THE EMERGING CONTOURS OF JUSTICE THOMAS'S TEXTUALISM

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To understand Justice Clarence Thomas as a jurist it is necessary to look closely at his statutory reasoning, for questions regarding how to read statutes figure large in his opinions. Although his philosophy of interpretation is by no means fully developed, he is leaving his mark on the new textualist movement as he explores the boundaries of sole recourse to the text. The purpose of this paper is to consider how Justice Thomas interprets statutes. The first part sets out the principles he references in his opinions. The second part addresses the need for higher–order rules justifying how canons are chosen and when outside sources may be used.

I. JUSTICE THOMAS'S PRINCIPLES OF STATUTORY CONSTRUCTION

A. Primacy of the Text

Justice Thomas begins with the text. He often prefaces his opinions by stating, "we turn first, as always, to the text of the statute."[1] This is a philosophical and methodological commitment. Philosophically, along with Justice Antonin Scalia, Thomas believes that

> [t]o be a textualist in good standing, one need not be too dull to perceive the broader social purposes that a statute is designed, or could be designed, to serve; or too hidebound to realize that new times

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[1] Shannon v. United States 512 U.S. 573, 580 (1994). *See, e.g.,* Gustafson v. Alloyd, 513 U.S. 561, 584 (1995) (Thomas, J., dissenting) ("'[T]he starting point in every case involving construction of a statute is the language itself.'") (citing Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985) (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J., concurring))); Holder v. Hall, 512 U.S. 874, 914 (1994) (Thomas, J., concurring) ("[W]hen interpreting any statute, we should begin with the statutory language."); United States v. Alvarez–Sanchez, 511 U.S. 350, 356 (1994) ("When interpreting a statute, we look first and foremost to its text."); Connecticut Nat. Bank v. Germain, 503 U.S. 249, 254 (1992) ("[W]e think that judicial inquiry into the applicability of § 1292 begins and ends with what § 1292 does say and with what § 158(d) does not.").

> require new laws. One need only hold the belief that judges have no authority to pursue those broader purposes or write those new laws.[2]

Assisted by canons and dictionaries, Justice Thomas asks whether the statutory text admits of plain interpretation, and if so, then "judicial inquiry is complete;"[3] or if there is irreducible ambiguity, and if so looks guardedly beyond. Where he finds that the statute speaks plainly, he takes its expression as conclusive of legislative intent.[4] When he must go beyond, he looks to sources of intent such as clear statement rules and legislative history. He seeks not strict construction but reasonable interpretation. The text is his lodestar.[5]

Thus, if words may reasonably be interpreted in more than one way, clarification should be sought first by reference to the statutory text. In *Varity Corp. v. Howe*,[6] Justice Thomas criticized the majority for beginning with common law rather than statutory text to determine whether an employer is an ERISA fiduciary.[7] He considered the majority's "novel approach to statutory construction," which he perceived as standing the traditional approach "on its head."[8]

Where Congress uses a common law term with a long–established meaning, absent indication otherwise, it presumably adopts that meaning.[9] However, ERISA specifically defines "fiduciary" to permit trustee–beneficiary arrangements generally prohibited by the common law of trusts, thus easing employer/administrator fears of financial liability and encouraging necessary business decisions.[10] Thomas wrote:

> Though we recognize that Congress borrowed from the common law of trusts in enacting ERISA, we must not forget that ERISA is a statute, and in "every case involving construction of a statute," the "'starting point . . . is the language itself.'". . . We should be particularly careful

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2 JUSTICE ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE COMMON LAW 23 (1997).

3 *Germain*, 503 U.S. at 254. ("When the words of a statute are unambiguous, then, the first canon is the last; judicial inquiry is complete.").

4 *See id.* at 253–54 ("[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and time again that courts must presume that a legislature says in a statute what it means and means what it says there.").

5 *See* McFarland v. Scott, 512 U.S. 849, 865 (1994) (Thomas, J., dissenting) ("[I]n any case of statutory interpretation, our primary guide to Congress' intent should be the text of the statute.").

6 516 U.S. 489 (1996) (Thomas, J., dissenting).

7 *See id.* at 528–29.

8 *Id.*

9 *See* Molzof v. United States, 502 U.S. 301 (1992).

10 *See Howe*, 516 U.S. at 528–29 (quoting . Justice Thomas would go on to say that ERISA made an employer who was also the plan administrator liable as a fiduciary only to the extent "he has any discretionary authority or discretionary responsibility in the administration of such plan." *See* 29 U.S.C. § 3(21)(A)(iii) and 29 U.S.C. § 1002(21)(A)(iii) (1998).

> to abide by the statutory text in this case, since, as explained, ERISA's statutory definition of a fiduciary departs from the common law in an important respect. *The majority, however, tells us that the "starting point". . . is the common law of trusts.*[11]

Where terms are undefined in the statute, they should be given their ordinary meaning. Dissenting in *Morse v. Republican Party*,[12] Justice Thomas wrote: "The Voting Rights Act provides no definition of the term 'State.' When the words in a statute are not otherwise defined, it is fundamental that they 'will be interpreted as taking their ordinary, contemporary, common meaning.'"[13] Thomas refers to the dictionary definition of "state" to determine its ordinary meaning.[14] He also finds textual support for use of the ordinary meaning interpretation of "state."[15] He criticized Justice Stevens for beginning, not with the statutory text, but with the administrative regulation applied by the lower court:

> In light of the plain meaning of the phrase "State or political subdivision," I see no reason to defer to the Attorney General's regulation interpreting that statute to cover political parties . . . . Without so much as a nod to the explicit "State or political subdivision" limitation in § 5, Justice Stevens substitutes the administrative regulation as the analytical starting point in this case.[16]

The starting point is the plain and ordinary meaning of the text, not an external source, such as an administrative regulation.

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[11] *Id.* at 528 (citations omitted) (emphasis added).

[12] 517 U.S. 186 (1996) (Thomas, J., dissenting). *Morse* concerned a fee assessed in connection with becoming a delegate to a convention to nominate the party's senatorial candidate. *Id. at* 191–92. Section 5 of the Voting Rights Act stated that any change by a "[s]tate or political subdivision" concerning voting required preclearance with the Attorney General." *Id.* at 253.

[13] *Id.* at 253–54. (quoting Perrin v. United States, 444 U.S. 37, 42 (1979)).

[14] *See id.* at 254. Justice Thomas applied the canon that where Congress does not provide a definition in the statute then terms are to be given their natural and ordinary meaning. Noting that the Voting Rights Act did not provide a definition of the term "state," he used the ordinary meaning as derived from Webster's New International Dictionary included only geographic location and did not relate at all to a political party. *See id.*

[15] *See id.* at 290 (Thomas, J., dissenting). Justice Thomas criticized the majority for "[cutting] 42 U.S.C.A. § 5 loose from its explicit textual moorings regarding both the types of entities and the kinds of changes that it governs." *Id.* Justice Thomas felt that it was clear that a political party is not a "state or political subdivision." Thus, § 5 was not triggered. In addition, the Voting Rights Act of 1965 § 14(c)(2) defined the term "political subdivision" as any "county or parish." *Id.*

[16] *Id.* at 258–62 (citations omitted).

B. Resolving Statutory Ambiguities

Rejecting legislative history and sources outside the statutory text, Justice Thomas relies on canons of construction to resolve statutory ambiguity. His use of canons mirrors Justice Scalia's philosophy, seeking to restrain judicial legislation and reduce uncertainty attendant upon recourse to external sources. He uses canons extensively and criticizes what he understands to be misapplication by other Justices.

1. Congress Is Presumed to Say What it Means in the Text

In *Connecticut National Bank v. Germain*,[17] Thomas emphasized that one "cardinal canon" is to be considered first: "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."[18] In *Germain*, the appellant argued that § 158 of the Bankruptcy Code was silent regarding interlocutory appeals, thus 28 U.S.C. § 1291 and § 1292 denied, by negative implication, Federal Courts of Appeal jurisdiction regarding interlocutory orders from a District Court sitting as bankruptcy appellate court.[19] Rejecting this rationale, Justice Thomas stated:

> [W]e think that judicial inquiry into the applicability of § 1292 begins and ends with what § 1292 does say and with what § 158(d) does not. . . . [N]owhere else . . . has Congress indicated that the unadorned words of § 1292 are in some way limited by implication. "It would be dangerous in the extreme to infer . . . that a case for which the words of an instrument expressly provide, shall be exempted from its operation."[20]

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[17] 503 U.S. 249 (1992).

[18] *Id.* at 253–54.

[19] *See id.* at 251–52. *Germain* argued that 28 U.S.C. § 1292(b), which states:

> [A] district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such an order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . ."

However, the Court held that the penultimate language of the statute allowing the "Court of Appeals . . . discretion [to] permit an appeal to be taken from such order" did not apply in Germain's case. The rationale was that Congress limited the scope of § 1292 by negative implication (via the absence of jurisdiction granted the Court of Appeals over interlocutory appeals in 22 U.S.C. § 158 (1992) (governing bankruptcy appeals). Conversely, § 1291 confers upon the Court of Appeals jurisdiction over appeals from any district court decision in any capacity.

[20] *Germain*, 503 U.S. at 254 (quoting Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202 (1819)).

He concluded § 158 and § 1292 are not in conflict because Congress would be presumed to have been aware of § 158 when later drafting § 1292.

