TEXTUALISM IN ALABAMA[*]

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Textualism is alive and well in Alabama. This interpretive doctrine teaches that legal texts have objective meaning and that it is the job of judges to find and apply that meaning. Justice Antonin Scalia and lexicographer Bryan Garner distilled the textualist philosophy and outlined its key operating principles in their seminal treatise *Reading Law*. But textualist principles are not new—they are time-tested tools that have guided Americans for centuries, including right here in Alabama.

This article seeks to demystify textualism and show how it operates in this state. I begin with a brief introduction to textualism—what it is, where it comes from, and why it's a foundational part of our legal system. Next, I describe how the court on which I serve, the Alabama Supreme Court, has relied on (or, in some cases, departed from) textualist principles. I then highlight some open questions and gray areas in our caselaw. My hope is that this article will help litigants, attorneys, scholars, and citizens understand how legal interpretation works in Alabama. More broadly, I hope that it inspires non-Alabamians to examine how textualist principles apply in their own states.

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[*] Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org. This essay was originally published in the *Alabama Law Review*. 74 ALA. L. REV. 1089 (2023). It is reprinted here, with minor alterations, with permission.

[**] Associate Justice, Supreme Court of Alabama. The views expressed in this article are my own, not necessarily those of my colleagues. I thank my law clerks for their helpful assistance with this article, especially Annie Wilson, Hunter Myers, and Zach Gillespie. I also thank William H. Pryor Jr., Kevin Newsom, Andrew Brasher, Aditya Bamzai, Jeff Anderson, and Othni Lathram for their helpful conversations and comments.

I. A Brief Introduction to Textualism

Textualism, in its simplest form, is the idea that a law's text *is* the law.[1] This principle applies to all written law—constitutional and statutory alike.[2] When presented with a dispute over the meaning of written law, a textualist judge does not speculate about what legislators privately *wanted* the law to accomplish, nor does he ask what a more sensible law *should* have said. He asks only how the text would be best understood by a reasonable, well-informed person reading the text in its historical and linguistic context.

In holding that text itself constitutes the law, the doctrine of textualism stands in contrast to the competing doctrine of purposivism, which holds that the law is what legislators subjectively intended it to be,[3] and the various theories of judicial updating, which treat the written law as merely a starting

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[1] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 397 (2012) ("The traditional view is that an enacted text is itself the law.").

[2] *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 938–39 (2017) (describing the traditional textualist view, originating with the Framers, that "constitutional interpretation should mimic ordinary statutory interpretation").

[3] Justice David Brewer captured the essence of purposivism in his majority opinion in *Church of the Holy Trinity v. United States*, when he wrote that "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." 143 U.S. 457, 471 (1892). For Justice Brewer, the way to ascertain the intention of a law's makers was not simply to analyze the law's text, but rather to examine "the evil which [congressmen] intended to be remedied, the circumstances surrounding the appeal to congress, [and] the reports of the committee of each house." *Id*. at 465. *Holy Trinity*-style reasoning had its heyday in the 20th century, but was abandoned by the U.S. Supreme Court before that century came to a close. SCALIA & GARNER, *supra* note 1, at 12–13. Even legal-process purposivists—a more modern school of purposivists who "cast purposivism as an objective framework that aspires to reconstruct the policy that a hypothetical 'reasonable legislator' would have adopted"—differ from textualists in that they care more about how "a reasonable person would address the mischief being remedied" by a law than they do about how "a reasonable person would [understand the law's] language . . . ." *See generally* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 76 (2006). Purposivists of all stripes are united by a willingness to subordinate a law's most plausible semantic meaning to the law's perceived background "purpose." *Id.* I note that some scholars have advocated that "purposivism" be reserved only for objective-framework purposivists, while "intentionalism" should be used for purposivists focused on subjective intent. *See* Lawrence B. Solum, *Legal Theory Lexicon 078: Theories of Statutory Interpretation and Construction*, LEGAL THEORY LEXICON (May 21, 2017), https://lsolum.typepad.com/legal_theory_lexicon/2017/05/theories-of-statutory-interpretation.html. This article, however, uses "purposivism" in its broader sense.

point that can be revised by judges in a common-law fashion.[4] For textualists, a law's meaning depends not on the wishes of legislators or the fiat of judges, but on the "objective indication" of the law's words.[5]

But just because the textualist inquiry is objective does not mean it is easy. Textualist judges are not robots. We understand that legal interpretation requires more than plugging a string of words into a dictionary and running with the first results that come up. A written law, like any text, acquires meaning from its context, and that context is often rich with nuance. Weighing all the relevant contextual clues can be difficult, especially when those clues conflict with each other. Even textualist judges can disagree about how to prioritize competing clues and, consequently, about the best interpretation of a law.[6] But textualists are united in their convictions that legal texts have objective meaning,[7] that judges are capable of discerning that meaning, and that the meaning of a law's text *is* the law.[8]

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[4] *See, e.g.*, David A. Strauss, *Do We Have a Living Constitution?*, 59 DRAKE L. REV. 973, 976–77 (2011) (urging judges to take a "common law approach" to the Constitution, which Strauss describes as an approach that "emphasizes precedent and tradition but that allows for [judicial] innovation . . . ." in contravention to the "original understanding" of the Constitution's text); DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010) (similar); Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 353 (7th Cir. 2017) (Posner, J., concurring) (arguing that judges should embrace the philosophy of "judicial interpretive updating," which would allow judges to "updat[e] old statutes" to keep pace with changing times, even if the judges know that "the Congress that enacted [the statute] would not have accepted" the "updated" meaning).

[5] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29 (1997).

[6] For an example involving constitutional interpretation, *compare* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 358–71 (1995) (Thomas, J., concurring in the judgment) (concluding that the "historical evidence from the framing" supports the view that the "freedom of speech" protected by the First Amendment includes anonymous speech), *with id.* at 371–85 (Scalia, J., dissenting) (reaching the opposite conclusion). For an example involving statutory interpretation, *compare* Van Buren v. United States, 141 S. Ct. 1648, 1654–61 (2021) (Barrett, J.) (holding, after extensive textualist analysis, that the federal Computer Fraud and Abuse Act does not criminalize the act of using a computer to obtain information a forbidden purpose), *with id.* at 1663–68 (Thomas, J., dissenting) (reaching the opposite conclusion).

