he remarked that *Chevron* was "[h]eedless of the original design of the [Administrative Procedure Act]," which contemplated that the reviewing court, and not the agency, would resolve statutory ambiguities "authoritatively."<sup>146</sup>

Around this same time, opposition to *Chevron* also became an open political project within the Republican Party.<sup>147</sup> In 2016, the Party included a rejection of *Chevron* in its platform, proclaiming that "courts should interpret the laws as written by Congress rather than allowing executive agencies to rewrite those laws to suit administration priorities," after years of expressing no reservations.<sup>148</sup> In 2016 and again in 2017, a Republican House of Representatives passed legislative proposals explicitly negating *Chevron's* holding that statutory silence or ambiguity indicated an intention to delegate

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<sup>141</sup> Remarks like this approached their logical limit in later years as textualist judges turned against the doctrine, with Judge Raymond Kethledge asserting, for instance, that he "personally" had "never had occasion" to defer to an agency under *Chevron* since, in every instance, the underlying statute proved "clear." Raymond Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 323 (2017).

<sup>142</sup> This turn was foreshadowed in 2013 in a dissent by Chief Justice John Roberts. See *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 314-16 (2013) (Roberts, C.J., dissenting).

<sup>143</sup> *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 119 (2015) (Thomas, J., concurring).

<sup>144</sup> See PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* (2008).

<sup>145</sup> *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) ("But the fact is *Chevron*... permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design.").

<sup>146</sup> *Perez*, 57 U.S. at 109 (Scalia, J., concurring).

<sup>147</sup> Craig Green, *Deconstructing the Administrative State: Chevron Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619, 660-61 (2021)

<sup>148</sup> REPUBLICAN NAT'L COMM., REPUBLICAN PLATFORM 2016 10 (2016), <https://www.presidency.ucsb.edu/sites/default/files/books/presidential-documents-archive-guidebook/national-political-party-platforms-of-parties-receiving-electoral-votes-1840-2016/117718.pdf> [https://perma.cc/2G62-L9JP].



primary interpretive authority to an administering agency.<sup>149</sup> And most importantly, throughout Donald Trump’s presidential term, the Republican Party, seemingly under the guidance of Federalist Society co-chairman Leonard Leo, systematically added to the federal judiciary individuals who expressed opposition to *Chevron* as well as more general discomfort with the administrative state.<sup>150</sup> *Chevron* in particular gained public attention during the Supreme Court confirmation process for then-Judge Gorsuch, with the previously obscure administrative law doctrine the subject of extended news coverage. Following Gorsuch’s confirmation, the nomination of “anti-administrativists” to the lower federal courts continued, such that, by 2018, the *New York Times* had identified opposition to *Chevron* as a “litmus test” for Republican judicial appointments.<sup>151</sup> This political strategy appeared to reflect an assessment that conservative ideological interests would be advanced by empowering the judiciary relative to the executive branch. And understandably so, as Republicans had gained control of the federal bench, seemingly for decades to come.<sup>152</sup>

Owing to the efforts of Gorsuch and Thomas, *Chevron* has been unmentionable in the Supreme Court the past few years. Indeed, the very suggestion that an agency’s reading might warrant special consideration has triggered mockery from Gorsuch in particular.<sup>153</sup> Such total disinterest in the reasoning of political branch actors was on full display in *Duguid*. In that case, unmentioned in either opinion was the extensive regulatory history surrounding the provision at issue. Under the TCPA, the Federal Communications Commission (FCC) is authorized to “prescribe regulations to implement” various provisions of the Act, including the subsection restricting the use of automatic dialers.<sup>154</sup> Pursuant to that statutory authority, the FCC promulgated an order in 1992 interpreting that subsection narrowly, construing it to exclude functions like speed dialing and call forwarding, reasoning that “the numbers called are not generated in a random or sequential fashion.”<sup>155</sup> Eleven years later, though, responding to “significant changes in the technologies and methods used to contact consumers,” the FCC construed the TCPA as including “predictive dialers,” which “store pre-programmed numbers or receive

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<sup>149</sup> Green, *supra* note 147, at 666-68.

<sup>150</sup> *Id.* at 687-88. See also Jeremy Peters, *New Litmus Test for Trump's Court Picks: Taming the Bureaucracy*, N.Y. TIMES (Mar. 28, 2018), <https://www.nytimes.com/2018/03/26/us/politics/trump-judges-courts-administrative-state.html>.

<sup>151</sup> Peters, *supra* note 150.

<sup>152</sup> Gregory Elinson and Jonathan Gould argue further that although attitudes toward deference have varied in accordance with partisan control of the executive branch and the judiciary, increased congressional gridlock has led liberals to depend more strongly upon administrative deference to advance their regulatory agenda. See Gregory Elinson & Jonathan Gould, *The Politics of Deference*, 75 VAND. L. REV. — (forthcoming 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3889828](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3889828).

<sup>153</sup> See, e.g., *BNSF Ry. Co. v. Loos*, 139 S. Ct. 893, 908-09 (Gorsuch, J., dissenting) (“Instead of throwing up our hands and letting an interested party—the federal government’s executive branch, no less—dictate an inferior interpretation of the law that may be more the product of politics than a scrupulous reading of the statute, the Court today buckles down to its job of saying what the law is...”).

<sup>154</sup> 47 U.S.C. § 227(b)(2).