2. Presumption of Ordinary Meaning

Thomas presumes the "ordinary meaning" of statutory terms unless Congress indicates otherwise. Thus, in *Holder v. Hall,*[21] in the absence of express definition, he gave the terms "standard practice or procedure" their ordinary meaning in order to interpret § 2 of the Voting Rights Act of 1965.[22] He criticized the Court's previous precedent for "[stretching] the terms 'standard practice or procedure' beyond the limits of ordinary meaning."[23] "Common sense," he concluded, determines that a governing body's size and structural aspects do not "comfortably fit within the terms."[24]

In *Gustafson v. Alloyd Co., Inc.,*[25] the majority used the ordinary meaning of "prospectus" in interpreting § 12(2) of the Securities Act of 1933.[26] Justice Thomas agreed that the term "prospectus," understood as a term of art, applies only to initial offerings in a sale of securities. However, § 2(10) defined "prospectus" expansively as "any prospectus, notice, circular, advertisement, letter, or communication . . . which offers any security for sale or confirms the sale . . . ."[27] Thomas said:

> For me, the breadth of these terms forecloses the majority's position that "prospectus" applies only in the context of initial distributions . . . . Indeed, § 2(10)'s inclusion of a prospectus as only one of the many different documents that qualify as a "prospectus" for statutory purposes indicates that Congress intended "prospectus" to be more that a mere "term of art." Likewise, Congress' extension of [the term] prospectus . . . underscores Congress' intent to depart from the term's ordinary meaning.[28]

Thomas subordinates ordinary meaning to express statutory definition.

3. Legal Definition and Cluster of Ideas Adopted Regarding Terms of Art

In interpreting legal "terms of art," absent contrary indications, Thomas presumes Congress knows and adopts the term's legal definition

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21 512 U.S. 874 (1994).

22 *See id.* at 915 (Thomas, J., dissenting).

23 *Id.*

24 *Id.*

25 513 U.S. 561 (1995).

26 *See id.* at 585 (Thomas, J., dissenting).

27 *Id.*

28 *Id.* at 585–86.

and accompanying "cluster of ideas."[29] In *Molzof v. United States*,[30] he determined the scope of the Federal Tort Claims Act's prohibition of "punitive damage" assessments against the United States.[31] The United States Court of Appeals for the Seventh Circuit affirmed the denial of the appellant's medical expenses because they were "punitive" in nature.[32] The Government argued that any damages not strictly compensatory were barred under the Act.[33] Thomas found the Government's broad reading contrary to the statutory text.[34] He recognized that under common law, the purpose of "punitive damages" was punishment, focusing on the defendant's conduct.[35] Unless Congress indicates differently, the term "punitive damages" is an established common law term and must be accorded that meaning.

4. When Borrowing from a State Statute Congress Adopts the State's Construction

Thomas presumes that when Congress borrows from a state statute with an established construction it adopts that construction, but he applies this canon only where there are no actual differences between Congress' enactment and the relevant state statute.[36] In *Shannon v. United States*,[37] the petitioner argued that Congress "borrowed" from § 24–301 of the District of Columbia Code in drafting the Insanity Defense Reform Act (hereinafter "IDRA"), the effect of which is to require a jury instruction on the consequences of a not–guilty–by–reason–of–insanity verdict.[38] In discussing the canon, Thomas said that it is only a "presumption of legislative intent."[39] While admitting Congress was influence by the D.C. Code, Thomas distinguished "borrowing" from "influencing."[40] He concluded that Congress was merely "influenced" because of the textual differences in IDRA and the D.C. statute.[41]

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29 Evans v. United States, 504 U.S. 255, 278 (1992) (Thomas, J., dissenting).

30 502 U.S. 301 (1992).

31 *See id.* at 302.

32 *See id.* at 304.

33 *See id.* at 306.

34 *See id.*

35 *See id.*

36 *See id.*

37 512 U.S. 573 (1994).

38 *See id.*

39 *Id.* at 583 (quoting Carolene Prod. Co. v. United States, 323 U.S. 18, 26 (1944)).

40 *Id.*

41 *See id.* For example, Thomas pointed out that IDRA required a "clear and convincing" standard of insanity compared to "by a preponderance of the evidence;" IDRA required a commitment hearing within 40 days of the NGI verdict compared to 40; IDRA

Thomas believed that a full and complete adoption of the state statute's text and ideas was required for this canon to apply.[42]

5. Statutory Language is not Construed as to Render Language Superfluous

Justice Thomas avoids interpreting ambiguities to render statutory language superfluous. At issue in *National Credit Union Administration v. First National Bank and Trust Co.*[43] was whether the term "common bond" in the Federal Credit Union Act allows multiple and unrelated employer groups membership in the same credit union.[44] Section 109 states: "Federal credit union membership shall be limited to groups having a *common bond* of occupation or association, or to groups within a well-defined neighborhood, community, or rural district."[45] Rejecting the National Credit Union Administrator's (hereinafter "NCUA") "internal common bond" argument, Thomas stated:

> NCUA's current interpretation makes the phrase "common bond" surplusage when applied to a federal credit union made up of multiple unrelated employer groups, because each "group" in such a credit union already has its own "common bond" . . . . If the phrase "common bond" is to be given any meaning when these employees are joined together, a different "common bond"—one extending to each and every employee considered together—must be found to unite them . . . . [I]t does not exist, however, when employees of unrelated groups are so joined. [46]

In *First National Bank and Trust Co.*, Thomas found the NCUA's reading of § 109 also violated the canon: "[S]imilar language contained within the same section of a statute must be accorded a consistent meaning."[47] He interpreted § 109's geographic limitation parallel to the "common bond" requirement:[48]

> [A]ll of the groups must come from the same "neighborhood, community, or rural district." The reason that the NCUA has never interpreted, and does not contend that it could interpret, the geographical limitation to allow a credit union to be composed of

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has a separate standard of "clear and convincing evidence" to be released after an NGI; and a fundamental difference in the test of insanity by requiring a more restrictive and narrow test under IDRA. *Id.* at 577, 581. [The quoted phrases in this paragraph appear on these 2 pages respectively].

42 *Id.* at 582.

43 522 U.S. 479 (1998).

44 *See id.* at 483.

45 *Id.* at 484 (citing 12 U.S.C. § 1759 (1998)) (emphasis added).

46 *Id.* at 501.

47 *Id.*

48 *See id.*

> members from an unlimited number of unrelated geographic units, is that to do so would render the geographic limitation meaningless . . . . We must interpret the occupational limitation in the same way.[49]

In discussing this canon, Thomas is really supporting his first argument against rendering language superfluous.

C. Leaving Policy to Congress

Justice Thomas's opinions often give voice to his conviction that textual departure leads to political theorizing which, he believes, is beyond the Court's province in the federal scheme of separation of powers.[50] A court may discern an ambiguity in order to advance its policy preferences, as to which Thomas wrote: "Matters of public political theory are beyond the ordinary sphere of federal judges. And that is precisely the point."[51]

In *Holder v. Hall*,[52] a plurality of the Court held that a governing authority's size is exempt from a vote dilution challenge under § 2 of the Voting Rights Act of 1965 because no objective standard exists.[53] Although concurring, Justice Thomas criticized resolution of the case on the ground of the lack of a standard.[54] Instead, he believed the text resolved the matter.[55] Thomas found the text's limitation to "standard practice and procedure" precluded any consideration of vote dilution. Therefore, the lack of a standard was irrelevant.[56] He criticized the vote dilution precedent: "Vote dilution cases have required the federal courts to make decisions based on highly political judgments—judgments that courts are inherently ill–equipped to make,"[57] he further added, "matters the Court has set out to resolve in vote dilution cases are questions of political philosophy, not questions of law."[58]

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[49] *Id.*

[50] *See, e.g.*, Holder v. Hall, 512 U.S. 874, 891–947 (1993) (Thomas, J., concurring).

[51] *Id.* at 901.

[52] 512 U.S. 874 (1993).

[53] *See id.* at 885–86. Justice Kennedy, joined by Justice O'Connor and Chief Justice Rhenquist held that the size of a governmental body cannot be challenged under a vote dilution challenge under § 2 because there was no objective benchmark for which to measure the existing voting practice. This rationale did not foreclose the challenge of vote dilution under the standard, practice, or procedure clause of § 2. *See id.*

[54] *See id.* at 892.

[55] *See id.* "While the practical concerns Justice Kennedy and O'Connor point out can inform a proper construction of the Act, I would explicitly anchor analysis in this case in the statutory text." *Id.*

[56] *See id.*

[57] *Id.* at 894.

[58] *Id.* at 901.