[7] Sometimes a text's objective meaning is indeterminate or nonsensical. In that case, the law cannot be applied because unintelligible texts are inoperative. *See* SCALIA & GARNER, *supra* note 1, at 134; Standard Oil Co. v. State, 59 So. 667, 667 (Ala. 1912) (a law with no "intelligible application" is "simply void"); Upson v. Austin, 4 Ala. 124, 128 (Ala. 1842) (explaining that laws can be "ineffectual for uncertainty").

[8] SCALIA, *supra* note 5, at 29; Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1120 (1998) (describing textualism as the belief that "the judicial branch serves best by enforcing enacted words rather than unenacted (more likely, imagined) intents, purposes, and wills").

Textualism is often discussed alongside a related term: originalism. Judges and scholars do not always agree about what, if any, differences exist between these two terms. Some use the word "textualism" to apply only to statutes, while using "originalism" to describe the application of textualist principles to the federal Constitution.[9] Others describe originalism as a canon of textualist interpretation,[10] or else use the terms interchangeably.[11] Terminology aside, in practice both doctrines reflect the same underlying commitments: the belief that a law's text *is* the law, and the belief that the meaning of a text is fixed at the time of its enactment.[12] In other words, the meaning of a law is its *original public* meaning, not its *modern* meaning.

The distinction between original meaning and modern meaning matters little for recent laws, but it can matter a great deal for older constitutional provisions and statutes whose language might have undergone linguistic drift.[13] Thus, the federal government's constitutional obligation to protect against "domestic violence," requires the national government to defend states from riots and insurrections within a state's territory (the 18th-century meaning of "domestic violence") but does not require it to prevent spousal abuse (the modern meaning).[14]

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[9] Justice Gorsuch has, at times, adopted this practice. *See* Rachel del Guidice, *Gorsuch Touts Originalism, Textualism in Address to Conservative Legal Society*, DAILY SIGNAL (Nov. 17, 2017), https://www.dailysignal.com/2017/11/17/gorsuch-touts-originalism-textualism-in-address-to-conservative-legal-society/ ("Originalism has regained its place at the table with the Constitution[al] interpretation and textualism in the reading of statutes.").

[10] Justice Scalia, for instance, described originalism as the instantiation of the fixed-meaning canon. SCALIA & GARNER, *supra* note 1, at 78–92.

[11] *See* Joseph S. Diedrich, *A Jurist's Language of Interpretation*, WIS. LAW., July–Aug. 2020, at 36, 42 ("Many lawyers and laypeople perceive textualism and originalism as two sides of the same coin.").

[12] *See* Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 367 (2005) ("the typical textualist judge seeks to unearth the statutes' *original* meanings"); *id.* at 376 ("When confronting a statute, all mainstream interpreters start with the linguistic conventions (as to syntax, vocabulary, and other aspects of usage) that were prevalent at the time of enactment.").

[13] *See, e.g.,* New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019) (discussing and applying the "'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute'" (citations omitted)); *accord* Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 320 n.* (2005) (Thomas, J., concurring) (noting the possibility that the meaning of "arising under" shifted between the time of the federal Constitution's ratification in 1788 and the enactment of 28 U.S.C. § 1331 in 1948).

[14] Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 281 (2017); U.S. CONST. art. IV, § 4.

A. Textualism's Origins and Development

Textualism is sometimes characterized (usually by its detractors) as an innovation, or even as the wholesale creation of Justices Antonin Scalia and Clarence Thomas. While it's true that Justices Scalia and Thomas have done much to popularize textualism, the doctrine itself is not new.

As far back as *Marbury v. Madison*, Americans understood that the written text of the Constitution is law and that "courts, as well as other departments, are bound by that instrument" as written. It was, after all, Chief Justice Marshall's conviction that "the written text" of a law *is* the law that "formed the core of the argument for the power of judicial review" embraced in *Marbury*.[15] As Marshall explained, the reason courts can (and must) refuse to enforce unconstitutional laws is not because the judicial branch somehow trumps the legislative branch—it emphatically does not[16]—but because both branches are jointly subordinate to a "supreme law": the written Constitution.[17]

Marbury focused on the paramount importance of the written *Constitution*, but early American courts took a similarly text-focused approach to *statutes*. Justice Salmon P. Chase, riding circuit in 1800, captured the spirit of the age when he wrote:

> By the rules, which are laid down in England for the construction of statutes, and the latitude which has been indulged in their application, *the British Judges have assumed a legislative power* . . . . Of those rules of construction, none can be more dangerous, than that, which distinguishing between the intent, and the words, of the legislature, declares, that a case not within the meaning of a statute, according to the opinion of the Judges, shall not be embraced in the operation of the statute, although it is clearly within the words. . . . For my part . . . I shall always deem it a duty to conform to the expressions of the legislature, to the letter of the statute,

[15] Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706, 2741 (2003).

[16] *See* THE FEDERALIST NO. 78 (Alexander Hamilton); *see also* Birmingham-Jefferson Civic Ctr. Auth. v. City of Birmingham, 912 So. 2d 204, 223 & n.21 (Ala. 2005) (Parker, J., concurring specially) (explaining the difference between the legitimate power of judicial *review* announced in *Marbury* and the illegitimate power of judicial *supremacy* asserted in, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18 (1958)).

[17] The Supreme Court of Alabama has adopted this justification in its own exercise of judicial review. *See*, *e.g.*, S. Express Co. v. Whittle, 69 So. 652, 659 (Ala. 1915).

> when free from ambiguity and doubt; without indulging a speculation, either upon the impolicy, or the hardship, of the law.[18]

Justice Chase was reminding the parties that courts lack authority to override a statute's clear semantic meaning, even if the judge thinks doing so would avoid injustice or better conform the statute to its background policy goals.[19] Other members of the Founding generation, including Jefferson,[20] Madison,[21] Hamilton,[22] and Brutus (the most influential antifederalist),[23] echoed Chase's sentiment when they warned against the dangers of atextual interpretation.