<sup>155</sup> *In the Matter of Rules & Regs. Implementing the Tel. Consumer Prot. Act of 1991*, 7 F.C.C. RCD. 8752, 8776 (1992).

numbers from a computer database and then dial those numbers in a manner that maximizes efficiencies for call centers.”<sup>156</sup> As a practical matter, the FCC reasoned that “through the TCPA, Congress was attempting to alleviate a particular problem – an increasing number of automated and prerecorded calls to certain categories of numbers,” and that construing automatic dialers as equipment that dialed stored numbers automatically, regardless of whether the numbers were randomly or sequentially generated, best served this purpose.<sup>157</sup> The FCC reiterated its position that predictive dialers were automatic dialers in 2008, again in 2012, and finally in 2015.<sup>158</sup> Throughout these orders, all adopted through notice and comment rulemaking and all enjoying the “force of law,” the FCC emphasized again and again that changes in automatic dialing technology necessitated an expansive reading of the automatic dialer provision since a narrower reading would “render the TCPA’s protections largely meaningless by ensuring that little or no modern dialing equipment would fit the statutory definition.”<sup>159</sup>

As a linguistic matter, the FCC’s position was somewhat opaque. On the one hand, the FCC seemed to rely upon a “broad interpretation” of the term “capacity,” explaining that a device had the “capacity ... to store or produce telephone numbers to be called, using a random or sequential number generator,” and “to dial such numbers,” so long as that device could be easily modified, through the downloading of software, for example, so as to be able to perform the specified functions.<sup>160</sup> The D.C. Circuit rejected that reading as overbroad in a 2018 decision, reasoning that the FCC’s interpretation would encompass most smartphones insofar as one could easily add software to such a phone allowing it to function as an automatic dialer.<sup>161</sup> In its orders, the FCC tried to limit the scope of its interpretation by emphasizing that “the basic functions of an autodialer are to ‘dial numbers without human intervention’ and to ‘dial thousands of numbers in a short period of time.’”<sup>162</sup> “How the human intervention element applies to a particular piece of equipment,” the FCC continued, “is specific to each individual piece of equipment, based on how the equipment functions and depends on human intervention, and is therefore a case-by-case determination.”<sup>163</sup> In *Duguid*, the respondent offered exactly this argument in response to Justice Sotomayor’s objection that his interpretation would encompass “virtually all modern cell phones.”<sup>164</sup> Dismissing that argument in a footnote, Sotomayor

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<sup>156</sup> *In Re Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C. Rcd. 14014, 14090 (2003)

<sup>157</sup> *Id.* at 14092-93.

<sup>158</sup> *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 F.C.C. Rcd. 559, 566-567 (2008); *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 F.C.C. Rcd. 15,391, 15,392 n.5 (2012); *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 F.C.C. Rcd. 7961, 7971-7973 (2015).

<sup>159</sup> *In the Matter of Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, 7976 (2015)

<sup>160</sup> *See id.* at 7973.

<sup>161</sup> *ACA Int'l v. Fed. Commc'ns Comm'n*, 885 F.3d 687, 695-701 (D.C. Cir. 2018)

<sup>162</sup> *In the Matter of Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, 7975 (2015).

<sup>163</sup> *Id.*

<sup>164</sup> *Facebook v. Duguid*, 141 S. Ct. 1163, 11171 (2021)1171.

“decline[d] to interpret the TCPA as requiring such a difficult line-drawing exercise around how much automation is too much.”<sup>165</sup>

In addition to its broad reading of “capacity,” the FCC also seemed to take up Duguid’s position that a device need not have the “capacity ... to store” telephone numbers “using a random or sequential number generator,” explaining, for example, that “[i]n the past, telemarketers may have used dialing equipment to *create and dial* 10-digit telephone numbers arbitrarily,” but that the industry had “progressed to the point where” it had become “far more cost effective” instead to “us[e] lists of numbers.”<sup>166</sup> As the D.C. Circuit observed in its decision invalidating the relevant portion of the 2015 order, the FCC was not entirely clear on this issue, however, and in the court’s view, while “[i]t might be permissible for the Commission to adopt either interpretation,” it was “unreasonable” for it to include language in the order suggesting both.<sup>167</sup> (Unlike the Supreme Court, the D.C. Circuit still treats *Chevron* as law, allowing it to say such things.)

Following the invalidation of its 2015 order, the FCC twice solicited comments from interested parties on the scope of the auto dialer provision, but, by the time of *Duguid*, had yet to issue a new order.<sup>168</sup> Noting the FCC’s ongoing consideration of the matter, as well as its lack of involvement in the litigation below, the Solicitor General declined to take a position in *Duguid* at issue at the certiorari stage.<sup>169</sup> During the merits briefing, though, the United States sided with Facebook, explaining that after the D.C. Circuit’s 2018 decision vacating the FCC’s 2015 order, the FCC had no position on the issue, and that in the view of the Solicitor General’s office, the better reading of the TCPA was the narrower one recommended by the petitioner.<sup>170</sup> In addition to standard interpretive arguments, the Solicitor General observed as a matter of “policy” that Duguid’s reading “could potentially sweep in every modern smartphone,” and that if, as the FCC had claimed, “[t]echnological changes” were such that devices falling outside the Act’s definition were “caus[ing] the same annoyance to consumers as the devices that the TCPA restricts,” Congress could “amend the TCPA to take account of those changes.”<sup>171</sup>

One can only speculate what led the United States to abandon the earlier, more consumer-protective position adopted by the FCC from 2003 to 2018.<sup>172</sup> Regardless, this complex and seemingly contentious policy debate within the executive branch makes no

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<sup>165</sup> *Id.* at 1171 n.6.

