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2019 Sumner Canary Memorial Lecture: Assorted Canards of Contemporary Legal Analysis: Redux

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ASSORTED CANARDS OF
CONTEMPORARY LEGAL ANALYSIS:
REDUX

Honorable Amy Coney Barrett[†]

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INTRODUCTION

It would be an honor for me to speak to you at any time, but I’m particularly honored to be doing so now, on the thirtieth anniversary of the Sumner Canary Lecture delivered by Justice Antonin Scalia, my former boss and mentor. His lecture, titled *Assorted Canards of Contemporary Legal Analysis*, described his “most hated legal canards”—baseless but frequently repeated statements that lawyers are “condemned to read, again and again, in the reported cases.”¹ He took aim, for example, at the hoary canon that “remedial statutes are to be broadly construed.” He asked, “How are we to know what is a remedial statute?” “Are not all statutes intended to remedy some social problem?” “And why should we construe any statute broadly?” Statutes should be construed neither broadly nor narrowly, but at the level of generality at which they are written. And he bemoaned the well-worn phrase, “A foolish consistency is the hobgoblin of little minds.” Why is consistency in the law a bad thing?

Tonight, in the spirit of Justice Scalia’s Canary Lecture, I’m going to share my own list of canards.

† Judge, United States Court of Appeals for the Seventh Circuit. This Essay is adapted from the 2019 Sumner Canary Lecture delivered at Case Western Reserve University School of Law on September 19, 2019.

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

I. TEXTUALISM IS LITERALISM

Here is my first: “textualism is literalism.” Before I explain why this is false, I ought to begin with a very brief definition of textualism. Textualism, a method of statutory interpretation closely associated with Justice Scalia, insists that judges must construe statutory language consistent with its “ordinary meaning.”² The law is comprised of words—and textualists emphasize that words mean what they say, not what a judge thinks that they ought to say. For textualists, statutory language is a hard constraint. Fidelity to the law means fidelity to the text as it is written.

Textualism stands in contrast to purposivism, a method of statutory interpretation that was dominant through much of the twentieth century. For purposivists, statutory language isn’t necessarily a hard constraint. As one famous Supreme Court case put it, “[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.”³ Sometimes, statutory language appears to be in tension with a statute’s overarching goal, and when that happens, purposivists argue that a judge should go with the goal rather than the text.

Today, purposivism is largely out of fashion, at least in its more extreme form. It was once unsurprising to see a judicial opinion stress the importance of adhering to a statute’s purpose even at the expense of clear text. Now, however, it’s rare to see a judicial opinion asserting the authority to depart from the statutory text in service of the statutory purpose. The shift away from purposivism is largely due to the force of Justice Scalia’s arguments. As he put it, “It is the *law* that governs, not the intent of the lawgiver. . . . Men may intend what they will; but it is only the laws that they enact which bind us.”⁴ I won’t rehearse all of his arguments against purposivism here, but suffice it to say that they have had a significant effect on the way that lawyers and judges think about the law.

The fact that textualism has become influential, however, does not mean that everyone understands what it means to be a textualist. And one misunderstanding—held by some of textualism’s sympathizers as well as by some of its critics—is that textualism is literalism. Some who have only passing familiarity with the theory assume that textualism requires judges to construe language in a wooden, literalistic way. And that, of course, would lead to absurd results.

If you want a vivid illustration of the dangers of literalism, consider the pitfalls of translating from one language to another. When I was in

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2. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 69–77 (2012).
 3. *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892).
 4. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 17 (Amy Guttmann ed., 1997).

college, I spent a summer in France with the primary goal of becoming fluent in French. One evening at dinner, my host asked if I wanted more food, and I responded, translating literally, “*Je suis pleine*”—“I am full.” I was proud of myself for responding in French. But my sentence was greeted with uproarious laughter—and not, as I initially assumed, because I spoke French with a distinctive southeastern Louisiana accent. It was much worse than that. I learned that in French, the phrase “*je suis pleine*” means “I am pregnant.” One could make a similar gaffe by declining food with the phrase “*je suis fini*,” which, literally translated, means “I am finished.” In French, though, this phrase means “I am about to expire.” Perhaps such mistakes might make one *want* to expire.

As a budding French speaker, I was unaware of the nuance. Language is a social construct made possible by shared linguistic conventions among those who speak the language. It cannot be understood out of context, and literalism strips language of its context. As my examples illustrate, fluent speakers of language are not literalists. There is a lot more to understanding language than mechanically consulting dictionary definitions.