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[18] Priestman v. United States, 4 U.S. (4 Dall.) 28, 30 n.1 (1800) (Chase, J.); *see also* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 86-87 n.336 (2001).

[19] *See* Manning, *supra* note 18, at 92 (explaining that the U.S. Supreme Court in the early 19th century "expressly disclaimed authority to adjust an otherwise clear statute in order to avoid a perceived hardship or injustice or supply an omission thought to be warranted by the statute's overall policy"); *see also, e.g.*, Evans v. Jordan, 13 U.S. 199, 203 (1815) (Washington, J.) ("[T]his Court would transgress the limits of judicial power by an attempt to supply, by construction, this supposed omission of the legislature. [An] argument, founded upon the hardship of this and similar cases, would be entitled to great weight, if the words of this [statute] were obscure and open to construction. But considerations of this nature can never sanction a construction at variance with the manifest meaning of the legislature, expressed in plain and unambiguous language.").

[20] *See* Letter from Thomas Jefferson to Wilson C. Nicholas (Sept. 7, 1803) ("Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction."), *available at* https://founders.archives.gov/documents/Jefferson/01-41-02-0255#TSJN-01-41-02-0255-fn-0001-ptr (last visited Oct. 11, 2022).

[21] *See* Letter from James Madison to Sherman Converse (Mar. 10, 1826) ("In the exposition of laws, and even of Constitutions, how many important errors, may be produced by mere innovations in the use of words and phrases, if not controuled by a recurrence to the original and authentic meaning attached to them."), *available at* https://founders.archives.gov/documents/Madison/99-02-02-0630 (last visited Oct. 11, 2022); *see also* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 536 & nn.75–76 (2003) (collecting similar quotes).

[22] Nelson, *supra* note 21, at 544 n.117 (citing Alexander Hamilton, *Opinion on the Constitutionality of an Act to Establish a Bank* (Feb. 23, 1791) ("[W]hatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself, according to the usual & established rules of construction. . . . [A]rguments drawn from extrinsic circumstances, regarding the intention of the [lawmakers], must be rejected."), *available at* https://founders.archives.gov/documents/Hamilton/01-08-02-0060-0003 (last visited Oct. 11, 2022)).

[23] BRUTUS XI (Jan. 31, 1788) (warning that allowing judges to prioritize the "spirit" of laws above their "letter" would "enable them to mould the government, into almost any shape they please"), *available at* https://teachingamericanhistory.org/document/brutus-xi/ (last visited Oct. 11, 2022). The Federalists agreed with Brutus that atextual exercise of the judicial power was anathema, and they denied that the Constitution granted federal judges any such power. *See supra* notes 19–22; *see also* Manning, *supra* note 18, at 79–85.

It is little surprise that the Founding generation, which had just fought a bloody revolution to establish a "government of laws, and not of men,"[24] viewed fidelity to written law as paramount. Experience had taught them that judges who view themselves as empowered to prioritize "the reasoning spirit" of laws "without being confined to the[ir] words or letter," would inevitably "erode the principle of a government of limited and enumerated powers."[25]

The Court continued to reflect that understanding well into the 19th century,[26] admonishing litigants in 1845:

> *[T]he judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress* in the debate which took place on its passage, *nor by the motives or reasons assigned by them* for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and *the only mode in which that will is spoken is in the act itself.*[27]

Justice Holmes similarly wrote, this time at the turn of the century:

> We ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used . . . . *We do not inquire what the legislature meant; we ask only what the statute means.*[28]

Courts, of course, have strayed from textualist principles from time to time, most famously during the Warren Court's heyday of living constitutionalism.[29] But it is the deviation from textualism, not textualism

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[24] *See* JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 304, at 184 (New York, Harper & Bros. 1840) (describing the principle that government "ought to be a government of laws, and not of men" as "the fundamental maxim of a republic").

[25] Manning, *supra* note 18, at 80.

[26] There were, of course, fits and starts along the way. *See id.* at 101–02 (conceding that lower federal courts, "at times," departed from a text-focused approach in favor of a purposivist approach and that "[e]ven the Supreme Court did so on occasion").

[27] Aldridge v. Williams, 44 U.S. 9, 12 (1845) (emphasis added).

[28] Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899) (emphasis added). Justice Felix Frankfurter would later echo this sentiment, explaining, "We [judges] are not concerned with anything subjective. We do not delve into the mind of legislators or their draftsmen, or committee members." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 539 (1947).

[29] *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961); Reynolds v. Sims, 377 U.S. 533 (1964); Griswold v. Connecticut, 381 U.S. 479 (1965); Miranda v. Arizona, 384 U.S. 436 (1966).

itself, that is remarkable in our nation's history.[30] Since the Warren Court era—thanks in large part to the influence of Justices Scalia and Thomas—textualism has been restored to its preeminent role.[31] As Justice Elena Kagan observed, "we're all textualists now."[32]

B. Why Textualism?

When I became a judge, I swore an oath to uphold the constitutions of the United States and Alabama.[33] Both constitutions refer to their own text as law and establish specific requirements for making additional laws.[34] According to those requirements, a statutory law is a text enacted by both branches of the legislature and signed by the executive (or enacted on reconsideration over the executive's veto).[35] Under our constitutions, the unexpressed intentions of individual legislators are not law, and neither are the policy preferences of judges.[36] Only a document that has gone through the rigorous process of bicameralism and presentment (or constitutional amendment) qualifies.[37] The rule of bicameralism and presentment requires agreement between both branches of the legislature—and, usually, the executive—as to a specific set of words. A judge who casts aside those words

[30] Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U. CHI. L. REV 81, 81 (2017) (observing that the U.S. "Supreme Court is dominantly textualist," and that "[n]o justice these days is a purposivist").

[31] *See generally* William H. Pryor Jr., *Textualism After Antonin Scalia: A Tribute to the Late Great Justice*, 8 FAULKNER L. REV. 29 (2016).

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

[33] *See* ALA. CONST. art. XVI, § 279.

[34] *See* U.S. CONST. art. VI, § 2 ("This Constitution . . . shall be the supreme Law of the Land."); ALA. CONST. preamble ("the following Constitution" controls the "form of government for the State of Alabama").