In *Gustafson v. Alloyd Co., Inc.*, Thomas also criticized the Court for resolving the case by reference to policy considerations.[59] The majority narrowly interpreted the term "prospectus" in § 12(2) of the Securities Act of 1933[60] only to apply to private sale contracts.[61] An isolated reading of § 12(2) provided no definition of "prospectus," and therefore its ordinary meaning would apply.[62] Justice Thomas found to the contrary, that Congress provided a broad definition in § 2(10), "the term 'prospect' means any prospectus, notice, circular, advertisement, letter, or communication . . . which offers any security for sale or confirms the sale . . . ."[63] Criticizing the holding, he said: "Unfortunately, the majority has decided to interpret the word 'prospectus' in § 12(2) by turning to sources outside the four corners of the statute, rather than by adopting the definition provided by Congress."[64] Justice Thomas accused the majority of "attempting to create ambiguities in § 2(10)" in order to reach its interpretation.[65] He believed the majority's analysis of § 12(2) was motivated by its policy preference to reduce extensive security liability.[66]

In *Caron v. United States*,[67] Thomas chastised the majority for rejecting the "plain meaning [of the statute] on the basis of 'a likely and rational *congressional* policy' of prohibiting firearms possession by all ex–felons."[68] The petitioner was convicted of illegal possession of a firearm under federal law,[69] and received an enhanced sentence.[70] The federal statute is applicable unless restoration of the offender's civil rights includes a prohibition against possession of firearms.[71] Massachusetts law permitted a convicted felon to possess rifles, but restricted possession of handguns to inside one's home or business.[72]

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59 513 U.S. 561 (1995) (Thomas, J., dissenting).

60 15 U.S.C. 77 § 12(2) (1998) creates a cause of action when a seller of securities makes a material omission or misstatement to the buyer by way of a "prospectus" or oral communication.

61 *See Gustafson*, 513 U.S. at 561.

62 *See id.* at 585.

63 *Id.*

64 *Id.* at 585.

65 *Id.* at 586.

66 *See id.* at 594.

67 524 U.S. 308 (1998) (Thomas, J., dissenting).

68 *Id.* at 315 (emphasis added).

69 *See* 18 U.S.C. § 922(g)(1) (1998) prohibits a person convicted of a serious offense from possessing any firearm.

70 *See* 18 U.S.C. § 924(e) (1998) requires that a three time violent felon who violates § 922 receive an enhanced sentence. However, a felon does not violate the statute if his civil rights had been restored by operation of law, unless in restoring his civil rights the law forbids the possession of firearms.

71 *See id.*

72 *See Caron*, 524 U.S. at 315 (Thomas, J., dissenting).

According to Thomas, the plain language of the Massachusetts statute was clear: the petitioner could possess firearms subject to limitations.[73] Because the statute did not prohibit possession, the federal statute did not apply.[74] He rejected the majority's rationale that despite the plain language, Congress could not have intended the "bizarre result" that a conviction does not count if a state only partially restricts the possession of a firearms.[75]

In *Evans v. United States*,[76] Justice Thomas disagreed with the Court's "common law" interpretation of the term "extortion"[77] in the Hobbs Act.[78] The majority held that at common law any taking of something of value by a public official when no payment is due is "extortion."[79] He criticized the majority for ignoring the phrase in the text "under color of office," which has a settled common law meaning.[80] Thomas stated:

> "At common law it was essential that the money or property be obtained under color of office, that is, under the pretense that the officer was entitled thereto by virtue of his office. The money or thing received must have been claimed or accepted in right of office, and the person paying must have yielded to official authority." . . . Although the Court purports to define official extortion under the Hobbs Act by reference to the common law, its definition bears scant resemblance to the common-law crime Congress presumably codified in 1946.[81]

He further criticized the Court for treating extortion as bribery because the two are different crimes with distinct elements.[82] Thomas believed the majority's expansive definition of extortion was motivated by its policy preference:

> I have no doubt that today's opinion is motivated by noble aims. Political corruption at any level of government is a serious evil, and, from a policy perspective, perhaps one well suited for federal law enforcement. But federal judges are not free to devise new crimes to meet the occasion.[83]

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[73] *See id.*

[74] *See id.*

[75] *See id.*

[76] 504 U.S. 255, 294 (1992).

[77] *Id.* at 278 (Thomas, J., dissenting). Thomas criticized the majority's construction and definition of the term "extortion" in the Hobbs Act.

[78] 18 U.S.C. § 1951 (1998).

[79] *See Evans*, 504 U.S. at 259–60 (citing United States v. O'Grady, 742 F.2d 682, 687 (2d Cir. 1984)).

[80] *See id.* at 279.

[81] *Id.* at 279–80 (citing 3 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 1393 at 790–91 (1957)).

[82] *See id.* at 283.

[83] *Id.* at 295.

To Thomas, even the "noble aims" of a court do not justify judicial policy making.

D. Excluding Legislative History

While Justice Thomas has not been as explicit and spirited as Justice Scalia in rejecting legislative history as a guide to statutory interpretation, he takes the textualist position that legislative history is indeterminate and unreliable. For this other members of the Court criticize him. In *Connecticut National Bank v. Germain*,[84] Justice Stevens criticized Thomas for not considering legislative history: "Whenever there is some uncertainty about the meaning of the statute, it is prudent to examine legislative history."[85]

Thomas's textualist approach presents two questions. Why is the use of legislative history impermissible? When if at all may legislative history figure into statutory construction? His answers are (1) consideration of legislative history is inappropriate because it abandons the text as a guide and grants it force of law, and (2) legislative history may be considered where the text is so ambiguous that Congress likely had no intent regarding the matter.

In *Shannon v. United States*,[86] the petitioner offered a Senate Report to support his argument.[87] Rejecting the petitioner's argument, Thomas explained that the Court has never given effect to legislative history not traceable to the text.[88] Thomas gave a brief overview of the Justices' different opinions on using legislative history but did not endorse a position.[89] He said that "[t]o give effect to this snippet of legislative history, we would have to abandon altogether the text of the statute as a guide in the interpretative process."[90]

Justice Thomas also rejects legislative history because its use accords it force of law. In *United States v. R.L.C.*,[91] he noted that the Court must be familiar not only with the United States Code, but with

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84 503 U.S. 249 (1992).

85 *Id.* at 255.

86 512 U.S. 573 (1994).

87 *See id.* at 583. The Senate Report cited by the petitioner said:

> [T]he Committee endorses the procedure used in the District of Columbia whereby the jury, in a case in which the insanity defense has been raised, may be instructed on the effect of a verdict of not guilty by reason of insanity. If the defendant requests that the instruction not be given, it is within the discretion of the court to give it or not.

S.Rep. No. 98–225, p. 240 (1983).

88 *See Shannon*, 512 U.S. at 583.

89 *See id.* at 583–84.

90 *Id.*

91 503 U.S. 291 (1992).

the United States Reporter where a number of "powerful" rules of construction have been developed.[92] Discussing the "rule of lenity," Thomas stated: "Like Congress' statutes, the decisions of this Court are law, the knowledge of which we have always imputed to the citizenry. At issue here, though, is a rule that would also require knowledge of committee reports and floor statements, which are not law."[93] Because the citizenry is presumed to know the law, using legislative history to resolve ambiguity gives a Senate Report or other form of legislative history the force of law, a status never intended.[94] Granting legislative history this status usurps the legislative process. For Justice Thomas, legislative history cannot be law because Congress has not voted it on. Additionally, consideration of legislative history may run afoul of the rule that Congress is presumed to say in the text what it meant.[95]

In *Commissioner of Internal Revenue v. Lundy*,[96] the Court had to reconcile two provisions in the Tax Code. The Code inadvertently allows for two different "look back" periods for which a refund can be claimed after a delinquent filing, depending on where the petition is filed.[97] The ability to collect a refund depends on which "look back period" is correct. The confused nature of the provisions led Thomas to admit: "Congress' intent on this issue is difficult to discern. There is reason to think that Congress simply did not consider how being delinquent in filing a return would affect a taxpayer's right to recover a refund—in any forum."[98]

In trying to resolve the confusion between the provisions, Justice Thomas noted that the selection of a three–year limitation on petitions for timely return coincides with the Government's time to make an assessment.[99] Thomas referenced a Senate Report in making this point.[100] He also framed the issue in a curious way:

> To my mind, then, the question is whether the additional language in § 6512(b)(3)(B) . . . *the statute's legislative history*, or other related statutory provisions indicate that Congress meant to prevent a

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92 *See id.* at 311–12 (Thomas, J., concurring).

93 *Id.* at 312.

94 *See id.* Justice Thomas notes, "I agree with Justice Scalia that there appears scant justification for extending the 'necessary fiction' that citizens know the law, to such extralegal materials." *Id.*

95 *See Germain*, 503 U.S. at 253–54.

96 516 U.S. 235 (1996).

97 *See id.* at 254–56 (Thomas, J., dissenting).

98 *Id.* at 255.

99 *See id.*

100 *See id.* Justice Thomas cites S.REP. NO. 1983, 85th Cong., 2d Sess., 98–99 (1958) to support his point.

> taxpayer from receiving his refund from the Tax Court, even though the other courts could have ordered the refund.[101]

Later in his opinion, Thomas discussed yet another Senate Report to clarify the purpose of one of the provisions with respect to the other.[102] He questioned whether Congress had any intent regarding the two provisions' applicability to delinquent returns and found that any congressional intent was at best obscured.[103]

Lundy suggests legislative history has a limited "last resort" role within Justice Thomas's textualism. Thomas believes the text is the guide in statutory construction.[104] However, his *Lundy* opinion demonstrates that where the text is ambiguous and it is likely Congress had no relevant intent, rules of construction are powerless, making resort to legislative history necessary. Canons of construction help to discern congressional intent from the text, but they do not apply where there is no intent to discern.