Textualists understand this, and they have spent more than thirty years driving home the point. Justice Scalia himself insisted that “the good textualist is not a literalist.”⁵ Still, textualism and literalism are often treated as synonyms. The distinction between them, though, is fundamental to the validity of the textualist enterprise. Here is how one scholar distinguishes the two:

Literalism should be distinguished from the genuine search for textual meaning based on the way people commonly understand language. Literalism is a kind of “spurious” textualism, unconcerned with how people actually communicate—with how the author wanted to use language or the audience might understand it. It holds up the text in isolation from actual usage.⁶

Collapsing the distinction is a strawman when presented by critics of textualism and a dangerous distortion when floated by textualists themselves. It bears emphasis, though, that this might be the most common misperception of textualism. I teach a seminar on statutory interpretation, and after our class on textualism, students routinely say that they were surprised to learn that textualism isn’t the same thing as either “literalism” or “strict construction.” Despite the best efforts of textualists, the caricature is still around.

5. *Id.* at 24.

6. WILLIAM D. POPKIN, MATERIAL ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS 224 (3d ed. 2001).

II. A DICTIONARY IS THE TEXTUALIST'S MOST IMPORTANT TOOL

This rejection of literalism bleeds right into the next proposition that I would like to shoot down: “A dictionary is a textualist’s most important tool.” Don’t get me wrong—a dictionary is *a* tool, and it is one used by interpreters of all stripes. But because textualism isn’t literalism, textualists do not come to the enterprise of statutory interpretation armed only with a dictionary. As John Manning—a prominent textualist scholar (and now dean of Harvard Law School)—explains, “[D]ictionary definitions of words will often fail to account for settled nuances or background conventions that qualify the literal meaning of language and, in particular, of legal language.”⁷ A dictionary can help, but it can’t get you all the way there.

Justice Scalia frequently invoked the case *Smith v. United States* to make this point.⁸ In that case, the Supreme Court was faced with the task of deciding what it means to “use a firearm” for purposes of 18 U.S.C. § 924(c)(1), a statute that prohibits a felon from using a gun.⁹ The majority (of which Justice Scalia was not a member) cited multiple dictionary definitions of the verb “to use” and concluded that “[a]s the dictionary definitions and experience make clear, one can use a firearm in a number of ways.”¹⁰ So it held that a person who trades his firearm for drugs “uses” the firearm during a drug-trafficking crime within the meaning of § 924(c)(1).¹¹

In dissent, Justice Scalia explained that the fact that a word *can* be used a certain way does not mean that it is *ordinarily* used that way or that it was used that way in a particular context.¹² In his view, the majority’s reliance on multiple, broad dictionary definitions of what the term “use” *could* mean violated the “fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.”¹³ In typical fashion, he offered a memorable illustration to bring his point home:

When someone asks, “Do you use a cane?,” he is not inquiring whether you have your grandfather’s silver-handled walking stick on display in the hall; he wants to know whether you *walk* with

7. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2393 (2003).

8. 508 U.S. 223, 228 (1993).

9. *Id.*

10. *Id.* at 228–30.

11. *Id.* at 225.

12. *Id.* at 241–42 (Scalia, J., dissenting).

13. *Id.* at 241 (quoting *Deal v. United States*, 508 U.S. 129, 132 (1993)).

a cane. Similarly, to speak of “using a firearm” is to speak of using it for its distinctive purpose, *i.e.*, as a weapon.¹⁴

This isn’t to say that dictionaries are useless; it’s simply a warning against overstating their usefulness. They should be used as evidence that terms can in fact bear a certain meaning, not as conclusive evidence of what a term means in context.

The upshot here is that textualism isn’t about holding language “in isolation from actual usage.” It isn’t about taking things out of context or strictly construing language that isn’t strict. It is about identifying the plain communicative content of the words. “A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.”¹⁵

III. TEXTUALISTS AND ORIGINALISTS ALWAYS AGREE

I hope I’ve made it clear by now that textualism isn’t a mechanical exercise, but rather one involving a sophisticated understanding of language as it’s actually used in context. That principle brings me to my third canard: “Textualists always agree.” Those who take an oversimplified view of textualism imagine that it works like Google Translate: a judge punches in words, and—voilà!—out pops the result. If that were how interpretation worked, one could expect every textualist judge to interpret text in exactly the same way. Popping words into a mental machine, after all, does not require judgment.