[35] *See* U.S. CONST. art. I, § 7; ALA. CONST. art. V, § 125.

[36] Judges are empowered to decide individual *cases* and *controversies*, but we are not empowered to promulgate or repeal laws. *See* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 936 (2018) ("[C]ourts have no authority to erase a duly enacted law from the statute books"). Even judges acting in their common-law capacity cannot invent or promulgate new laws in the fashion of a legislature. Gamble v. United States, 139 S. Ct. 1960, 1983 (2019) (Thomas, J., concurring). And, in Alabama, judges' common-law powers are simultaneously granted and constrained by statutory law. *See* ALA. CODE § 1-3-1 (1975).

[37] *See, e.g.*, *Ex parte* Christopher, 145 So. 3d 60, 69 (Ala. 2013) ("No law can be enacted or amended apart from the constitutionally mandated procedure, known as bicameralism and presentment."); Pruitt v. Oliver, 331 So. 3d 99, 111–12 (emphasizing that courts "are not at liberty to amend statutes to conform to what we might think the legislature should have done," and cannot "assume the legislative prerogative to correct defective legislation").

in favor of something (such as an unexpressed intention or policy goal) has usurped legislative power by enforcing as "law" a rule that was not validly enacted. That usurpation contravenes our constitutions and the oath we judges swear to defend them. "Sneering at the promise in the oath is common in the academy," as Judge Easterbrook once observed, but the oath "matters greatly to conscientious public officials."[38] It matters to me, and it should matter to everyone who cares about how and by whom we are governed.

That, in my view, is reason enough to be a textualist. But there are practical reasons to be one too. First among them is that textualism safeguards predictability and stability in law. By anchoring the meaning of a text to the objective indication of its words at a fixed point in time, textualism constrains judges' ability to "update" laws as they go along. For the textualist judge, a statute enacted in 1789 carries the same meaning today as it did two hundred years ago, and it will continue to carry that meaning until it is amended or repealed by the People's elected representatives. This commitment to fixed meaning allows members of the public to govern themselves and structure their affairs without having to worry that next year's judges will pull the rug out from under them.

In a similar vein, textualism promotes fair notice.[39] By focusing on what a reasonable citizen would understand the law to mean—rather than on legislators' intentions or judges' preferences—textualism ensures that the law is accessible to the people who are bound by it.

Textualism also promotes legislative competence. When judges refuse to fix policy problems for the legislature, the legislative branch has a stronger incentive to draft clear, coherent laws at the outset. In contrast, purposivism encourages strategic behavior by legislators (who know they can circumvent the legislative process by sprinkling their preferred language into committee reports, floor debates, or amicus briefs—even if that language never would have been able to garner a majority of votes), and judicial updating encourages legislative laziness (why take pains to avoid mistakes or think through additional contingencies if you know judges will do it for you?).

This is not to say that textualism is foolproof. Judges are human beings. Despite our best efforts, we make mistakes. Neither textualism nor any other

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[38] Easterbrook, *supra* note 8, at 1122; *see also* William H. Pryor Jr., *Against Living Common Goodism*, 23 FEDERALIST SOC'Y REV. 24, 36 (2022) ("The judicial oath obliges judges, as a moral duty, to support the written text that is our Constitution.").

[39] *See generally* Note, *Textualism As Fair Notice*, 123 HARV. L. REV. 542, 557 (2009).

interpretive approach can eliminate the possibility of judicial error. But textualism is far less error-prone than its two competitors.

Compare it, first, with judicial updating. While textualism confines judges to our narrow sphere of expertise and training (the interpretation and application of legal texts), judicial updating invites judges to opine on all sorts of abstract and far-reaching political, social, and economic questions outside the judicial wheelhouse. There's a reason that the People elect *legislators* to formulate public policy, and there's every reason to think they are better at it and better situated to be accountable for those choices than judges are.

Now consider purposivism. Unlike judicial updating, purposivism correctly recognizes that policy judgments belong to the legislative branch. But purposivism goes astray by misunderstanding what "the legislative branch" is and does. Purposivists assume that, since legislators have the power to make law, the law must be defined as whatever legislators wanted it to be, whether they express their desires in the text or not. Thus, for a purposivist, the meaning of a law's text is only *evidence* of the law's true meaning—and the text-based evidence can be overcome by legislative history or other subjective-intent evidence (such as amicus briefs filed on behalf of legislators) indicating that the legislators *wanted* the law to mean something other than what the law actually says.[40] As explained above, that view is wrong as a matter of first principles: our constitutions authorize the enactment of texts, not the enactment of intentions.[41] But even setting aside that objection, the subjective inquiry required by purposivism is inherently unreliable. That is so for several reasons.

For one thing, evidence of legislative purpose is highly vulnerable to strategic manipulation. A legislator who knows that courts will rely on legislators' statements to extend (or limit) a statute beyond its text can easily mislead judges by asserting—either in the legislative record or in amicus briefs—that the proposed law enacts his policy preferences, even if he knows those preferences are not shared by his colleagues.

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[40] *See, e.g.,* David K. Ismay & M. Anthony Brown, *The Not So New Textualism: A Critique of John Manning's Second Generation Textualism*, 31 J.L. & POL. 187, 190–91 (2015) (defending purposivism by arguing that "purposivists, who are more willing to consult the full range of available evidence of statutory intent, are more likely to discern what Congress was actually trying to accomplish when passing a statute").

[41] *See* Easterbrook, *supra* note 30, at 82 ("Intents are irrelevant even if discernible (which they aren't), because our Constitution provides for the enactment and approval of texts, not of intents. The text is not evidence of the law; it *is* the law."); SCALIA AND GARNER, *supra* note 1, at 397–98 (objecting to the "false notion" that a statute's text is merely "evidence" of legislative intent).