<sup>166</sup> *In Re Rules & Regs. Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C. RCD. 14014, 14092 (2003).

<sup>167</sup> *ACA Int’l*, 885 F.3d at 702-03.

<sup>168</sup> See *Consumer & Governmental Affs. Bureau Seeks Comment on Interpretation of the Tel. Consumer Prot. Act in Light of the D.C. Circuit’s Aca Int’l Decision*, 33 F.C.C. RCD. 4864, 4865-66 (2018); *Consumer & Governmental Affs. Bureau Seeks Further Comment on Interpretation of the Tel. Consumer Prot. Act in Light of the Ninth Circuit’s Marks v. Crunch San Diego, LLC Decision*, 33 F.C.C. RCD. 9429, 9429 (2018).

<sup>169</sup> *Brief for the United States*, Facebook v. Duguid, 141 S. Ct. 1163 (2021), 2019 WL 6211316 at \*11.

<sup>170</sup> *Brief for the United States as Respondent Supporting Petitioner*, Facebook v. Duguid, 141 S. Ct. 1163 (2021), 2020 WL 5439453 at \*12-15.

<sup>171</sup> *Id.* at \*33.

<sup>172</sup> As this change in policy reflects, it is important in contexts like these to distinguish between *political* decisions and *partisan* ones.

appearance in *Duguid* (beyond, perhaps, an unattributed, ‘icing-on-the-cake’ endorsement of the Solicitor General’s position that the earlier FCC reading was overbroad). Such a discussion would have been interesting, of course, and would have re-raised many of the questions dealt with in the cases developing *Chevron* about which executive branch positions are warranting of deference (or “respect” or some other weighting<sup>173</sup>) and under what conditions. Because the D.C. Circuit had invalidated the FCC’s 2015 order, there was no agency interpretation enjoying the force of law to which the Court could have deferred.<sup>174</sup> At the same time, the Court could have at least considered whether to assign significance to the position of the Solicitor General, whether because the policy views of the Executive Branch more generally are better informed and more democratically legitimate than those of federal judges, or because the Solicitor General’s position was the best predictor of how the FCC would rule in the future.<sup>175</sup> Relatedly, the Court could have solicited additional briefing from the FCC, to the extent that its position was viewed as importantly distinct from that of the Department of Justice. Such attempts to rely upon the Executive Branch would have seemed sensible, of course, had the Court been more candid about the complex policy choices at issue, balancing concerns with consumer protection and privacy with potentially overly expansive liability (and this is to say nothing of the political complexities, given, in particular, the tremendous influence of the technology sector). Rather than acknowledge this complex reality, though, the Court opted to ignore (by name, at least) the policy reasoning of the various political branch actors involved, pretending instead that grammatical rules and structural reasoning left only one tenable interpretive position.

With the rule of lenity, the story is similar though slightly more complicated. Glossed alternatively as the principle that “penal statutes must be construed strictly”<sup>176</sup> or that courts should “interpret ambiguous penal statutes in favor of the defendant,”<sup>177</sup> some textualists have commented upon the rule critically, warning against any interpretive principle that would invite judges to deviate from a statute’s “most natural” reading. As then-Professor Barrett explained, however, in a 2010 law review article on the relationship between textualism and “substantive” canons, textualists nonetheless embrace the rule of lenity so long as it is taken to apply only if a statute is truly “ambiguous.”<sup>178</sup> In this respect, the critical commentary just mentioned is best understood as warning against a misinterpretation of the interpretive principle or, as Barrett puts it more candidly, an effort to conform the rule of lenity to a more thoroughgoing commitment to faithful agency.

The justifications offered for adherence to the rule of lenity are many. Sometimes textualists explain adherence to the rule mostly in terms of historical pedigree, observing, for instance, that the rule is “perhaps not much less old than [statutory] construction

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<sup>173</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

<sup>174</sup> See *United States v. Mead Corp.*, 533 U.S. 218, 229-33 (2001).

<sup>175</sup> See Ryan D. Doerfler, *Mead As (Mostly) Moot: Predictive Interpretation in Administrative Law*, 36 CARDOZO L. REV. 499 (2014).

<sup>176</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*88.

<sup>177</sup> Barrett, *supra* note 8, at 109.