Construing language in context, however, does require judgment. Skilled users of language won’t always agree on what language means in context. Textualist judges agree that the words of a statute constrain—but they may not always agree on what the words mean. Thus, in a case that preceded my time on the Seventh Circuit, two of my colleagues on the court—both textualists—disagreed about whether Title VII, which prohibits discrimination on the basis of sex, prohibits discrimination on the basis of sexual orientation.¹⁶ Judge Frank Easterbrook joined the majority, which held that it does;¹⁷ Judge Diane Sykes wrote a dissent arguing that it does not.¹⁸ Neither disavowed the text; they simply disagreed about what the text meant.

The same holds true for originalists, who insist that judges must adhere to the original public meaning of the Constitution’s text. Justices Scalia and Thomas are both known as originalists, yet they

14. *Id.* at 242.

15. SCALIA, *supra* note 4, at 23.

16. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (en banc).

17. *Id.* at 340–41.

18. *Id.* at 359 (Sykes, J., dissenting).

didn't agree in every case. The differences between them enable my friend Judge Amul Thapar of the Sixth Circuit to teach a class at the University of Virginia that he colloquially describes as "Scalia versus Thomas." Here is an example of a case in which those two Justices diverged: in *Davis v. Washington*,¹⁹ the Court had to decide whether the Sixth Amendment's Confrontation Clause prohibits the admission of statements made during a 911 call.²⁰ Justice Scalia wrote the majority opinion, grounding the Court's decision in an analogy to statements that would have been considered "testimonial" at common law.²¹ The relevant portion of the 911 call qualified as "nontestimonial hearsay," the majority held, because its "primary purpose" was not "to establish or prove past events potentially relevant to later criminal prosecution" but rather "to enable police assistance to meet an ongoing emergency."²² Justice Thomas, by contrast, rejected the majority's "primary purpose" test.²³ He chided the majority for selecting a standard "disconnected from history" and observed that "the Court all but concedes that no case can be cited for its conclusion."²⁴ Justice Thomas read the historical record to support a much narrower Confrontation Clause test: only those statements that "include 'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions'" are prohibited from admission.²⁵

On the current Court, Justices Thomas and Gorsuch have been the most vocal about their commitment to originalism. But they don't always agree either. Just last Term, they split in *Gamble v. United States*, a case that validated the so-called "dual sovereignty doctrine" of the Double Jeopardy Clause.²⁶ That doctrine means that two offenses are not "the same offense" for purposes of the Double Jeopardy Clause if they are prosecuted by separate sovereigns.²⁷ Thus, the federal government can't prosecute someone twice for the same murder, but the Double Jeopardy Clause doesn't bar the state and federal governments from each prosecuting someone for the same murder.

19. 547 U.S. 813 (2006).

20. *Id.* at 817.

21. *Id.*

22. *Id.* at 822.

23. *Id.* at 834 (Thomas, J., concurring in the judgment in part and dissenting in part).

24. *Id.* at 838.

25. *Id.* at 836 (alteration in original) (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring)).

26. 139 S. Ct. 1960, 1964 (2019).

27. *Id.* at 1977.

Where there are two sovereigns, there are two laws and therefore two different offenses.

Justice Gorsuch dissented from that holding on the ground that the dual-sovereignty doctrine is inconsistent with the original meaning of the Fifth Amendment.²⁸ Justice Thomas, however, agreed with the majority. In his concurring opinion, he had this to say:

The historical record presents knotty issues about the original meaning of the Fifth Amendment, and Justice Gorsuch does an admirable job arguing against our longstanding interpretation of the Double Jeopardy Clause. Although Justice Gorsuch identifies support for his view in several post-ratification treatises, I do not find these treatises conclusive without a stronger showing that they reflected the understanding of the Fifth Amendment at the time of ratification. . . . Ultimately, I am not persuaded that our precedent is incorrect as an original matter, much less demonstrably erroneous.²⁹

In short, even card-carrying originalists don't always wind up at the same spot, and it oversimplifies originalism to expect that they always will.