A deeper problem is that evidence of subjective intent is almost always non-representative. Even if we leave aside the possibility of strategic manipulation and assume that all statements made by individual legislators are uttered in good faith, the fact remains that each statement represents the views of only the legislator who made it.[42] Usually only a handful of legislators give statements on a bill, and there is no reason to assume that statements of *those* legislators represent the views of the median, or "swing," legislator—i.e., the views of the legislator whose vote was necessary to ensure the law's passage. If anything, the opposite is true: the legislators most likely to comment on a law are usually those who are either strongly opposed to, or strongly in favor of, its enactment.[43]

Subjective-intent evidence is non-representative in another way, too: it discounts the role of the executive branch. Even perfect evidence of legislators' intent would tell us nothing about the intent of the executive, whose approval (absent legislative override of the executive's veto) is often necessary for a bill to become law.[44] If we care about lawmakers' intents, the executive's intent should matter too, because she is an integral part of the lawmaking process.

And the executive's veto is just one example of the many "veto gates" that are built into the legislative process.[45] There are numerous other ways in which the lawmaking process gives "political minorities extraordinary power to block legislation,"[46] such as committees' drafting rules, the threat of filibuster, and "countless other procedural devices that temper unchecked majoritarianism."[47] The ultimate statutory language that comes out of this process often does not represent a singular coherent purpose. The text, rather, is usually the product of an awkward but carefully crafted compromise. A judge who prioritizes the legislature's perceived overall purpose above the

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[42] *See* State v. $223,405.86, 203 So. 3d 816, 848 (Ala. 2016) (Shaw, J., concurring in the result) (making this point and explaining that "[t]he views of a single legislator are irrelevant").

[43] Easterbrook, *supra* note 30, at 91.

[44] In Alabama, a bill can also become a law without the governor's signature if the governor takes no action on the bill within a certain timeframe. *See* ALA. CONST. art. V, § 125.

[45] Manning, *supra* note 3, at 77.

[46] *Id.*

[47] John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2005).

ordinary semantic meaning of the enacted text risks undoing the legislative bargain that enabled the law's enactment in the first place.[48]

I've saved the most technical problem with subjective-intent evidence for last. Even if we assume that a judge has perfect information about the mental states of everyone involved in the legislative process, subjective intent *still* would not be a reliable way of giving meaning to a law. That's because there is no principled method judges can rely on for aggregating individual politicians' subjective intentions into a unitary group intention. To see this problem in action, consider the following classic illustration, in which three legislators (1, 2, and 3) enact an ambiguous statute that has three plausible meanings (A, B, and C):

Legislator 1 prefers A to B to C;

Legislator 2 prefers B to C to A; and

Legislator 3 prefers C to A to B.

Now imagine that you're a purposivist judge trying to decide which meaning the legislature as a whole preferred. You'll quickly run into a problem: In a contest between A and B, A wins 2-1; in a contest between B and C, B wins 2-1; but in a contest between C and A, C wins 2-1. The legislature prefers A to B, prefers B to C, yet—somehow!—prefers C to A. Even though each individual legislator has a rational set of preferences, aggregating those preferences into a unitary "group preference" or "legislative intention" yields an irrational result: an endless cycle with no winner.[49] It is impossible for a judge in such a scenario—even one who knows *everything* about *every* legislator's mental state—to say which preference should control.[50]

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[48] *See* Rodriguez v. United States, 480 U.S. 522, 525–26 (1987) (explaining that "no legislation pursues its purposes at all costs" and rejecting the assumption that "whatever furthers the statute's primary objective must be the law").

[49] *See generally* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963) (formally proving that such an irrational result cannot be avoided when three or more individuals are faced with three or more alternatives).

[50] Our legislative voting systems put an end to preference cycling by picking a policy proposal, fixing that proposal to text, and then holding up-and-down votes on each proposal until one gets a majority. The ultimate outcome thus depends on the order in which proposals are considered, which means that the legislators who control the order in which proposals are voted—that is, the legislators who "control the agenda"—have enormous power over which proposal ultimately gets adopted. "The existence of agenda control makes it impossible for a court—even one that knows each

The textualist judge faces no such problem. The textualist judge simply asks which of the possible meanings is the most objectively reasonable and then applies that meaning.[51] Discerning objective meaning isn't always easy, but it is far less fraught than trying to peer into the heads of over a hundred legislators and aggregate their individual desires into a coherent whole.

II. Textualism in the Alabama Supreme Court

Since its earliest days, the Supreme Court of Alabama has endorsed textualist principles. But we have not always faithfully applied those principles, and we sometimes describe our interpretive approach in confusing or conflicting ways. A primary goal of this article is to clear up some of that confusion and—when it can't be cleared up—to flag the open questions.

The simplest place to begin is with our modern court's canonical statements of legal interpretation. Below are two typical examples. The first deals with constitutional interpretation, and the second with statutory interpretation. But, as you can see, the fundamental idea in each statement is the same. Start with the constitution:

> [W]e look to the plain and commonly understood meaning of the terms used in [a constitutional] provision to discern its meaning. . . . The object of all construction is to ascertain and effectuate the intention of the people in the adoption of the constitution. The intention is collected from the words of the instrument, read, and interpreted in the light of its history.[52]

Now statutes:

> The cardinal rule of statutory interpretation is to determine and give effect to the intent of the legislature as manifested in the language of the

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legislator's complete table of preferences—to say what the whole body would have done with a proposal it did not consider in fact." Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 547–48 (1983).

[51] If all three meanings are equally plausible, the textualist judge must turn to some other rule of decision, such as the "rule that a tie goes to the defendant," Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 330 (2007) (Scalia, J., concurring in the judgment), or the rule that unintelligible laws are inoperative, *see* Scalia & Garner, *supra* note 1, at 134; *cf.* Easterbrook, *supra* note 30, at 82 ("When texts run out of meaning, we should put them down and go to other sources of law, rather than invent things in their name.").

[52] Barber v. Cornerstone Cmty. Outreach, Inc., 42 So. 3d 65, 79 (Ala. 2009) (quoting State v. Sayre, 24 So. 89, 92 (Ala. 1897)); *see generally* Clint Bolick, *Principles of State Constitutional Interpretation*, 53 Ariz. St. L.J. 771 (2021) (explaining that state constitutions must be interpreted according to the meaning those provisions bore to the ratifying public *in that state*, and cautioning against interpreting state constitutions in lockstep with the federal Constitution).