E. Summary

The contours of Thomas's textualism are still being defined with each Supreme Court term. However, we can say with certainty that he is committed to the text as his guide and to the canons as his tools. Without regard for his own personal policy preferences, he stands by the text to preserve the judiciary's role as interpreter of the statute, not its maker. Thomas rejects legislative history to avoid giving a committee report or house debate force of law, usurping the legislative process. Additionally, he believes legislative history undermines the primacy of the text. Only where textual ambiguity indicates no congressional intent will he abandon the canons and consider legislative history.

II. THE NEED FOR A UNIFIED THEORY OF STATUTORY INTERPRETATION

A. The Integrity of the Canons

> Hearken and hear them, said he. I affirm that the just is nothing else than the advantage of the stronger.
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> – Thrasymachus of Chalcedon[105]

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101 *Id.* at 257 (emphasis added).

102 *See id.* at 260. Justice Thomas cites to S. REP. NO. 2273, at 15 (1962) ("The Senate Report that accompanied the 1962 amendment to § 6512(b), . . . added what is now § 6512(b)(3)(C) . . . . Rather than demonstrating that § 6512(b)(3)(B) was meant to prohibit recognition of 'real' claims, *this Report*, and the Service's pre–1962 interpretation of § 6512(b)(3)(B) . . . suggest the opposite.") (emphasis added).

103 *See Germain*, 503 U.S. at 260.

104 *See id.*

105 E. HAMILTON & H. CAIRNS, THE COLLECTED DIALOGUES OF PLATO (1980).

Some deconstruct the opinions of Justice Thomas to illustrate that textualism is no prophylactic but the conservative costume of choice. The textualist pretense masks the ideological agenda. Thus, Bradford Mank accused Justice Thomas of injecting anti–environmental bias in his ostensibly textualist dissent in *PUD No. 1 v. Washington Department of Ecology*:[106]

> Justice Thomas'[s] dissenting opinion in *PUD No. 1 v. Washington Department of Ecology*, . . . illustrates that a textualist approach to statutory interpretation will not always lead to favorable results for environmentalists.
>
> . . . .
>
> In dissent, Justice Thomas, joined by Justice Scalia, argued that the majority had misinterpreted the statute by too broadly reading language in Section 401(d) allowing a state to impose "other limitations" beyond the effluent limitations required by Section 301 of the Act, and also argued that the Court's interpretation would allow states to impose virtually any condition on applicants for a permit under the Act. Justice Thomas demonstrated a palpable pro–development bias when he argued that stream flow levels established by the Federal Energy Regulatory Commission (FERC) ought to prevail over state–imposed levels because "[i]n issuing licenses, FERC must balance the Nation's power needs together with the need for energy conservation, irrigation, flood control, fish and wildlife protection, and recreation. State environmental agencies, by contrast, need only consider parochial environmental interests."
>
> In a brief concurring opinion, Justice Stevens argued that "[f]or judges who find it unnecessary to go behind the statutory text to discern the intent of Congress, this is (or should be) an easy case" both because nothing in the Act restricts the power of states to regulate the quality of their waters more stringently than federal law might require and because "the Act explicitly recognizes states' ability to impose stricter standards." Even if textualism is in theory more favorable to environmental interests, a judge who is hostile to environmental values can easily manufacture a textualist argument for ruling against the environment.[107]

Looking ostensibly to Thomas's opinion itself, Mank found it a textualist facade manufactured in order to rule against the environment. If Thomas were true to his textualist presuppositions, he would have opted for the alternative textualist analysis of the seven–Justice majority, including Justices Rehnquist and Kennedy.

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[106] 511 U.S. 700 (1994).

[107] Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro–Environmentalist?: Why Pragmatic Agency Decisionmaking is Better That Judicial Literalism*, 53 WASH. & LEE L. REV. 1231, 1256–57 (1996).

An argument of the sort that as between textualist option A, which is pro–environment, and textualist option B, which is anti–environment, a textualist judge who chooses option B must for that reason alone have done so out of anti–environment bias, cannot be refuted by pointing out that the arguments for option B are persuasive for reasons unrelated to the environment. The assumption is that the judge carries his or her biases into the reasoning without saying so up front. The judge is either deliberately evasive or naively unacquainted with what drives his or her reasoning. Such is the coin of the realist critique. This critique makes an important contribution in throwing down the gauntlet to the textualists to answer the charge of indeterminacy: Is there discretion, what are its bounds, and by what principles is it exercised? But we are getting ahead of ourselves.

Thomas's dissent can fairly be read to arise not out of anti–environmental bias but out of concern for the balance of federal–state relations and a persuasion that the majority's result is not faithful to the text of § 401 of the Federal Water Pollution Act:

> In my view, the Court makes three fundamental errors. First, it adopts an interpretation that fails adequately to harmonize the subsections of § 401. Second, it places no meaningful limitation on a State's authority under § 401 to impose conditions on certification. Third, it gives little or no consideration to the fact that its interpretation of § 401 will significantly disrupt the carefully crafted federal–state balance embodied in the Federal Power Act.[108]

The context of Thomas's remarks about the FERC's balancing role and the "parochial environmental interests" of the state environmental agencies is his argument about the disruptive effect of the majority opinion on the federal–state balance achieved in the Federal Power Act:[109]

> Although the Court notes in passing that "[t]he limitations included in the certification become a condition on any federal license," . . . it does not acknowledge or discuss the shift of power from FERC to the States that is accomplished by its decision. Indeed, the Court merely notes that "any conflict with FERC's authority under the FPA" in this case is "hypothetical" at this stage, . . . because "FERC has not yet acted on petitioners' license application," . . . . We are assured that "it is quite possible . . . that any FERC license would contain the same conditions as the state § 401 application."
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> The Court's observations simply miss the point. Even if FERC might have no objection to the stream flow condition established by respondents *in this case*, such a happy coincidence will likely prove to be the exception, rather than the rule. In issuing licenses, FERC must balance the *Nation's* power needs together with the need for energy

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[108] *PUD No. 1*, 511 U.S. at 724.

[109] *See id.* at 735.

> conservation, irrigation, flood control, fish and wildlife protection, and recreation. 16 U.S.C. § 797(e). State environmental agencies, by contrast, need only consider parochial environmental interests. *Cf. e.g.*, Wash. Rev. Code § 90.54.010(2) (1992) (goal of State's water policy is to "insure that waters of the state are protected and fully utilized for the greatest benefit to the people of the state of Washington"). As a result, it is likely that conflicts will arise between a FERC–established stream flow level and a state–imposed level.
>
> Moreover, the Court ignores the fact that its decision nullifies the congressionally mandated process for resolving such state–federal disputes when they develop.[110]

It may be, as the realist would have it, that Thomas ginned up this argument to insert and justify his anti–environmentalist bias without saying so. It may be that Thomas was not really concerned about federal–state relations here. I merely suggest that the persuasive force of his argument can and should be assessed independently of his personal motives. Taken on its own terms, it cannot be dismissed casually out–of–hand and, indeed, raises important consequentialist considerations that the majority does not answer. His concern about the importance of federal–state relations arises in other contexts.[111] Finally, the contention that Thomas decides ideologically is called into question by decisions in which he declares his policy preferences and holds to the contrary out of respect for the determinations of his method.

It is not unusual for Thomas to find himself in agreement with the policy conclusions or preferences of the majority but to dissent because he finds his interpretive method to require a contrary result. Thomas here suspended his stated policy commitments in deference to the prescriptions of his interpretive method, guided by it rather than his policy predilections, if you take what he says at face value.[112] Three examples follow. In the first, Thomas reached his opinion even if policy might counsel to the contrary. In the second, Thomas held as he did even though he believed policy in fact counseled to the contrary. In the third, Justice Thomas agreed the majority's policy preference was noble, but dissented, believing the Court should apply Congress' policy, not question it.

In *Rowland v. California Men's Colony*,[113] the majority held that only a natural person, and not an "association" under the Dictionary Act,

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[110] *Id.* at 736 (citations omitted).

[111] *See, e.g.*, City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 742 (1995).

[112] I suppose you could say that Thomas is not declaring his *real* concerns. I will not step into this regress. There comes a point where constructive criticism is best advanced by taking ideology out of play–not abandoning it, of course, or denying its potential explanatory power–but taking the stated arguments on their own terms for what they bring to the table and accepting or refuting them as you will.