<sup>178</sup> *Id.* at 166.

itself.”<sup>179</sup> More commonly, textualist appeal to the idea of “fair notice,” offered alternatingly as a constitutional or a purely normative justification, with Justice Gorsuch remarking, for example, that “much like the vagueness doctrine, [the rule of lenity] is founded on ‘the tenderness of the law for the rights of individuals’ to fair notice of the law.”<sup>180</sup> And, as relevant here, textualists consistently describe the rule of lenity as “democracy-promoting,”<sup>181</sup> drawing upon Chief Justice John Marshall’s explanation in *United States v. Wiltberger* that “the power of punishment is vested in the legislative, and not in the judicial, department.”<sup>182</sup> Implicit in Marshall’s reasoning, of course, is that to construe a statute as imposing criminal liability outside its unambiguous “core” would be, in effect, for a court to *create* criminal law. (Hence, the occasional description of the rule of lenity as a prohibition against federal criminal common law.<sup>183</sup>)

Setting aside offered justifications, the rule of lenity also *operates* as a principle of non-intervention. Unlike administrative law settings in which agency adjudication can sometimes establish civil liability as the legal status quo, criminal liability can only be established through judicial enforcement. For that reason, if a court declines to hold a defendant criminally liable on the ground that the statute invoked by the prosecution is insufficiently “clear,” one can understand that decision, ala Easterbrook, as declaring the situation “outside the statute’s domain.”<sup>184</sup> The “party relying upon the statute,” after all, has failed to show that Congress resolved the dispute in the way it alleged, and so the court has declined to rule in its favor, leaving the legal status quo unaffected.<sup>185</sup>

Though uniform in recognizing the principle, textualists have differed and continue to differ in their enthusiasm for it. Practically speaking, this difference manifests mostly in the degree of “ambiguity” believed to be required for the principle to come into play. Scalia and Garner, while emphasizing that “[n]aturally, the rule of lenity has no application when the statute is clear,” recommend that courts construe criminal statutes favorably for defendants when “after all the legitimate tools of interpretation have been applied, ‘a reasonable doubt persists’” as to statutory meaning.<sup>186</sup> This more expansive understanding contrasts with Barrett’s, according to which the rule only serve to select “between *equally plausible* interpretations of ambiguous text”<sup>187</sup> or Kavanaugh who says the rule “applies only in cases of ‘grievous’ ambiguity,” which is to say circumstances in

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<sup>179</sup> *United States v. Wiltberger*, 18 U.S. 76, 95 (1820).

<sup>180</sup> *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019) (quoting *Wiltberger*, 18 U.S. at 95).

<sup>181</sup> *Abramski v. United States*, 573 U.S. 169, 204 (Scalia, J., dissenting) (citing *Wiltberger*, 18 U.S. at 95).

<sup>182</sup> *Wiltberger*, 18 U.S. at 95.

<sup>183</sup> *Screws v. United States*, 325 U.S. 91, 152 (1945) (Roberts, J., dissenting) (describing “Anglo-American conceptions of liberty” according to which “crimes must be defined by the legislature”).

<sup>184</sup> Easterbrook, *Statutes’ Domains*, *supra* note 13, at 544.

<sup>185</sup> *Id.*

<sup>186</sup> SCALIA & GARNER, *supra* note 12, at 299.

<sup>187</sup> Barrett, *supra* note 8, at 123 (emphasis added).

which, “even after applying all of the traditional tools of statutory interpretation,” the Court “can make *no more than a guess* as to what Congress intended.”<sup>188</sup>

Such differences between the justices notwithstanding, it would be misleading to suggest that the rule of lenity has played a major role in the Court’s reasoning at any point in recent decades. Even when affirmatively invoked, the rule has typically been presented as removing “any doubt” as to the correct reading of the statute.<sup>189</sup> In this respect, the rule of lenity differs meaningfully from the *Chevron* doctrine, which, regardless of its influence over case outcomes, was the prevailing analytical frame for statutory cases involving an administering agency until very recently. Be that as it may, there does appear to be a similar if more subtle shift away from using the rule of lenity even as window dressing or as a principle that must be acknowledged if only to be dismissed as having no application. Illustrated more fully in cases from this Term discussed in the next Part, textualist justices today (as well as justices adhering to a textualist methodology strategically) appear increasingly to make a point of saying that the rule of lenity has no application even in opinions that construe the criminal statute at issue in favor of the defendant or to outright ignore the rule in opinions that side against the defendant. As with *Chevron*, then, this deemphasizing of the rule of lenity, though, again, more subtle and more uneven, is further indication of a textualist Court’s decreasing interest in even the appearance of a commitment to non-intervention.

Sticking for now to the narrow discussion of canons, one can see how a refusal to take advantage of lenity can lead to the sorting of “dueling canons” opinions Llewellyn parodied more than 70 years ago. Returning to *Lockhart*, in her majority opinion, Sotomayor ironically cited Llewellyn’s *Remarks* as evidence that the apparent availability of the series-qualifier canon invoked by Kagan in her dissent was inadequate to prove the statute ambiguous since “[t]here are two opposing canons on almost every point.”<sup>190</sup> And in her dissent, Kagan made a point of emphasizing that resorting to the rule of lenity was unnecessary since “the ordinary way all of us use language” was the real reason “why *Lockhart* should win.”<sup>191</sup> Commenting on the decision, Easterbrook lamented that this pair of opinions suggested an “absence of method” in statutory cases.<sup>192</sup> While “attracted to the dissent’s approach,” Easterbrook confessed that he did not “think that either the majority or the dissent in .. *Lockhart* ... can be called wrong” since, as in “most” cases reaching the Court, the language at issue in *Lockhart* was “incomplete.”<sup>193</sup> Given this irresolvable “ambiguity,” Easterbrook continued, the only principled way to resolve a case

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<sup>188</sup> *Shular v. United States*, 140 S. Ct. 779, 788 (Kavanaugh, J., concurring) (emphasis added) (quoting *Ocasio v. United States*, 136 S. Ct. 1423, 1434 n.8 (2016)) (further citations omitted).