> statute. . . . Words must be given their natural, ordinary, commonly understood meaning, and where plain language is used, the court is bound to interpret that language to mean exactly what it says.[53]

These formulations may seem simple enough at first glance, but they contain some nuances that can trip up unwary litigants. A few aspects of our interpretive approach, in particular, deserve unpacking.

A. The Role of "Intent"

The most common stumbling block for Alabama litigants involves our court's use of the word "intent." As the two quotations above illustrate, our caselaw routinely asserts that the goal of legal interpretation is to ascertain the law's "intent," which sometimes leads litigants to assume that our court endorses purposivism.[54] In fact, the opposite is true. As the quotes above go on to explain, the only "intent" Alabama courts are supposed to consider is the intent "manifested in the language" or "words" of the law.[55] That qualification is crucial. It means that the process of ascertaining a law's "intent" is an objective exercise focused on the statute's text, not a subjective one focused on lawmakers' unexpressed goals or desires. Our court has spelled out that point many times over the centuries. As far back as 1890:

> The office of construction is to ascertain what the language of an act means, and not what the Legislature may have intended. "Index animi sermo."[56] *The court knows nothing of the intention of an act, except from the words in which it is expressed, applied to the facts existing at the time; the meaning of the law being the law itself.*[57]

And again in 2020:

> *The intention of the Legislature, to which effect must be given, is that expressed in the act*, and the courts will not inquire into the motives which influenced the Legislature or individual members in voting for its passage, nor indeed as to the intention of the draftsman or of the Legislature so far as it has not been expressed in the act. So in ascertaining the meaning of an act the court

[53] Swindle v. Remington, 291 So. 3d 439, 457 (Ala. 2019) (quoting *Ex parte* State Dep't of Revenue, 683 So. 2d 980, 983 (Ala. 1996)).

[54] Recall that purposivism is the belief that the meaning of a law is determined by the lawmakers' intentions, purposes, or goals rather than by the objective indication of the law's words. Accordingly, purposivists prioritize a law's (perceived) animating purpose over its text. *See supra* Part I.

[55] *See supra* notes 52–53 and accompanying text.

[56] "Speech is the indication of the mind."

[57] Maxwell v. State, 7 So. 824, 827 (Ala. 1890) (emphasis added).

> will not be governed or influenced by the views or opinions of any or all of the members of the Legislature, or its legislative committees or any other person.[58]

The upshot here is that when our caselaw speaks about the "intent" of a law, it is usually describing the intent that a reasonable member of the public would ascribe to a reasonable lawmaker, based simply on reading the law's text in context. Alabama courts do not—or, at least, are not supposed to—inquire about *actual* legislators' subjective goals or purposes.[59] When a law's objective semantic meaning diverges from the subjective intentions of the legislators who enacted it, only the former governs; the latter is irrelevant.[60] If the rule were otherwise, judges could decide legal disputes by taking legislative opinion polls and ignore enacted text entirely.[61]

Our court's reliance on an objective concept of intent "track[s] a long tradition of discerning intent 'solely on the basis of the words of the law,'" read objectively in light of their context, "and not by investigating any other source of information about the lawgiver's purposes."[62] Even so, I try to avoid the term "intent" when I write judicial opinions because I'm concerned it has become a source of confusion. Many modern-day lawyers—including some appellate lawyers—are unfamiliar with the technical, objective sense in which judges have long used that word, so they mistakenly equate any talk of "intent" with *subjective* intent or purposivism. That mistake leads them to argue for their preferred interpretation by appealing to legislators' subjective goals, beliefs, or purposes (usually by arguing that a contrary result would

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[58] State v. Epic Tech, LLC, 323 So. 3d 572, 597 (Ala. 2020) (quoting James v. Todd, 103 So. 2d 19, 28–29 (Ala. 1957)) (emphasis added) (internal alteration marks omitted).

[59] Bynum v. City of Oneonta, 175 So. 3d 63, 69–70 (Ala. 2015) ("[I]n ascertaining the meaning of a statute the court will not be governed or influenced by the views or opinions of any or all of the members of the Legislature, or its legislative committees or any other person"); *see also* Manning, *supra* note 3, at 83 (explaining that the "reasonable lawmaker" is an "idealized, rather than actual, legislator").

[60] *See, e.g.*, Fulton v. State, 54 So. 688, 689 (Ala. 1911) ("[I]f the intention of the lawmakers has not been carried into effect by the language used, it is better that we should abide the words of the statute, than to reform it according to the supposed intention.").

[61] *See* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988) ("Imagine how we would react to a bill that said, 'From today forward, the result of any opinion poll among members of Congress shall have the effect of law.' We would think the law a joke at best, unconstitutional at worst. This silly 'law' comes uncomfortably close, however, to the method by which courts deduce the content of legislation when they look to subjective intent.").

[62] Pryor, *supra* note 38, at 36 (quoting H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 895 (1985)).

amount to poor public policy and thus would be inconsistent with legislators' desires) rather than by analyzing the statute's objective semantic meaning. I think that judges could probably avoid most of that confusion if we spoke more in terms of "meaning" and less in terms of "intent." "Meaning" is clearer,[63] more intuitive to most litigants, and serves as a useful reminder that legislators' private intentions—even if they were knowable (which they usually aren't[64])—are not law.

B. Interpreting Language As "Commonly Understood"

A second common pitfall involves the rule that judges must give a law's words their "natural," "ordinary," or "commonly understood meaning." Some litigants assume this rule requires a mechanistic or hyperliteral approach to legal interpretation. Again, that assumption is mistaken.

When judges say words should be given their "ordinary" meaning, we do not mean that each word in a text always takes its literal meaning or its most statistically-common meaning. We mean instead that words must be given the meaning that an ordinary reasonable person would ascribe to them after reading them in context. The reasonable person is not a robotic literalist, so a textualist cannot be either.[65] Textualists understand that words do not exist in a vacuum and that sometimes contextual clues reveal that a term carries an idiomatic or technical meaning as opposed to a more common meaning.