IV. “[W]E MUST NEVER FORGET, IT IS A *CONSTITUTION* WE
ARE EXPOUNDING.”

In his Canary Lecture thirty years ago, Justice Scalia identified and attempted to correct the common misuse of one of Chief Justice Marshall's most famous quotes from *McCulloch v. Maryland*: “[W]e must never forget, that it is a *constitution* we are expounding.”³⁰ Justice Scalia explained that this quote “is often trotted out, nowadays, to make the point that the Constitution does not have a fixed meaning—that it must be given different content, from generation to generation, retaining the ‘flexibility’ needed to keep up with the times.”³¹ In his view, this reading of Chief Justice Marshall's language is exactly backwards. Rather than sanctioning judicially guided constitutional evolution, the *McCulloch* quote is simply an acknowledgment that “it is the nature of a constitution not to set forth everything in express and

28. *Id.* at 1996 (Gorsuch, J., dissenting) (“[T]his ‘separate sovereigns exception’ to the bar against double jeopardy finds no meaningful support in the text of the Constitution, its original public meaning, structure, or history.”).

29. *Id.* at 1987 (citation omitted).

30. Scalia, *supra* note 1, at 594 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819)).

31. *Id.*

minute detail” *precisely because* it is a fixed document “intended to endure for ages to come” as is.³²

So Justice Scalia made the point that the *McCulloch* quote offers no support for a theory of an evolving constitution. Today, I want to make a different but related point: the *McCulloch* quote offers no support for the idea that the Constitution should be interpreted differently from other legal texts. After all, the Constitution is, at its base, democratically enacted written law. Our approach to interpreting it should be the same as it is with all written law.

I willingly concede that no matter how one reads “[W]e must never forget, it is a *constitution* we are expounding,” Chief Justice Marshall surely meant to communicate that the Constitution is unique.³³ And he was indisputably right. None of our other written laws purport to lay out an entire system of government meant to endure through the ages. That singularity often manifests itself in expansive phrasing and broad delegations of congressional and executive authority to address unforeseen circumstances.³⁴ But as Justice Scalia explained elsewhere, “The problem [of interpreting the Constitution] is distinctive, not because special principles of interpretation apply, but because the usual principles are being applied to an unusual text.”³⁵ The text itself remains a legal document, subject to the ordinary tools of interpretation.

Due in large part, I’m sure, to Justice Scalia’s contributions, the idea of approaching the Constitution like any other legal text has gained not only traction but force in judicial opinions, and it has inspired a rich proliferation of scholarship in the area.³⁶ For example, Vasan

32. *Id.* at 595–96 (quoting *McCulloch*, 17 U.S. at 415).

33. *Id.* at 594.

34. See SCALIA, *supra* note 4, at 37 (“In textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation—though not an interpretation that the language will not bear.”); see also John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1699–700 (2004) (“Marshall’s statement merely addressed the virtue of recognizing adequate congressional authority to address unforeseen circumstances under the Necessary and Proper Clause.”); Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 387 (2013) (“As originalists have long recognized (and sometimes even emphasized), the power-granting provisions of the Constitution are designed to give the legislative and executive branches discretionary authority to make policy and the necessary tools to implement those policies.”).

35. SCALIA, *supra* note 4, at 37; see also *id.* at 38 (“What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text . . .”).

36. See, e.g., Manning, *supra* note 34, at 1670 (“Whereas the Rehnquist Court has tended toward textualism in statutory cases, few would contend that

Kesavan and Michael Stokes Paulsen have emphasized that “any project of constitutional interpretation that seeks to apply the Constitution as law must reckon with the fact that it is a written text that the Constitution purports to make authoritative.”³⁷ They also point out that judges take an oath to be bound by that written text.³⁸

So what does it mean to be bound by written law? Well, at the very least it means that the meaning of the law is fixed when it is written. This is a largely, though not entirely, uncontroversial proposition when it comes to statutory interpretation. Textualists and purposivists are both inclined to ground their approaches to statutory interpretation in the concept of faithful agency, giving voice and authority to what the enacting Congress did in a particular statute.³⁹

Textualists, though, place more significance on the very existence of a written, enacted law. As I said before, textualists limit the meaning of text to the semantic communicative content (in context) of the words themselves—not some underlying purpose behind the words—because it is the words themselves that are written down and enacted. Indeed, those words “reflect (unknowable) legislative compromise,” and “the carefully drawn lawmaking process prescribed by the Constitution makes it imperative for judges to respect such compromise.”⁴⁰ That means reading the text of the statute at the level of specificity and generality at which it was written, even if the result is awkward or the interpretation “does not appear to make perfect sense of the statute’s

constitutional interpretation warrants the same strictness as statutory interpretation. Instead, the conventional wisdom, often traced (mistakenly) to *McCulloch v. Maryland*, presupposes that judges have greater freedom to interpret the Constitution atextually to effectuate its broader purposes. . . . I argue here that the conventional wisdom is backwards . . .”).

37. Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1128 (2003).
38. *Id.* at 1127–28 (“But if one does decide to be bound by [the Constitution] (and takes an oath to support it, as the very next clause of the Constitution requires for all legislative, executive, and judicial officers holding positions under the regime created by the Constitution), one necessarily has decided to be bound by the text as law, because that is what the document itself appears to specify.” (footnote omitted)); see also Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1, 8–9 (2016) (describing originalism’s claim that the original public meaning of the Constitution’s text is enforceable law).
39. See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 9 (2001) (“[I]t is important to realize that strong purposivism and textualism differ markedly in technique, but they do so in the name of an ostensibly shared constitutional premise. In particular, strong purposivism and textualism both seek to provide a superior way for federal judges to fulfill their presumed duty as Congress’s faithful agents.”).
40. Manning, *supra* note 34, at 1713.

overall policy.”⁴¹ That awkward compromise made it through the process of becoming law.

When we look at the Constitution for what it is—a popularly enacted legal text subject to the same kind of “bargaining and compromise over the reach and structure of the policy under consideration”⁴²—it makes sense that statutory textualists are usually constitutional originalists.⁴³ These approaches are premised on the same fundamental orientation toward legal text that finds legitimacy in popular sovereignty. Kesavan and Paulsen summarize the import of written law this way:

We therefore think that to avoid creeping or lurching anachronism infecting the interpretation of an authoritative legal text, the proper approach must be one of “originalist” textualism—faithful application of the words and phrases of the text in accordance with the meaning they would have had at the time they were adopted as law, within the political and linguistic community that adopted the text as law.⁴⁴

Originalists, like textualists, care about what people understood words to mean at the time that the law was enacted because those people had the authority to make law. They did so through legitimate processes, which included writing down and fixing the law. So “[e]ach textual provision must necessarily bear the meaning attributed to it at the time of its own adoption.”⁴⁵ And, as with statutes, the law can mean no more or less than that communicated by the language in which it is written. Just as “when a precise statute seems over- or underinclusive in relation to its ultimate aims[,] . . . [a textualist] hews closely to the rules embedded in the enacted text, rather than adjusting that text to make it more consistent with its apparent purposes,” so too an originalist submits to the precise compromise reflected in the text of the

41. Manning, *supra* note 39, at 3–4; *see also* Manning, *supra* note 34, at 1665, 1735.

42. Manning, *supra* note 34, at 1715.

43. *See* Manning, *supra* note 39, at 26.

44. Kesavan & Paulsen, *supra* note 37, at 1131.

45. Whittington, *supra* note 34, at 377–78; *see also* Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 *GEO. L.J.* 97, 129 (“Putting the Constitution in writing was one of the ways in which the law of the Constitution was to be fixed.”); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 *NW. U. L. REV.* 923, 944–46 (2009) (explaining the originalist premise that the meaning of the Constitution’s text is fixed at the time of its formal legal approval).

Constitution.⁴⁶ That is how judges approach legal text, and the Constitution is no exception.

I will end this section where I started, leaving you with a simple but astute observation from Justice Scalia himself. The judiciary is charged with authoritatively interpreting the Constitution *because* it is a legal text—and interpreting it requires the same tools and skills that one would bring to bear on any other legal text. Were it otherwise—that is, “if the people come to believe that the Constitution is *not* a text like other texts; that it means, not what it says or what it was understood to mean, but what it *should* mean”—“well, then, they will look for qualifications other than impartiality, judgment, and lawyerly acumen in those whom they select to interpret it.”⁴⁷ This is a Constitution that we are expounding, unique in many ways. But it is also, at its core, a legal text, and we should not misconstrue a quote from the great Chief Justice Marshall as license to treat it as anything else.

V. JUDICIAL ACTIVISM IS A MEANINGFUL TERM

As for the next canard, I will be brief—but I think my point will be clear. The term “judicial activist” is thrown around a lot today, both inside and outside the legal world. People use it all the time with great authority, confident that they know exactly who the judicial activists are. But there is no agreed-upon definition of what it means to be an activist. The only thing that is clear is that it is never a compliment.