<sup>189</sup> *E.g.*, *Yates v. United States*, 574 U.S. 528, 547 (2015) (“Finally, if our recourse to traditional tools of statutory construction leaves any doubt about the meaning of [the statute] we would invoke the rule that ‘ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.’” (quoting *Cleveland v. United States*, 531 U.S. 12, 25 (2000))).

<sup>190</sup> *Lockhart*, 577 U.S. at 361 (quoting Llewellyn, *supra* note 2, at 401).

<sup>191</sup> *Id.* at 377 (Kagan, J., dissenting).

<sup>192</sup> Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U. CHI. L. REV. 81, 83, 84-87 (2017).

<sup>193</sup> *Id.* at 87-90.

like *Lockhart* would be by appeal to lenity or some similar rule.<sup>194</sup> Even there, though, Easterbrook worried that disagreements about how ambiguous a statute must be to trigger the rule might render it insufficiently rule-like—a problem that might be resolved, he suggested intriguingly, through the implementation of a voting rule.<sup>195</sup>

## V. Beyond Canons

While the discussion above focused on interpretive canons, a more ‘wooden’ or ‘mechanical’ textualism has spread much further than that. In multiple cases, textualist reasoning has been the subject of mockery or outright derision in popular coverage, even in circumstances in which the outcomes reached were ones commentators otherwise praised. As illustrated below, the reason, as with the cases involving canons above, is that textualist judges today have no option but to exaggerate the determinacy of linguistic meaning.

Two additional cases from this past Term capture textualism’s current position. Both cases devote extended, dictionary-supported analysis to Congress’s selection of a one- or two-letter word. And much worse, both offer what purports to be careful, detailed linguistic analysis but what is, upon closer inspection, mildly elaborate obfuscation.

Start with *Niz-Chavez v. Garland*.<sup>196</sup> In that case, the Supreme Court considered what discretion the federal government enjoys in issuing “a notice to appear” in a removal proceeding.<sup>197</sup> Under the Immigration and Nationality Act (INA), a non-citizen eligible for removal may receive discretionary relief if, among other things, she has been continuously present in the United States for at least ten years.<sup>198</sup> The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), however, provides that a non-citizen’s continuous presence “shall be deemed to end ... when the [non-citizen] is served a notice to appear” in a removal proceeding.<sup>199</sup> The IIRIRA, in turn, defines “notice to appear” as “written notice ... specifying” various things, including the nature of the proceedings against the recipient, the legal authority under which those proceedings would be conducted, and, as relevant here, their time and location.<sup>200</sup> In *Niz-Chavez*, the government ordered the removal of Augusto Niz-Chavez, sending him a document containing his removal charges.<sup>201</sup> Two months later, the government sent a second document providing Niz-Chavez with the time and place of his hearing.<sup>202</sup> An immigration judge eventually denied Niz-Chavez’s plea for relief under the INA.<sup>203</sup> The Board of

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<sup>194</sup> *Id.* at 90.

<sup>195</sup> *Id.*

<sup>196</sup> 141 S. Ct. 1474 (2021).

<sup>197</sup> *Id.* at 1478.

<sup>198</sup> 8 U.S.C. § 1229b(b)(1).

<sup>199</sup> *Id.* at § 1229b(d)(1).

<sup>200</sup> *Id.* at § 1229(a)(1).

<sup>201</sup> 141 S. Ct. at 1479.

<sup>202</sup> *Id.*

<sup>203</sup> *Niz-Chavez v. Barr*, 789 F. App’x 523, 525-526 (6th Cir. 2019), cert. granted, 141 S. Ct. 84 (2020), and rev’d sub nom. *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021).

Immigration Appeals affirmed, concluding in part that Niz-Chavez was ineligible for discretionary relief because the two documents sent to him by the government collectively constituted “notice to appear” under the IIRIRA and so “stop[ped]” his continuous presence prior to his accruing the needed ten years.<sup>204</sup>

Dividing six to three, the Supreme Court held that the Board erred in its interpretation of the IIRIRA.<sup>205</sup> Writing for the majority, Justice Gorsuch explained that the IIRIRA’s requirement that the government serve “a notice to appear” was incompatible with the Board’s conclusion that a *series* of documents containing the necessary information was enough to end a non-citizen’s continuous presence.<sup>206</sup> To the contrary, Gorsuch continued, Congress’s use of the indefinite article indicated its intention to require the government to issue a “single document” with all the relevant information before continuous presence would cease.<sup>207</sup> Pushing back against this inference, the government and the dissenters, led by Justice Kavanaugh, observed that the IIRIRA defined “notice to appear” as, simply, “written notice,” giving no indication such notice “must be provided in a single document.”<sup>208</sup> Gorsuch countered that the dissenters’ observation was irrelevant because the definition in question defined “notice to appear,” not “a notice to appear,” and so even if one were to substitute the supposedly helpful definition for the operative phrase, the problem posed by Congress’s use of the indefinite article would persist.<sup>209</sup> The dissenters argued further that even *if* Congress’s use of the indefinite article was deliberate (something they seemed to impliedly question), that did not preclude the issuing of “a” written notice in “installments.”<sup>210</sup> Here Kavanaugh pointed to a handful of seemingly helpful examples, including “a job application” that may be submitted “by sending a resume first and then references as they are available.”<sup>211</sup> Gorsuch responded with examples of his own, observing, for instance, that “someone who agrees to buy ‘a car’ would hardly expect to receive the chassis today, wheels next week, and an engine to follow.”<sup>212</sup> More generally, Gorsuch observed, “[n]ormally, indefinite articles (like ‘a’ or ‘an’) precede *countable* nouns,” suggesting that here Congress intended to refer to a “countable object (‘a notice,’ ‘three notices’),” as opposed to a “noncountable abstraction (‘sufficient notice,’ ‘proper notice’)” as the government and the dissenters were suggesting.<sup>213</sup>