To see this principle in action, consider two scenarios. In the first scenario, the legislature passes a statute containing a single provision, which criminalizes "deliberate importation or introduction of new viruses into the State of Alabama." Every court would hold that the text's ordinary meaning prohibits people from intentionally bringing new infectious diseases into the state.

In the second scenario, the legislature enacts the same text, but this time as part of the Alabama Cybersecurity Act, in which every other provision deals with computer crimes. This time, every court (and every reasonable citizen)

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[63] *See* Frankfurter, *supra* note 28, at 538–39 ("it is better to use a less beclouding characterization" than the word "intent"); Easterbrook, *supra* note 30, at 81 ("At the same time as the Justices tell us to pay heed to the 'intent' of Congress, they concede that 'intent' is empty and that meaning is objective.").

[64] *See supra* Part I.B.

[65] *See*, *e.g.*, Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1498 (2019) (Thomas, J.) (condemning "ahistorical literalism"); Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1825 (2020) (Alito, J., dissenting) ("As Justice Scalia explained, 'the good textualist is not a literalist.'" (quoting SCALIA, *supra* note 5, at 24)).

would recognize that the word "virus" carries its idiomatic meaning of "malicious software" rather than its more common meaning of "biological disease." In both instances, the meaning of the law is clear to any reasonable reader, even though the meaning is different in the second scenario than in the first. Context does all the work.

It bears repeating here that the contextual inquiry is an objective one. Judges care about context because it affects how a reasonable reader would understand the text, not because it reveals the inner workings of legislators' minds. To stick with the "virus" example: In the first scenario, where the no-new-viruses law was passed in isolation, courts would (correctly) refuse to consider evidence that legislators subjectively intended "virus" to mean "computer virus," because the latter meaning is nonstandard and is unsupported by any contextual clues. Even if a survey showed that *every single* legislator privately intended "virus" to mean "computer virus" it would not matter—under our constitutions, intentions are not laws, only texts are.[66] Likewise, in the second scenario, courts would refuse to consider evidence indicating that legislators secretly wanted "virus" to mean "biological disease," because no reasonable person would assume that the word "virus" carries its biological meaning when used in the context of a computer-crimes act. In both cases, the subjective intent of legislators is irrelevant. All that matters is how a reasonable reader would interpret the text in context. That is what our court means when it says that a text's "normal" or "plain" meaning "'may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens . . . .'"[67]

[66] *See Bynum*, 175 So. 3d at 69 ("[I]n ascertaining the meaning of a statute the court will not be governed or influenced by the views or opinions of any *or all* of the members of the Legislature. . . ."); *see also* Young Americans for Liberty v. St. John IV, No. 1210309, 2022 WL 17073690, at *14 (Ala. Nov. 18, 2022) (Mitchell, J., concurring in part and concurring in the result) ("[T]he subjective intentions that animate a law are not the law; only the text of a law is the law."); *$223,405.86*, 203 So. 3d at 848 (Shaw, J., concurring in the result) ("'[T]o seek the intent of the provision's drafters or to attempt to aggregate the intentions of [the] voters into some abstract general purpose underlying the Amendment, contrary to the intent expressed by the provision's clear textual meaning, is not the proper way to perform constitutional interpretation.' . . . The words of a law must speak for themselves.") (citation omitted).

[67] *Barber*, 42 So. 3d at 79 (quoting District of Columbia v. Heller, 554 U.S. 570, 576–77 (2008)).

C. "Construction" and the Canons

Like all courts, the Alabama Supreme Court relies on canons of construction to aid our textual interpretation. A canon of construction is any "principle that guides the interpreter of a text."[68] If that definition sounds broad, that's because it is. Canons are rules of thumb that describe how people interpret texts, so *every* principle of interpretation is a canon.[69]

At a high level, canons of construction can be sorted into two buckets: descriptive and prescriptive. Descriptive canons, as their name suggests, help judges (indeed, all readers) ascertain the most plausible meaning of a text by describing how English text is ordinarily understood. Descriptive canons encompass all rules of grammar, usage, and context that help a reader understand what a text means.[70] Familiar examples include the general/specific canon (if there is a conflict between a general law and a specific law, the specific law prevails), the associated-words canon (words in a list bear on each other's meaning), and the gender/number canon (abstract masculine pronouns include the feminine, abstract singular nouns include plural nouns, and vice versa). While there are many varieties of descriptive canons—"semantic," "syntactic," "contextual," and so on—the ultimate point of each is the same: to describe how reasonable English speakers use and understand our language, including legal language.

Prescriptive canons are different. Prescriptive canons do not tell judges how to ascertain the most plausible meaning of a text; instead, they tell judges how to choose between multiple (already-ascertained) possible meanings. Some of the so-called substantive canons fall into this bucket,[71] with the most

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[68] *Canon*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[69] Karl Llewellyn once argued that canons have limited utility because "there are two opposing canons on almost every point." Karl 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). Textualists often dispute Llewellyn's critique by pointing out that many of the "canons" he cites are not actually canonical at all (in the sense of being well established), but rather are simply obscure, silly, or widely-contradicted judicial assertions. *See* SCALIA & GARNER, *supra* note 1, at 59–62.

[70] *See generally* SCALIA & GARNER, *supra* note 1 (cataloguing several of these canons).

[71] But perhaps not all. It seems plausible to me that some of the so-called clear-statement canons—which often get tagged with the "substantive canon" or "normative canon" label—serve a semantic purpose rather than a normative purpose. There are perhaps dozens of clear-statement canons, but to give a few well-known examples: judges usually require laws to contain a "clear statement" before interpreting the law to delegate vast power to an administrative agency; to strip courts of jurisdiction; to create new private causes of action; to override a state's sovereign immunity; to apply retroactively; or to derogate a longstanding common-law rule. Each of these clear-statement

notable examples being the federal doctrine of *Chevron* deference,[72] and Alabama's parallel doctrine that judges should defer to an agency's interpretation of a statute that the agency is charged with enforcing,[73] even if the agency's interpretation "may not appear as reasonable as some other interpretation."[74]

Canons of construction undergird all interpretation, but not all canons are equally useful—some may be entirely illegitimate[75]—and no canon is absolute.[76] Litigants often go astray by treating canons as algorithms rather than guideposts.[77] It is not enough to recite a canon, assert its applicability, and declare the case won. The difficult work of legal interpretation lies in

canons reflects the universal intuition that texts—including legal texts—aren't usually interpreted to require highly unusual or drastic results unless the text says so in unmistakably clear terms. Properly applied, then, many clear-statement canons may simply provide guidance on what a text is most plausibly understood to mean in light of this country's legal history and tradition; they do not (or, at least, need not and should not) tell judges to discard the most plausible meaning in favor of a less-plausible meaning.