[113] 506 U.S. 194 (1993).

could qualify for treatment *in forma pauperis* under 28 U.S.C. § 1915(a). Section 1 of the Dictionary Act provides that "in determining the meaning of any Act of Congress, unless the context indicates otherwise . . . 'person' [includes] . . . associations" and other artificial entities.[114] Justice Thomas wrote a dissent that was joined by Justices Blackmun, Stevens, and Kennedy, arguing that the Court's holding "rests upon an impermissibly broad reading" of the phrase, "unless the context indicates otherwise," interpreting "context" to refer to the immediate statutory text and other related statutes and "indicates" as short of requirement or syllogism.[115] Thomas found this interpretation of "indicates" to open the door to considerations of policy:

> I do not share the Court's understanding of the word "indicates," however, because its gloss on that word apparently permits (and perhaps even requires) courts to look beyond the words of a statute, and to consider the policy judgments on which those words may or may not be based. (It certainly enables the Court to do so in this case.) . . . Whatever "unless the context indicates otherwise" means, however, it cannot mean "unless there are sound policy reasons for concluding otherwise."[116]

Even if there are sound policy reasons for concluding otherwise, Thomas argued, the text does not exclude "associations":

> Permitting artificial entities to proceed *in forma pauperis* may be unwise, and it may be an inefficient use of the Government's limited resources, but I see nothing in the text of the *in forma pauperis* statute indicating that Congress has chosen to exclude such entities from the benefits of that law.[117]

Thomas argued that the majority's interpretive method turned upon these policy considerations:

> The Court's holding rests on the view that § 1915 has four "contextual features," . . . indicating that only a natural person is entitled to *in forma pauperis* status. These "features" include a few select words in § 1915 and a number of practical problems that may arise when artificial entities seek to proceed *in forma pauperis*. I do not believe that § 1915 contains any language indicating that an association is not a "person" for purposes of that provision, and I do not think it is appropriate to rely upon what are at bottom policy considerations in deciding whether "the context indicates otherwise."[118]

Thomas found the intrusion of policy considerations to be evident in the "difficulties" seen by the Court in its third "contextual feature," § 1915's affidavit requirement:

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[114] 1 U.S.C. § 1

[115] *Id.* at 212–13.

[116] *Id.* at 214.

[117] *Id.* at 215-16.

[118] *Id.* at 217.

> But these are classic policy considerations—the concerns of a legislature, not a court. Unlike the majority, I am perfectly willing to assume that in adding the word "person" to § 1915 Congress took into account the fact that it might be difficult to determine whether an association's member has the authority to speak on its behalf, and that the possibility of perjury prosecution might not deter artificial entities sufficiently. In deciding that "the context indicates otherwise," the Court has simply second-guessed Congress' policy judgments.[119]

Thomas is willing to grant that there might be merit in what he takes to be the majority's policy conclusions, but he is unwilling to allow policy concerns to overrule what he by his method determines the text to say. "While it might make sense as a matter of policy to exclude associations and other artificial entities from the benefits of the *in forma pauperis* statute, I do not believe that Congress has done so."[120]

Likewise, in *Gustafson v. Alloyd Co., Inc.*,[121] the second example, the majority held that § 12(2) of the Securities Act of 1933 ("the Act") does not extend to a private sale contract because the contract is not a "prospectus" as that term is used in the Act. Dissenting, Thomas found the majority's result determined by considerations of policy. Thomas agreed with the majority's policy conclusions but dissented because faithfulness to the text as interpreted by his methodology required the contrary result:

> The majority's analysis of § 12(2) is motivated by its policy preferences. Underlying its reasoning is the assumption the Congress could never have intended to impose liability on sellers engaged in secondary transactions . . . I share the majority's concern that extending § 12(2) to secondary and private transactions might result in an unwanted increase in securities litigation. But it is for Congress, and not for this Court, to determine the desired level of securities liability. . . . The majority is concerned that a contrary reading would have a drastic impact on the thousands of private and secondary transactions by imposing new liabilities and new transaction costs. But the majority forgets that we are only enforcing *Congress'* decision to impose such standards of conduct and remedies upon sellers.[122]

Thomas criticized the majority for defining "prospectus" by reference to sources *outside* the four corners of the statute rather than adopting the definition supplied by Congress *inside* the statute:

> As we have emphasized in our recent decisions, "'[t]he starting point in every case involving construction of a statute is the language itself.'"
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> . . . .

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[119] *Id.* at 220.

[120] *Id.* at 222–23.

[121] 513 U.S. 561 (1995).

[122] *Id.* at 594–95.

> There is no reason to seek the meaning of "prospectus" outside of the 1933 Act, because Congress has supplied just such a definition in § 2(10). That definition is extraordinarily broad.
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> . . . .
>
> The majority seeks to avoid this reading by attempting to create ambiguities in § 2(10). . . . *Noscitur a sociis*, however, does not require us to construe *every* term in a series narrowly because of the meaning given to just one of the terms.
>
> . . . .
>
> The majority uses the canon in an effort to *create* doubt, not to *reduce* it. The canon applies only in cases of ambiguity, which I do not find in § 2(10).[123]

Creating, as opposed to *finding*, ambiguity is a strong charge to level against the majority, for it carries the clear implication that the majority thereby opened the door for its own predilections. Thomas agrees with those preferences but will not find ambiguity where on his reading none exists.[124]

Justice Thomas conceded the majority's noble motives in *Evans v. United States*:[125] "I have no doubt that today's opinion is motivated by noble aims. Political corruption at any level of government is a serious evil, and, from a policy perspective, perhaps one well suited for federal law enforcement."[126] However, he reminded the Justices that despite the

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[123] *Id.* at 584–86 (citations omitted). Justice Ginsburg, dissenting, agrees: "As Justice Thomas persuasively demonstrates, the statute's language does not support the Court's reading. Section 12(2) contains no terms expressly confining the provision to public offerings, and the statutory definition of 'prospectus' . . . is capacious." *Id.* at 596.

[124] At least one commentator agrees with Thomas's criticism:

> Under a literal, plain meaning approach, the Court should have first examined the language of section 12(2) to decide the proper scope of that provision. Assuming that the plain meaning of section 12(2) contained some ambiguous language, the majority should have then turned to the statutory definition of prospectus contained in section 2(10) of the 1933 Act. Indeed, at this point in the analysis, the Court should have halted its analysis given the fact that Congress provided a broad definition of prospectus in section 2(10), clearly intended to sweep all forms of communication under section 2(10). As Justice Thomas pointed out in his dissent, Congress expressed a clear intent in section 2(10) to depart from the ordinary meaning of the term prospectus. Therefore, the majority, by ignoring the intent of Congress to define the term "prospectus" more broadly in section 2(10) than the ordinary meaning, usurped Congress's law-making power.

Brian E. Burns, *Red Means Green: The Disruption of the Statutory Construction Process in Gustafson to Harmonize Section 12(2) and Rule 10(b)(5) Private Liability Actions Under the Federal Securities Laws*, 57 OHIO ST. L.J. 1365, 1390 (1996).

[125] 504 U.S. 255, 294 (1992).

[126] *Id.* at 295 (Thomas, J., dissenting). Thomas was criticizing the majority's construction and definition of the term "extortion" in the Hobbs Act.

well–meaning intentions of the Court, "federal judges are not free to devise new crimes to meet the occasion."[127] Here, Justice Thomas demonstrated that while he agreed certain policies are desirable, perhaps even meriting congressional adoption, those issues are for Congress to decide and not the Court. Affirming this conviction, Justice Thomas stated:

> It is not the usual practice of this Court to require Congress to explain why it has chosen to pursue a certain policy. Our job simply is to apply the policy, not to question it. I share the majority's concern that extending § 12(2) to secondary and private transactions might result in an unwanted increase in securities litigation . . . policy considerations "cannot override our interpretation of the text and structure of the Act . . . ."[128]

In the face of these and other examples, it is argued that Thomas hides his ideology behind his method. This gnostic insight can be brought to bear against the whole judicial enterprise. Thus conceived, every reason, every ruling is radically ideological. But is there not in this critique an unstated plea for the very thing the possibility of which is being denied, yet for which we nonetheless strive, namely, a fair and impartial ruling on the law irrespective of the judge's ideology? Shall we, like Thrasymachus, look at law and see only power? If we have not abandoned the enterprise, we must also examine Thomas's arguments in their own right. If we can just for a moment put aside the ideological explanation, what I believe we find is a Justice who strives—and sometimes fails, but strives nonetheless—to limit the play of policy by the stricture of text. It is to the coherence of his efforts that we now turn.

B. Toward A Unified Theory

> For it is written in the law of Moses, "You shall not muzzle an ox while it treads out the grain." Is it oxen God is concerned about?
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> – Paul of Tarsus[129]

The critique of textualism is well rehearsed in the extensive literature of constitutional and statutory interpretation.[130] The heart of

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[127] *Id.*

[128] *Gustafson*, 513 U.S. at 594.

[129] *I Corinthians* 9:9 (New King James).

[130] *See* A. SCALIA *et al.*, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE COMMON LAW 23 (1997); Bradford C. Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 539–42 (1997); Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 817–831 (1994); Bradley C. Karkkainen,

the challenge is to theoretical coherence, not merely applying the principles, but clarifying the conditions of their application.[131]

Theoretical coherence requires an account of the limits and uses of discretion when the interpretation and application of a statute, based upon a firm sense of legislative intent, do not immediately follow, deductively, from a plain meaning reading of the words of the text. Faced with the necessity of inference or abduction, textualist judges exercise discretion when choosing among canons,[132] among sources of

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"Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction, 17 HARV. J.L. & PUB. POL'Y 401 (1994).

[131] As Thomas G. Kelch said,

> It cannot be denied that textualist interpretation presently dominates the imagery of Supreme Court treatment of bankruptcy issues. Even this rhetoric, however, is not consistent. It is vague. It is fragmentary. It is not homogeneous. It is not a "theory" at all. It is a muffled and ill–defined echo of a concept not deserving of the name. It is this lack of interpretive cogency that one properly decries. Without adherence to solid and consistent principles, the lines of interpretation slip and flail in divergent theoretical breezes. It is hardly astonishing that results appear incongruous and ill–reasoned when the underlying interpretive scheme partakes of these same characteristics. It is, then, not the theory of plain–meaning analysis which leaves us blank and confused, but the admixture of droplets of divergent and poorly defined theories. Were there a cohesive theory, the boundaries of scholarly dispute might be aptly drawn; as it is, they cannot be discerned.