Liberal commentators were enthusiastic about the Court’s pro-immigrant outcome. At the same time, Gorsuch’s text-bound opinion elicited mockery. *Slate* reporter Mark Joseph Stern, for example, belittled Gorsuch’s reasoning as “persnickety libertarianism”

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<sup>204</sup> *Id.*

<sup>205</sup> *Niz-Chavez*, 141 S. Ct. at 1486.

<sup>206</sup> *Id.* at 1480.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 1490 (Kavanaugh, J., dissenting).

<sup>209</sup> *Id.* at 1480.

<sup>210</sup> *Id.* at 1491 (Kavanaugh, J., dissenting).

<sup>211</sup> *Id.* at 1492 (Kavanaugh, J., dissenting).

<sup>212</sup> *Id.* at 1481.

<sup>213</sup> *Id.*



and a “grammatical geek-out.”<sup>214</sup> Similarly, law professor Michael Dorf called Gorsuch’s argument “ridiculous,” complaining that the justice’s “petty sticklerism,” despite “fortuitously benefit[ing] an undocumented immigrant,” was “still petty sticklerism.”<sup>215</sup>

One sympathizes with this sort of derision. Though presented as careful linguistic analysis, Gorsuch’s opinion mostly alternates between question-begging and misdirection. Gorsuch’s appeal to countable nouns, for instance, is simply a non-sequitur insofar as an example like “a job application” submitted in installments *is* an example of countable nouns that *can be delivered in installments*. (In referencing “written notice” as a “noncountable abstraction,” Gorsuch appears to be harkening back to the dissenters’ argument based on the definition of “notice to appear,” but that argument is wholly separate from the observation that singular objects sometimes are delivered in parts.) Ultimately, the best Gorsuch can muster to explain away such examples is to offer examples of his own, explaining why his are more similar.<sup>216</sup> Most forcefully, Gorsuch observes that one would expect “an indictment in a criminal case or a complaint in a civil case” to arrive in a single document.<sup>217</sup> In response, the dissenters observe that, unlike an indictment or a complaint, a notice to appear contains “charging information *and* logistical calendaring information,” making it “easy to understand why a notice to appear might require two installments while an indictment requires only one.”<sup>218</sup>

Implicit in the previous exchange, of course, is that whether Congress intended (or maybe better *precluded*) the use of multiple documents in providing “a notice to appear” turns less on the grammatical article that Congress selected than what practicalities Congress did or did not have in mind. Concerning such “policy arguments,” Gorsuch candidly observes that, in this case, “[a]s usual, there are (at least) two sides,” which is why the Court was resting its decision on Congress’s “plain statutory command,” and not “raw consequentialist calculation.”<sup>219</sup> Notably, the dissenters in this regard sounded remarkably like Gorsuch, conceding that “one may reasonably debate” which of the two readings of the IIRIRA was better as a matter of policy, but that here, the Court’s job was to “follow the law passed by Congress and signed by the President,” the meaning of which was “clear” in their view.<sup>220</sup> For all nine justices, then, the IIRIRA admits of only one plausible reading. Such an implausible claim is forced most obviously for Gorsuch, who, wishing to decide against the government but thus far unable to assemble five votes to declare *Chevron* no longer the law, must insist that the available “textual and structural

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<sup>214</sup> Mark Joseph Stern, *Neil Gorsuch’s Persnickety Libertarianism Gave Immigrants a Win at the Supreme Court*, SLATE (April 29, 2021, 2:54pm) <https://slate.com/news-and-politics/2021/04/gorsuch-libertarian-textualist-immigrant-rights.html>

<sup>215</sup> Michael C. Dorf, *Petty Sticklerism That Fortuitously Benefits an Undocumented Immigrant is Still Petty Sticklerism*, DORF ON LAW (April 30, 2021), <http://www.dorfonlaw.org/2021/04/petty-sticklerism-that-fortuitously.html>

<sup>216</sup> *Niz-Chavez*, 141 S. Ct. at 1481.

<sup>217</sup> *Id.* at 1482 (citing Tr. of Oral Arg. in *Pereira v. Sessions*, O. T. 2017, No. 17–459, p. 39) (alteration omitted).

<sup>218</sup> *Id.* at 1492 (Kavanaugh, J., dissenting).

<sup>219</sup> *Id.* at 1486.

<sup>220</sup> *Id.* at 1498 (Kavanaugh, J., dissenting).

clues” permit the Court to “resolve the interpretive question,” thus making irrelevant any “conflicting reading the government might advance.”<sup>221</sup> For Kavanaugh and the other dissenters, though, deferring to the Board’s interpretation of ambiguous statute would seem like an attractive, less embarrassing route to the same outcome. And yet, similarly skeptical of agency deference, the dissenters too are compelled to say that, despite the contestable underlying policy issue, Congress’s instruction can only be read one way.