Sometimes, people use the term “judicial activism” to describe a judge who is willing to hold a statute or executive action unconstitutional. Judicial restraint, the argument goes, means deference to the popular will; it is activism, therefore, to say that the popular will has run afoul of constitutional limits. The problem, however, is that it has been settled since *Marbury v. Madison* that judicial review is part of the judicial function.⁴⁸ Everyone agrees that judges—within the limits of their authority, of course—must hold political actors accountable to

46. Manning, *supra* note 34, at 1665; *see id.* at 1702 (“Precisely because political minorities do have an extraordinary right to insist upon compromise in the framing of constitutional texts, it is especially important to pay attention to the level of generality of the relevant text—that is, the type of compromise reached.”); Whittington, *supra* note 34, at 386 (“Originalism has instead recently emphasized the value of fidelity to the constitutional text as its driving principle. The goal of constitutional interpretation is not to restrict the text to the most manageable, easily applied, or majority-favoring rules. The goal is to faithfully reproduce what the constitutional text requires. Textual rules need not be narrow. The breadth of the rule is determined by the embodied principle, not an a priori commitment to narrowness.”).

47. SCALIA, *supra* note 4, at 46–47.

48. 5 U.S. (1 Cranch) 137 (1803).

the Constitution. If a statute or executive action is unconstitutional, a judge discharges her judicial duty by calling a spade a spade. So if judicial activism merely means exercising judicial review, then it simply describes a well-settled and uncontroversial part of what judges do.

When people use the term “judicial activism,” I think they are really referring to a misuse of judicial authority. Criticizing misuses of judicial authority is fair game, but we ought to do it with an explanation of *why* a particular decision was misguided. As David Kaplan wrote in his recent book about the Supreme Court, judicial activism today means nothing more than “what the other guy does.”⁴⁹ It goes without saying that finger-pointing isn’t an argument.

VI. CONGRESSIONAL SILENCE IS ACQUIESCENCE

My next canard returns to statutory interpretation. It is the notion that congressional inaction can tell us something about what Congress thinks—what is known as “congressional acquiescence.” One noted scholar and judge has explained the logic of the acquiescence rationale this way: “When a court says to a legislature, ‘You (or your predecessor) meant X,’ it almost invites the legislature to answer: ‘We did not.’”⁵⁰ So, the theory goes, if the legislature does not respond, then the court, as Congress’s faithful agent, should treat its silence as acquiescence or approval and stay the course even if the original interpretation was wrong.

But there are several reasons why such an approach makes little sense. For starters, why should we care what the current Congress thinks about a previously enacted statute? Whether you think that what matters is “the language of the statute enacted by Congress,”⁵¹ the intent or purpose behind the enacted statute,⁵² or something else,

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49. DAVID A. KAPLAN, *THE MOST DANGEROUS BRANCH* 12 (2018).
50. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 31–32 (1982); *see also* Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 *GEO. WASH. L. REV.* 317, 322 (2005); William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 *MICH. L. REV.* 67, 71–78 (1988); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 *GEO. L.J.* 1361, 1402–08 (1988).
51. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002); *see also* *Johnson v. Transp. Agency*, 480 U.S. 616, 671 (1987) (Scalia, J., dissenting) (“It is . . . [a] patently false premise that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant.”).
52. *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980); *United States v. Price*, 361 U.S. 304, 313 (1960); *European Cmty. v. RJR Nabisco, Inc.*, 355 F.3d 123, 136 (2d Cir. 2004) (holding that “expressions of legislative intent made years after the statute’s initial enactment are entitled to limited weight under any circumstances, even when the post-enactment views of Congress as a whole are evident”), *vacated by* 544 U.S. 1012 (2005).

most theories of statutory interpretation seek to give a statute the meaning it had at the time that it was enacted.⁵³ So what a later Congress thinks is irrelevant.⁵⁴

And even if we did care, there is no way to reliably count on congressional silence as a source of information. There are many reasons other than approval for why Congress might not pass a bill to override a court's interpretation of a statute.⁵⁵ For one, Congress must first know about the judicial decision before the body can make a collective, conscious decision to act (or not act) in response—and that is not a given.⁵⁶ Then, even assuming that Congress knows about a given judicial interpretation and disagrees with the decision, it may be deterred from acting out of concern for political expedience: Who takes the credit? Who bears the responsibility? Is this the best time to act to achieve the best result? How much capital—both political and monetary—will this legislation cost? And on and on.⁵⁷ But let us assume that Congress knows about the decision, disagrees with it, and would like to respond. Political realities might still prevent it from doing so. This won't come as news to anyone, but passing legislation is hard and resources are limited. As I've said elsewhere, "Numerous obstacles, both