Thomas G. Kelch, *An Apology for Plain–Meaning Interpretation of the Bankruptcy Code*, 10 BANKR. DEV. J. 289, 300 (1994).

Kelch laments what he perceives to be the failure of textualists to advance an adequate theoretical justification of their methodology and hints at the damage thereby rendered that cause. Kelch overstates, but his polemic underscores the urgency of the textualists' theoretical task–the task that befalls Justice Thomas–to acknowledge the limits and yet the necessity of the textualist enterprise, and in so doing to define and affirm the judicial prerogative in our democratic polity.

[132] The issue here goes beyond Llewellyn's famous argument that for every canon there is a contradictory canon. *See* Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401 (1950); SCALIA, A MATTER OF INTERPRETATION, *supra* note 2, at 26–27. What is needed, and often incomplete in textualist analyses, is what compels the choice of even a linguistic canon. The answer to this question would take the form of a higher–order rule. *See* Nobelman v. American Sav. Bank, 508 U.S. 324, 330 ("Petitioners urge us to apply the so–called 'rule of the last antecedent,' which has been relied upon by some Courts of Appeals to interpret § 1322(b)(2) the way petitioners favor. . . . According to this argument, the operative clause 'other than a claim secured only by a security interest in . . . the debtor's principal residence' must be read to refer to and modify its immediate antecedent, 'secured claims.' . . . We acknowledge that this reading of the clause is quite sensible as a matter of grammar. But it is not compelled."). Justice Stevens concurred because he found Thomas's literal reading faithful to the intent of Congress. *Id.* at 332. Justice Thomas's opinion suggested the need for a philosophy of application of the canons of construction. In *Nobelman*, Thomas found petitioners' application of a canon plausible, but he nonetheless rejected it because of administrative difficulties which would follow. *Id.* at 330. There is no issue of ambiguity. What is needed here—and what is in fact being applied, albeit

definition,[133] among sources of intent, among emphases in placing the statute in its wider statutory context, in deciding whether a statute applies to a new situation, in deciding what to do if the statute does not apply to the new situation, in choosing which of competing lines of interpretive case precedent to apply, and in deciding which among possibly applicable statutes governs a new situation. What guides their choices? What role do normative considerations play?[134] What rules,

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unstated—is a higher-order principle of weight assigned to competing canons and consequences.

[133] Plain meaning is an underpinning of Justice Thomas's textualism. But in the face of linguistic ambiguity and alternate meanings, or families of meanings, plain meaning is difficult to ascertain and requires justification of choices among alternative "meanings". *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 536 (1983) ("The invocation of 'plain meaning' just sweeps under the rug the process by which meaning is divined."); Thomas G. Kelch, *An Apology for Plain-Meaning Interpretation of the Bankruptcy Code*, 10 BANKR. DEV. J. 289, 301–07 (1994) (discussing the implications of the Wittgenstein–Austin debate for plain meaning statutory interpretation, and suggesting that the argument from ambiguity of language is overstated). *See also* Justice Thomas's opinion in Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253-54 (1992) ("In any event, canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."); District of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125, 127 (1992) ("This reading is true to the ordinary meaning of 'relate to,' see BLACK'S LAW DICTIONARY . . . .").

[134] It is not enough merely to describe the sources, the canons, and the formulae of their application. The reason is that a descriptivist account of sources and applicational principles does not validate itself as against competitors. Just announcing the conclusions in an opinion–which canons, which sources, work here–supplies reasons for the holding but not the reasons for the reason which would justify choosing among sources and canons, saying why certain sources qualify for determining intent and definition and which interpretive principles apply in the instance. Professor Leff crystallized the point:

> The central difficulty with the Descriptivist position, then, for all the subtlety and intelligence with which various adherents have elaborated it, is that it "validates" every legal system equally. If a valid system is one that is in fact in place, then anything that is in fact in place is the legal system. No particular characteristic of or procedure employed by the "sovereign" is necessary to validate the system except its power to generate something that is in fact obeyed. The basic engine of law is nowhere–or, rather, it is anywhere at any moment it happens to be–and that robs Descriptivism of any *critical* capacity. Under Descriptivism, it is impossible to say that anything ought or ought not to be.

Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1234 (1979).

Thus, justification requires saying why certain sources qualify for determining intent and definition and which interpretive principles apply in the instance. Saying why demands more than description. Justification is inescapably *normative*. It could not be otherwise, for normative reasoning is at the heart of what judges do, the soul of their enterprise:

> It is the office therefore of a judge to consider whether the antecedent rule does apply, or ought, according to the intention of the lawgiver, to apply to a given

consistently applied, govern what is weighed and how? In rigorously setting out the bases of his exercise of discretion, Justice Thomas would answer the charge of ideological influence, define his textualism more clearly, pave the way for a new account of statutory interpretation which acknowledges and incorporates the merits of the various schools, and address the fundamental issue of when in this democratic federalism judges can properly look to normative principles.

Without rules governing discretion, textualism, like any theory of interpretation, is vulnerable to the claim that there are alternate, and perhaps illegitimate, reasons, such as political or policy agendas, for the choices that must be made, and particularly so in politically charged cases such as those involving the regulation of firearms. In *Staples v. United States*[135] we find Justice Stevens in dissent accusing Justice Thomas, and the majority for whom he wrote, of exactly that:

> To avoid a slight possibility of injustice to unsophisticated owners of machineguns and sawed–off shotguns, the Court has substituted its views of sound policy for the judgment Congress made when it enacted the National Firearms Act (or Act). Because the Court's addition to the text of 26 U.S.C. § 5861(d) is foreclosed by both the statute and our precedent, I respectfully dissent.[136]

In *Staples,* the Court held that to convict for possession of an unregistered firearm under 26 U.S.C. § 5861(d), a felony carrying a ten–year prison sentence, the Government must prove beyond a reasonable doubt that the accused knew that his gun, here a rifle, had the properties of a "firearm," here a machinegun, under the statutory definition. The statute was silent as to *mens rea,* leaving the Court to determine Congressional intent.[137]

> case; and if there are two rules nearly approaching to it, but of opposite tendency, which of them ought to govern it; and if there exists no rule applicable to all the circumstances, whether the party should be remediless, or whether the rule furnishing the closed analogy ought to be followed.

1 STORY, EQUITY § 7 at 9.

Of course, Story wrote of equity. But even though in statutory interpretation one must be wary of direct translation of common law reasoning as the pattern. *See* SCALIA, A MATTER OF INTERPRETATION, *supra* note 2, at 3–47. I argue above that textualists must confront the problem of when and how normative reasoning enters into the analysis, especially when discretion must be exercised.

[135] 511 U.S. 600 (1994).

[136] *Id.* at 624 (Stevens, J., dissenting).

[137] A case considered by Grotius is interestingly analogous to *Staples.* As related by Professor Lieber:

> The French marine ordinances, for instance the one of 1543, declared that the neutral ship which bore the enemy's goods should be forfeited with them. Grotius limits this to the case where the ship–owner knew the hostile character of the goods, and adduces for this the following analogy from the Roman law:
>
> If the ship–owner himself, or the freighters, have unlawfully placed any thing on board, the ship also is forfeited to the treasury; but if in the owner's

In his opinion, Justice Thomas infered congressional intent as to the requisite *mens rea* in this silent statute from the nature of what was regulated and the penalty for violation of the statute:

> As in our prior cases, our reasoning depends upon a commonsense evaluation of the nature of the particular device or substance Congress has subjected to regulation and the expectations that individuals may legitimately have in dealing with the regulated items. In addition, we think that the penalty attached to § 5861(d) suggests that Congress did not intend to eliminate a *mens rea* requirement for violation of the section . . . . We note only that our holding depends critically on our view that if Congress had intended to make outlaws of gun owners who were wholly ignorant of the offending characteristics of their weapons, and to subject them to lengthy prison terms, it would have spoken more clearly to that effect.[138]

The statute's silence as to *mens rea* impeled recourse to extra–textual sources. The issue was whether statutory silence should be interpreted to mean that Congress intended common law *mens rea* to apply or no *mens rea*. Thomas began with the reasonable premise that common law *mens rea* presumptively applied.[139] He then turned to case precedent. His "commonsense evaluation of the nature of the particular device or substance" thus began with the treatment accorded other items or substances in prior cases.[140]

Prior cases relied upon by the parties and discussed by Justice Thomas in his opinion categorized these items or substances in two ways. On the one hand, there are those which address such items as hand grenades and narcotic drugs, as to which *mens rea* is not required, the so–called "public welfare" or regulatory offenses. On the other hand, there are those which address such items as food stamps, as to which

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> absence that has been done by the master, or pilot, or boatswain, or any of the crew, these are punished in person, and with forfeiture of the goods, but the ship is restored to the owner.

Francis Lieber, *Legal and Political Hermeneutics, or Principles of Interpretation and Construction in Law and Politics, with Remarks on Precedents and Authorities*, 16 CARDOZO L. REV. 2079, 2081 (1995).

[138] *Staples*, 511 U.S. at 619–20.