Consider next *Van Buren v. United States*.<sup>222</sup> The question there was whether the Computer Fraud and Abuse Act of 1986 (CFAA) criminalizes the use of computer access for an improper purpose.<sup>223</sup> Nathan Van Buren, a police officer, had run a license-plate search in a law enforcement database in exchange for money as the target of a sting operation by the Federal Bureau of Investigation. While Van Buren had been authorized to access the database for law enforcement purposes, his use of the database for personal gain plainly (and knowingly) violated departmental policy. The question in *Van Buren* was whether this conduct also violated the CFAA, which imposes criminal liability on someone who “intentionally accesses a computer without authorization or exceeds authorized access.”<sup>224</sup> The Act in turn defines “exceeds authorized access” as “to accesses a computer with authorization and use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter.”<sup>225</sup> According to Van Buren, the operative provision of the CFAA did not apply to his conduct because that provision concerns only information one is not permitted to access for any reason. The government, by contrast, argued that the provision applies to anyone who accesses information for an unauthorized purpose, regardless of whether that person could access the same information legitimately for some other reason.<sup>226</sup>

Six justices sided with Van Buren. Writing for the Court, Justice Barrett set aside the “host of policy arguments” raised by Van Buren and the government, “start[ing],” instead, “with the text of the statute.”<sup>227</sup> Drawing on the Random House Dictionary of the English Language and Black’s Law Dictionary, Barrett observed that Van Buren was uncontestably “entitled” to obtain the license-plate information at issue given his position as a police officer.<sup>228</sup> But was he “entitled so to obtain” that information, as the CFAA required? Appealing again to Black’s Law Dictionary and this time the Oxford English Dictionary, Barrett reasoned that “so,” as used in the Act, “serves as a term of reference that recalls ‘the same manner as has been stated’ or ‘the way or manner described.’”<sup>229</sup> And since the “only manner of obtaining information already stated” in the relevant

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<sup>221</sup> *Id.* at 1480.

<sup>222</sup> 141 S. Ct. 1648 (2021).

<sup>223</sup> *Id.* at 1652.

<sup>224</sup> *Id.*

<sup>225</sup> 18 U.S.C. § 1030(e)(6).

<sup>226</sup> *Van Buren*, 141 S. Ct. at 1653.

<sup>227</sup> *Id.* at 1654.

<sup>228</sup> *Id.* (citing RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 649 (2d ed. 1987); BLACK’S LAW DICTIONARY 477 (5th ed. 1979)).

<sup>229</sup> *Id.* (citing Black’s Law Dictionary, at 1246; 15 Oxford English Dictionary 887 (2d ed. 1989)).

provision is “via a computer [one] is authorized to access,” it follows that one only obtains information, for CFAA purposes, one is not “entitled so to obtain” if one obtains that information using a computer one is *not* “authorized to access.”<sup>230</sup> Against this interpretation, Barrett noted that the government read “entitled so to obtain” to refer to “information one was not allowed to obtain *in the particular manner or circumstances in which he obtained it.*”<sup>231</sup> That “manner or circumstance,” Barrett continued, supposedly included “any ‘specifically and explicitly’ communicated limits on one’s right to access information.”<sup>232</sup> Despite “surface appeal,” Barrett reasoned, the government’s reading “prove[d] to be a sleight of hand” since it had interpreted “so” to refer to a “manner or circumstance” but had “ignore[d] the definition’s further instruction that such manner or circumstance already will ‘have been stated,’ ‘asserted,’ or ‘described.’”<sup>233</sup> After all, on the government’s interpretation, the “manner or circumstance” captured by “so” is “not identified earlier in the [CFAA]” but instead could “appear[] *anywhere*—in the United States Code, a state statute, a private agreement, or anywhere else.”<sup>234</sup>

Like Gorsuch’s opinion in *Niz Chavez*, Barrett’s extended discussion of “so” in *Van Buren* also invited mockery. While here again liberal commentators were generally praising of the Court’s non-carceral outcome, veteran Supreme Court reporter Marcia Coyle chided Barrett and her textualist colleague Justice Thomas (more on Thomas’s dissent below) for being unable to agree on the meaning such a simple term.<sup>235</sup> Similarly, law professors Leah Litman, Melissa Murray, and Kate Shaw jointly characterized Barrett’s opinion as “fetishistically textualist,” with Murray comparing Barrett’s analysis to then-President William Jefferson Clinton’s infamous disputation of the meaning of “is.”<sup>236</sup> And law professor Nicholas Bagley summarized his assessment as follows: “The outcome is good; the analysis is daft. How many dictionaries can you cite, to so little effect?”<sup>237</sup>

Such disparaging commentary was understandable. As Justice Thomas observed in his dissent, Barrett’s extended discussion of “so” itself proved a sleight of hand.<sup>238</sup> Given his status as a police officer, there was, of course, a sense in which Van Buren was “authorize[d]” to “access[]” the law enforcement database at issue. There was also, though, a sense in which he was not since one could also hear Van Buren’s “authoriz[ation]” as having been limited to “accessing” that database *for legitimate*

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<sup>230</sup> *Id.* at 1654-55 (citations omitted).

<sup>231</sup> *Id.* at 1654 (emphasis in original).