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53. See Lawrence C. Marshall, "Let Congress Do It": *The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 193 (1989).
54. See *id.* at 193 ("No one has ever explained how a court attempting to understand the intent of a Congress that passed a statute in 1866 or 1870 can find any guidance in the views of a Congress sitting in the 1970s."); *Price*, 361 U.S. at 313 ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.").
55. See *United States v. Craft*, 535 U.S. 274, 287 (2002) ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction.") (alteration in original) (quoting *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 187 (1994)); *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) ("It does not follow . . . that Congress' failure to overturn a statutory precedent is reason for this Court to adhere to it. It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the Court's statutory interpretation.") (quoting *Johnson*, 480 U.S. at 672 (Scalia, J., dissenting)).
56. See Marshall, *supra* note 53, at 187 ("[I]t seems quite unrealistic to assume that a substantial number of congressional actors are routinely made aware of most court decisions on statutory matters. This being the case, how can a court possibly find acquiescence in Congress' silence?"). And if members of Congress are unaware of Supreme Court decisions on matters of statutory interpretation, it would seem even less likely that Congress is aware of decisions at the court of appeals level. See Stefanie A. Lindquist & David A. Yalof, *Congressional Responses to Federal Circuit Court Decisions*, 85 JUDICATURE 61, 61 (2001).
57. See Barrett, *supra* note 50, at 335–36; Marshall, *supra* note 53, at 190–91.

procedural and practical, hinder the passage of legislation, and, as a result, even a legislature with a majority that vehemently disagrees with a judicial decision may fail to act on its disagreement.”⁵⁸ Thus, mistaking inaction for agreement “reflects a simple and complete misunderstanding of the legislative process.”⁵⁹

Equating abstract agreement with any kind of legal salience also reflects a misunderstanding of the separation of powers prescribed by the Constitution. This is the most fundamental flaw in the approval-by-silence approach. Even if we could know that Congress’s current silence on a particular statutory question meant that it wholeheartedly endorsed a court’s interpretation of that statute, that approval is not the standard by which the Constitution confers legal effect. To have the force of law, a bill must be passed by both Houses of Congress and presented to the President for possible veto.⁶⁰ Congress can’t shirk the responsibility of acting, sidestep procedural obstacles, or skirt the President’s veto power in the name of efficiency. And courts can’t usurp any of those same powers by assuming away the bicameralism and presentment requirements. The Supreme Court has been clear on this point: those requirements serve “essential constitutional functions . . . [and] represent[] the Framers’ decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.”⁶¹ Relying on congressional silence for legal meaning thwarts that finely wrought and exhaustively considered procedure.

I will conclude this section with a warning from Justice Frankfurter, who was one of the first to recognize this canard and call out its folly:

To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities. . . . Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction of the Treasury and of Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.⁶²

It is, of course, a good thing that we have a process by which Congress can override a court’s interpretation of a statute if the

58. Barrett, *supra* note 50, at 336.

59. *Id.*

60. See U.S. CONST. art. I, § 7, cl. 2 (bicameralism and presentment).

61. *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 951 (1983); see also *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) (“Congress may legislate, moreover, only through the passage of a bill which is approved by both Houses and signed by the President. Congressional inaction cannot amend a duly enacted statute.”) (citation omitted).

62. *Helvering v. Hallock*, 309 U.S. 106, 119–21 (1940).

interpretation does not reflect what Congress meant. But congressional silence in the face of a judicial decision—constitutionally and practically—has no legitimate role in that process.

CONCLUSION

Justice Scalia ended his Canary Lecture not because he was out of canards, but because he was out of time.⁶³ Likewise, I could list canards until the cows come home, but I will follow my boss's lead and conclude my remarks here. I hope that my contribution to Justice Scalia's list has shown that the last three decades have not done much to eradicate our canard problem. We lawyers love to repeat what has already been written—it's our stock-in-trade. In its best form, our invocation of vintage verbiage serves the purpose of tying us to precedent and creating continuity in the law. But in its worst form we reflexively repeat these "certain ritual errors" without scrutiny.⁶⁴ We should not mistake ubiquity for accuracy.

63. Scalia, *supra* note 1, at 596.

64. *Id.* at 581.