[139] "[W]e must construe the statute in light of the background rules of the common law." *Staples*, 511 U.S. at 605. Compare Justice Thomas's reasoning in *Mozlof v. United States*, 502 U.S. 301 (1992), wherein he adopts "a cardinal rule of statutory construction":

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Id. at 307 (quoting Morissette v. United States, 342 U.S. 246, 263 (1952)).

[140] *Staples*, 511 U.S. at 619.

mens rea is required, the *malum in se* offenses. Justice Thomas's "commonsense evaluation" concluded that Staples' semiautomatic rifle was more properly analogized to food stamps than to grenades and drugs, prompting Justice Stevens to comment, "the Court instead reaches the rather surprising conclusion that guns are more analogous to food stamps than to hand grenades."[141] Let us explore further the strength of Thomas's analogy, beginning with the cases he drew from and distinguished.

As to the cases relied upon by the Government in support of the classification of this statute as regulatory, in *United States v. Freed*,[142] a prosecution for the possession of unregistered hand grenades, the Court held that § 5861(d) "did not require the Government to prove the defendant also knew that the grenades were unregistered."[143] In *United States v. Balint*,[144] a prosecution for the undocumented sale of opium, the Court held that "the Narcotic Act of 1914, which was intended in part to minimize the spread of addictive drugs by criminalizing undocumented sales of certain narcotics, required proof only that the defendant knew the specific items he had sold were 'narcotics' within the ambit of the statute."[145] In *United States v. Dotterweich*,[146] a prosecution of a retailer for sale of adulterated or misbranded drugs, the Court stated in dictum that the statute did not require knowledge that the drugs were adulterated or misbranded.[147]

As to authority Thomas cited in support of classifying this offense as non–regulatory or *malum in se*, in *Liparota v. United States*,[148] a prosecution for unlawfully acquiring and possessing food stamps under § 15(b) of the Food Stamp Act of 1964,[149] the Court held that the Government must prove that a defendant so charged knew that his acquisition or possession of food stamps was done in a manner not authorized by statute or regulation.

Justice Thomas distinguished *Balint* and *Dotterweich*, and then *Freed*. By his reasoning, *Balint* and *Dotterweich* did not render § 5861(d) regulatory as far as the element of knowing whether the gun is a "firearm" was concerned, because guns do not fall within the categorical delimitation that these cases established for regulatory offenses.

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141 *Id.* at 631.

142 401 U.S. 601 (1971).

143 *Id.* at 609.

144 258 U.S. 250 (1922).

145 *Id.* at 254.

146 320 U.S. 277 (1943).

147 *See id.* at 281.

148 471 U.S. 419 (1985).

149 7 U.S.C.A. § 2024(b)(1) (1998).

Regulatory offenses regulate potentially harmful or injurious items, or "dangerous or deleterious devices or products or obnoxious waste materials."[150]

> In such situations, we have reasoned that as long as a defendant knows that he is dealing with a dangerous device of a character that places him "in responsible relation to a public danger," he should be alerted to the probability of strict regulation, and we have assumed that in such cases Congress intended to place the burden on the defendant to "ascertain at his peril whether [his conduct] comes within the inhibition of the statute."[151]

The success of this distinction depends upon showing, by "commonsense evaluation," that guns are not "potentially harmful or injurious items" or "dangerous or deleterious devices or products or obnoxious waste material . . . that put their owners on notice that they stand 'in responsible relation to a public danger'" for determining *mens rea* regarding § 5861(d).[152] This is at first counterintuitive, for one might suppose that guns are potentially harmful or injurious or dangerous and that those who possess guns should be held to be on notice that they stand in responsible relation to a public danger. But automobiles can be called dangerous, and Congress does not assign ten–year sentences for lack of awareness of auto emissions.[153] More is involved here than potential for inflicting injury, which, we shall see, is the fact that guns are widely owned and widely owned innocently.

Before reaching this analytical juncture, Justice Thomas distinguished *Freed* on the grounds that *Freed* considered *mens rea* regarding registration, not knowledge of type of weapon, and that the nature of grenades is such as to raise the question of regulation.[154] Unlike grenades, guns are owned commonly and innocently: "In glossing over the distinction between grenades and guns, the Government ignores the particular care we have taken to avoid construing a statute to dispense with *mens rea* where doing so would 'criminalize a broad range of apparently innocent conduct.'"[155]

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[150] *Staples*, 511 U.S. at 607 (citing United States v. International Minerals & Chemical Corp., 402 U.S. 558, 564–65 (1971)) (characterizing *Balint* and similar cases as involving statutes regulating "dangerous or deleterious devices or products or obnoxious waste materials").

[151] *Id.* (citing *Balint*, 258 U.S. at 254) (citations omitted).

[152] *Staples*, 511 U.S. at 610–11.

[153] *See id.* at 610-12.

[154] *See id.* at 610 ("In fact, in *Freed* we construed § 5861(d) under the assumption that 'one would hardly be surprised to learn that possession of hand grenades is not an innocent act.'" (quoting United States v. Freed, 401 U.S. 601, 609 (1971))).

[155] *Staples*, 511 U.S. at 610 (quoting Liparota v. United States, 471 U.S. 419, 426 (1985)).

Thus Justice Thomas reached the analogy to *Liparota*, which he found persuasive:

> In *Liparota*, we considered a statute that made unlawful the unauthorized acquisition or possession of food stamps. We determined that the statute required proof that the defendant knew his possession of food stamps was unauthorized, largely because dispensing with such a *mens rea* requirement would have resulted in reading the statute to outlaw a number of apparently innocent acts. . . . Our conclusion that the statute should not be treated as defining a public welfare offense rested on the commonsense distinction that a "food stamp can hardly be compared to a hand grenade."[156]

A reasonable person should know that hand grenades would be subject to regulation because hand grenades are a threat to the community. One who sells pharmaceuticals should be aware of their regulation because of the community danger posed by misbranded or adulterated drugs however innocent.[157] Food stamps are not grenades.

This disanalogy is premised upon the nature of the item, not the incidence of its innocent ownership. But if the nature of the item is the basis of the analogy, neither are guns food stamps. Indeed, as Justice Stevens pointed out, the analogy of guns to grenades is far stronger than that of guns to food stamps, if the basis of comparison is the nature of these items. According to *Balint* and *Dotterweich*, regulatory offenses are deemed such precisely because of the nature of what they regulate, whether the items are potentially harmful or injurious or dangerous. To say that cars are not so regulated begs the question, for by their nature they could be under the definitional rubric of *Balint* and *Dotterweich*.

Something more than the nature of the item is in play here, unless by nature is meant not only its characteristics and potential for harm, as in *Balint* and *Dotterweich*, but how widely it is owned by innocent parties. When this factor is introduced, the analogy of guns to food stamps, and the disanalogy of guns to grenades, are strengthened. Justice Thomas argued that, as in *Liparota*, Congress would not have intended to criminalize large numbers of innocent gun owners (or food stamp dealers).

Here, Justice Stevens concluded, is where "the Court has substituted its views of sound policy for the judgment Congress made when it enacted the National Firearms Act,"[158] simply explaining "why . . . it would be unfair to punish the possessor of this machinegun."[159] According to Stevens, in light of legislative history, the statute's silence as to *mens rea* was more appropriately interpreted "that Congress did

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[156] *Id.* (quoting Liparota v. United States 471 U.S. 419, 426 (1985) (citations omitted)).

[157] *See Liparota*, 471 U.S. at 432.

[158] *Staples*, 471 U.S. at 624.

[159] *Id.* at 635.

not intend to require proof that the defendant knew all of the facts that made his conduct illegal:"[160]

> In addition, at the time of enactment, this Court had already construed comparable provisions of the Harrison Anti–Narcotic Act not to require proof of knowledge of all the facts that constitute the proscribed offense. Indeed, Attorney General Cummings expressly advised Congress that the text of the gun control legislation deliberately followed the language of the Anti–Narcotic Act to reap the benefit of cases construing it. Given the reasoning of *Balint*, we properly may infer that Congress did not intend the Court to read a stricter knowledge requirement into the gun control legislation than we read into the Anti–Narcotic Act.[161]

Moreover, according to Justice Stevens, a proper analysis would treat the case of semiautomatic rifles instead of the general category of guns. In terms of dangerousness, semiautomatic rifles are much closer to grenades than guns in general:

> Accurately identified, the Government's position presents the question whether guns such as the one possessed by petitioner "are highly dangerous offensive weapons, no less dangerous than the narcotics" in *Balint* or the hand grenades in *Freed* . . . .
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> Thus, even assuming that the Court is correct that the mere possession of an ordinary rifle or pistol does not entail sufficient danger to alert one to the possibility of regulation, that conclusion does not resolve this case. Petitioner knowingly possessed a semiautomatic weapon that was readily convertible into a machinegun. The "character and nature" of such a weapon is sufficiently hazardous to place the possessor on notice of the possibility of regulation.[162]

Finally, Stevens found no principled distinction between the *mens rea* required for registration offenses, as in *Freed*, and that for knowledge of what sort of weapon was actually possessed: "No significant difference exists between imposing upon the possessor a duty to determine whether such a weapon is registered, and imposing a duty to determine whether that weapon has been converted into a machinegun."[163]

Stevens argued that ignoring legislative history, enlarging the category of item beyond its analytically proper scope (semiautomatic/ machinegun to all guns), and distinguishing a prior determination of *mens rea* (*Freed*) on the general ground that different elements may have different *mens rea,* were grounds for supposing that Justice Thomas's decision was based upon his legislative policy preferences. Legislative history would lend strong support to *Balint* as the controlling precedent. "Machinegun" rather than "gun" would strengthen the analogy to *Freed.*

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[160] *Id.* at 626.