<sup>232</sup> *Id.* at 1654-55.

<sup>233</sup> *Id.* at 1655 (internal quotation marks and alteration omitted)

<sup>234</sup> *Id.* at 1655.

<sup>235</sup> Marcia Coyle, *So, Yeah, 'Textualists' Barrett and Thomas Won't Agree on Everything*, NAT. LAW J. (June 3, 2021), <https://www.law.com/nationallawjournal/2021/06/03/so-yeah-textualists-barrett-and-thomas-wont-agree-on-everything/>.

<sup>236</sup> STRICT SCRUTINY, FETISHISTICALLY TEXTUALIST (June 4, 2021), <https://strictscrutinypodcast.com/podcast/fetishistically-textualist/>.

<sup>237</sup> NICHOLAS BAGLEY (@NICHOLAS\_BAGLEY), TWITTER (June 3, 2021, 6:12 PM), [https://twitter.com/nicholas\\_bagley/status/1400591220729069569](https://twitter.com/nicholas_bagley/status/1400591220729069569).

<sup>238</sup> *Van Buren*, 141 S. Ct. at 1662-63 (Thomas, J., dissenting).

*purposes*.<sup>239</sup> The government noted this possible interpretation in its briefing, only for Barrett to brush it aside as lacking “any textual basis.”<sup>240</sup> Despite this assertion, the government’s alternate reading showed, however, that the case turned less on the meaning of “so” than on the nature of Van Buren’s “authoriz[ation],” which was something appeal to dictionaries was not going to settle. To the contrary, whether Congress intended a broad or narrow reading of “authoriz[ation]” depended on whether it meant to create narrow or broad criminal liability for computer misconduct, which is to say it depended on what Congress was trying to *do* with the statute.

And here we return to the “host of policy arguments,” the significance of which Barrett tried to downplay at the outset.<sup>241</sup> On Van Buren’s side was the entirely reasonable concern that the government’s interpretation would subject employees prohibited from using their workplace computer for personal use to criminal liability for checking their email or reading the news. For the government, there was the nontrivial worry that a national security official might evade liability despite misusing their access to monitor a former spouse. Barrett understandably preferred not to rest her conclusion on such arguments the underdeterminacy of which (in terms of Congress’s intention) almost jumps off the page. At the same time, Barrett was conspicuously unwilling to place weight on the rule of lenity, seemingly an easy basis upon which to reach the resolution that she preferred but the inapplicability of which Barrett chose to highlight.<sup>242</sup> (In dissent, Thomas ignored the rule of lenity, reasoning instead that any ambiguity in the case could be resolved by the presumption that Congress uses the “ordinary meaning” of a term.<sup>243</sup>) The reason, according to Barrett, was that Van Buren’s interpretive arguments left no ambiguity to be resolved.<sup>244</sup> As a result, Barrett was stuck with dictionaries and an extended (and irrelevant) discussion of ‘so.’

## VI. Conclusion

In its modern form, textualism promised to be less wooden than its earlier manifestations through careful attention to interpretive context. By recognizing the inherently flexible, *practical* nature of words, modern textualists would thus be able to avoid the embarrassing ‘contradictions’ that saddled their predecessors. To avoid that sort of embarrassment, though, required that textualists be more modest about the determinacy of statutory language. To make their method of interpretation less wooden, after all, was to make it more nuanced and, accordingly, to make it more vulnerable to reasonable disagreement about its application in individual cases. To back away from the ‘foolish pretense’ of statutory determinacy was awkward, though, in a legal environment

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<sup>239</sup> *Id.* at 1663 (Thomas, J., dissenting).

<sup>240</sup> *Id.* at 1655.

<sup>241</sup> *Id.* at 1654.

<sup>242</sup> *Id.* at 1661 (“Because the text, context, and structure support Van Buren’s reading, neither of these canons [the rule of lenity or constitutional avoidance] is in play.”).

<sup>243</sup> *Id.* at 1688 (Thomas, J., dissenting) (citation omitted).

<sup>244</sup> *Id.* at 1661.

disfavoring the open exercise of judicial discretion, and all the more so for proponents of an interpretive methodology grounded so explicitly in a commitment to democratic self-rule and opposition to juristocracy.<sup>245</sup>

To the extent that it did, modern textualism was able to incorporate a more Realist understanding of legal determinacy because it also contained a (concededly modest) commitment to judicial non-intervention. That commitment is, however, now mostly gone. Seemingly motivated by a desire to accrue power to a now firmly conservative judiciary, a combination of interpretive methodological conversions and new judicial appointments has yielded a federal judiciary committed not only to textualism but also to deciding the cases before them on the basis of “independent” judicial judgment.<sup>246</sup> And because the legal environment *continues* to disfavor the open exercise of judicial discretion—and understandably so, given judges’ comparative lack of democratic legitimacy<sup>247</sup>—the result has been increasingly wooden analysis, giving new and unfortunate relevance to Llewellyn’s near-century old critique.

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<sup>245</sup> See Samuel Moyn, *Resisting the Juristocracy*, B. REV. (Oct. 5, 2018), <https://bostonreview.net/articles/samuel-moyn-resisting-juristocracy/>.

<sup>246</sup> *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 119 (2015) (Thomas, J., concurring in the judgment).

<sup>247</sup> See Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CAL. L. REV. 1703 (2021).