[161] *Id.* at 627 (citation omitted).

[162] *Id.* at 632–33 (citation omitted).

[163] *Id.* at 633–34 (citation omitted).

Indeed, registration requirements are not free floating. They do not obtain apart from characteristics which invoke them. As Justice Thomas recognizes, the Court in *Freed* called the statute regulatory.[164] Why, then, is the *mens rea* as to registration not determinative? As against the textualist/legislative history argument of Justice Stevens, Justice Thomas the textualist seems vulnerable to the charge of departing from the statutory text in favor of a legislative policy–cum–interpretive principle of avoiding constructions that criminalize large numbers of heretofore innocent citizens, a result that could have been avoided by not universalizing the category.[165]

Thomas could point out in response that Stevens admits that the determination of *mens rea* is a question of statutory interpretation ascertained by reference to Congressional intent. Given the long history of citizen gun ownership in the United States, it is unlikely Congress would have intended to make criminals of otherwise innocent gun–owning citizens. From a textualist perspective, however, this argument goes beyond the statutory text—which is silent on the point—and ventures into historical and sociological speculations. Once into legislative history, strong arguments can be made that Congress intended the Firearms Act to track the *mens rea* of *Balint*, as Justice Stevens observes. Moreover, the problem only arises if the category is guns in general rather than semiautomatics.

The essence of Stevens's rejoinder was that Thomas failed adequately to justify, within the bounds of legal reasoning *per se*, two types of reasons which involve discretion. First, the rational force of Justice Thomas's reasoning by analogy and disanalogy to case precedent seemed to depend upon the introduction of policy considerations over and beyond, and as a basis for, comparison of similarities. Why does

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[164] *See id.* at 608–09 (citing *Freed*, 401 U.S. at 608–09).

[165] Justice Thomas responded to the question of why he dealt with guns in general rather than the semiautomatic in question by asking how semiautomatics qualify as a category and by stating that the Government's argument was as to guns in general (which Justice Stevens denied, *Staples v. United States*, 511 U.S. 600, 631–32 (1994)), and by the need to define "a class of items the knowing possession of which satisfies the *mens rea* element of the offense." *Id.* at 612 n.6. He is certainly correct to point to the need for such a class, but the point here is the analytic basis for the class chosen. Guns in general as a class introduces the problem of criminalizing large numbers of innocent citizens. Semiautomatics as a class does not. Justice Thomas stated, "[r]oughly 50 percent of American homes contain at least one firearm of some sort, and in the vast majority of States, buying a shotgun or rifle is a simple transaction that would not alert a person to regulation any more than would buying a car." *Id.* at 613–14. Justice Stevens responded, "only about 15 percent of all the guns in the United States are semiautomatic. . . . Although it is not known how many of those weapons are readily convertible into machineguns, it is obviously a lesser share of the total." *Id.* at 624 n.1. Moreover, in light of the purposes of the Act, "a substantial percentage of the unregistered machineguns now in circulation are converted semiautomatic weapons." *Id.* at 624.

widespread innocent ownership enter into an analysis of a statute that makes no reference thereto, thus bringing the case at hand under the controlling influence of *Liparota* (about which the same question could be asked) and defeating the analogy to *Balint*, which figured in the drafting of the statute, based upon dangerousness? If dangerousness is what this statute is about, why should incidence of ownership be determinative? The broader question, in philosophy–of–law terms, is, among the many possible similarities among cases, which similarities count as relevant in determining which precedent controls? What canons of relevance give shape and bounds to the choice of similarities among cases when deciding among competing precedents?

Second, consistent with textualist premises concerning the role of judges in the federal system and the indeterminacy of legislative intent, what role should policy considerations play in a textualist account of Congressional intent? What canons should bound judges' discretion in the introduction and use of policy considerations? Here we encounter normative reasoning and, immediately, the questions of its legitimate source and exercise in a textualist theory of statutory interpretation.

A related question is the applicability of a statute to facts the statute does not address. This problem arises in two contexts. First, a court may face whether a statute should be construed to encompass "new" facts. Second, a court may have to decide which of two or several statutes, if any, governs "new" facts. Judge Easterbrook suggested that "unless the statute plainly hands courts the power to create and revise a form of common law, the domain of the statute should be restricted to cases anticipated by its framers and expressly resolved in the legislative process."[166] If the textualist jurist adopts Easterbrook's suggestion, the door arguably is opened once again for discretion. By what canons of relevance would the judge then proceed?[167] Theoretical coherence would

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[166] Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544 (1983).

[167] Martin H. Redish and Theodore T. Chung argue:

> Under Easterbrook's scheme, then, a statute that does not clearly and unambiguously instruct the judge as to an interpretive outcome is to be put aside, presumably leaving the judge entirely to his own creative devices. Given the generality with which many statutes are drafted, as well as the complexity of many statutory disputes, it would appear that few interpretive dilemmas could be dispensed with simply by an invocation of express statutory text. Viewed in this light, instead of ensuring that the expectations of Congress take precedence over the judge's own policy preferences, new textualism can be seen to permit virtually unfettered judicial discretion in through the back door. By placing the burden of locating express supporting text on those that would find the statute controlling, Easterbrook's version of new textualism seems to create something approaching a presumption of statutory inapplicability. This presumption leads to a corresponding increase in the power of unelected judges—a result hardly consistent with the goal of ensuring that primary

require the articulation of canons governing the exercise of discretion consistent with textualist premises.[168]

Staples is a prime example of a forceful opinion grounded in a modified textualism which admits of recourse to extra–textual sources but leaves questions as to the choice and application of those sources. The challenge to textualism is to clarify its principles, their interrelations, and the conditions of their application, particularly in the exercise of discretion. If there is to be discretion in the deployment of canons, precedents, and policies, then higher–level principles defining bounds to that discretion would seem to be required by textualism's federalist premise and the need for consistency. Addressing these questions, and particularly the role of normative reasoning, would lay a groundwork for a unified theory of statutory interpretation that acknowledges the contributions of textualism and its critics.[169] From the

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policymaking authority is exercised by those representative of and accountable to the electorate.

Redish & Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 825–26 (1994).

[168] A related problem is in applying the *ejusdem generis* canon of construction. Professor Brewer writes:

> This interpretive norm instructs the interpreter of a series of terms that are either relatively more specific or more precise (or both) followed by a term that is either more general or more vague (or both) to read the last term in the series as being "of the same genus" as the previous, more specific terms. Often, it is exemplary reasoning that an interpreter uses to discover the "genus," that is, the category, to which both the series of specific (or precise) terms and the general (or vague) term belong. As one judge tidily described the connection among generality, specificity, and exemplary reasoning in the application of the rule of construction expressed in the maxim 'ejusdem generis': "when general words follow specific words, and the latter are not exhaustive of their class, the comprehensive words are restricted to a sense analogous to that of the particular words."

Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 937 (1996). *See also* Otis Elevator Co. v. Secretary of Labor, 921 F.2d 1285 (D.C. Cir. 1990) (Justice Thomas discussed the *ejusdem generis* canon, disagreeing with Otis' use of it).

[169] Judge Hand aptly characterized the divide:

> Thus, on the one hand, [the judge] cannot go beyond what has been said, because he is bound to enforce existing commands and only those; on the other, he cannot suppose that what has been said should clearly frustrate or leave unexecuted its own purpose. This is his frequent position in cases that are not very plain; that is to say, in the greater number that arise. As I have said, there are two extreme schools, neither one of which is really willing to apply its theory consistently, usually applying it when its interests lie along the path it advocates. One school says that the judge must follow the letter of the law absolutely. I call this the dictionary school. No matter what the result is, he must read the words in their usual meaning and stop where they stop. No judges have ever carried on literally in that spirit, and they would not be long tolerated if they did. Nobody would in fact condemn the surgeon who bled a

strength of his opinions to date, it is to be anticipated that Justice Thomas will make a strong contribution toward that end.

> man in the street to cure him, because there was a law against drawing blood in the streets. Everyone would say that the law was only meant to prevent street fighting, and was not intended to cover such a case; that is, the government which passed that law, although literally it used words which covered the case, did not in fact forbid necessary assistance to sick people.
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> . . . .
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> But it is also easy to go wrong, if one gives [judges] too much latitude. The other school would give them almost complete latitude. They argue that a judge should not regard the law; that this has never really been done in the past, and that to attempt ever to do it is an illusion. He must conform his decision to what honest men would think right, and it is better for him to look into his own heart to find out what that is. As I have already said, in a small way some such process is inevitable when one is interpreting any written words. When a judge tries to find out what the government would have intended which it did not say, he puts into its mouth things which he thinks it ought to have said, and that is very close to substituting what he himself thinks right. Let him beware, however, or he will usurp the office of government, even though in a small way he must do so in order to execute its real commands at all.

Learned Hand, *How Far Is a Judge Free in Rendering a Decision?* (Nationwide radio address, May 14, 1933), *reprinted in* DILLARD, THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 103, 106–08 (1953). *See also* GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 486–73 (1994).