[72] *See generally* Chevron v. Nat. Res. Def. Council, 467 U.S. 837 (1984). There is some dispute about whether *Chevron* deference is best described as a "canon" or as something else. *See generally* Kristin Hickman, *Categorizing* Chevron, 81 OHIO ST. L.J. 611 (2020). But the doctrine plainly fits within the definition of canon provided by Black's, because it is a "principle" that purports to "guide[] the interpreter of a text." *See supra* note 68.

[73] *See Ex parte* Chestnut, 208 So. 3d 624, 640 (Ala. 2016).

[74] Kids' Klub, Inc. v. State Dep't of Hum. Res., 874 So. 2d 1075, 1092 (Ala. Civ. App. 2003) (citation omitted). Another example of a substantive canon that courts often confront is the *Moses H. Cone* canon, which holds that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *See* Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24–25 (1983); *see also* Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1215 (11th Cir. 2021) (Newsom, J., concurring) (arguing that "the *Moses H. Cone* canon is just made up" and that courts "should rethink it").

[75] *See infra* text accompanying notes 111–15 and Part III.D.

[76] The rule that no canon is absolute is itself a canon. SCALIA & GARNER, *supra* note 1, at 59 ("No canon of interpretation is absolute."). So a more precise statement would be "No canon is absolute, except for this one."

[77] *See, e.g.*, Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1175 (2021) (Alito, J., concurring in the judgment) ("Canons of interpretation can help in figuring out the meaning of troublesome statutory language, but if they are treated like rigid rules, they can lead us astray."); Heyman v. Cooper, 31 F.4th 1315, 1323 (11th Cir. 2022) (Newsom, J.) ("[L]ike all tools, the canons are sometimes of limited utility. When that's true, we shouldn't stubbornly insist on pounding square pegs into round holes. If we do, we're likely to do more harm than good. Our obligation remains to the duly enacted text.").

analyzing the canon's relevance to the case at hand and the extent to which it is complemented—or contradicted—by other indicia of meaning.[78]

An example from one of our recent cases illustrates the point nicely. Alabama's Workers' Compensation Act provides that certain settlement agreements become irrevocable "unless within 60 days after the agreement is signed . . . the court on a finding of fraud, newly discovered evidence, or other good cause, [relieves] all parties of the effect of the agreement."[79] The question before our court in *Ex Parte ACIPCO*[80] was whether a settlement contract could be set aside after the 60-day period based on a finding of mental incompetence. The insurance company thought not. In its view, mental incompetence is a form of "other good cause" for setting aside an agreement, and so is included within the types of claims that are subject to the 60-day deadline. The injured worker disagreed, pointing to a different provision of Alabama law, § 8-1-170, which says that contracts entered into by incompetents are void at the outset and cannot be enforced. The insurer responded by citing the "general/specific canon," which provides that when two statutory provisions conflict, the specific provision trumps the general. The insurance company correctly identified and described the general/specific canon, but the parties—and the court—disagreed about how to apply that canon.

To start, there was disagreement over which statute is the "general" and which is the "specific." The workers' compensation statute is more specific with respect to workers' compensation settlements, but the incompetency statute is more specific with respect to contracts by incompetent persons. In a case involving the effect of mental incompetency on a workers' compensation settlement, which type of specificity matters more? The answer is not immediately obvious, and good arguments could be (and were) made on both sides.

Even assuming that the workers' compensation statute is more specific—and therefore trumps the incompetency statute in the event of a conflict—that still leaves the question whether the two statutes really do conflict with

[78] The brilliant 19th-century English jurist James Fitzjames Stephen once quipped that canons of construction should be called "minims than maxims," because "the exceptions and disqualifications to them are more important than the so-called rules" themselves. 2 JAMES FITZJAMES STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 94 n.1 (London, Macmillan & Co. 1883).

[79] ALA. CODE § 25-5-292 (1975).

[80] *Ex parte* Am. Cast Iron Pipe Co. (*Ex parte ACIPCO*), No. 1200500, 2022 WL 4395533 (Ala. Sept. 23, 2022).

each other. In her opinion for the court, Justice Sarah Hicks Stewart explained that there was no conflict because the incompetency statute and the workers' compensation statute could be read harmoniously.[81] She pointed out that both statutes are compatible with the common-law doctrine that an "agreement" requires mutual assent: since mentally incompetent people lack capacity to assent, the injured worker's settlement contract was never a legally valid "agreement" under either statute, and thus was not subject to the 60-day deadline under the workers' compensation statute.[82] Justice William B. Sellers's dissenting opinion took a different view about the definition of "agreement" and the applicability of the general-specific canon,[83] which goes to show that even after extensive briefing and argument, judges can disagree about whether and how canons apply. The case also illustrates why it's crucial for litigants to know the canons and their limitations.

Ten years ago, Justice Scalia and the renowned linguist Bryan Garner wrote a book on textualist methodology called *Reading Law*, which highlights fifty-seven of the most important canons, provides prototypical examples of when they apply (or don't), and gives advice about how to weigh them in the event of a conflict or tension between the canons. Perhaps most helpfully of all, *Reading Law* also refutes over a dozen false canons—interpretive rules that lawyers or judges often invoke but which lack any solid foundation.[84] Our court, along with the Supreme Court of the United States and courts within the Eleventh Circuit, has cited *Reading Law* numerous times.[85] It is a resource that I and many other jurists turn to when we are confronted with a difficult interpretive question.[86]

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[81] *Id.* at *5.

[82] *Id.* at *5–6.

[83] *See id.* at *7–8 (Sellers, J., dissenting).

[84] *See* SCALIA & GARNER, *supra* note 1, at 341–410.

[85] By my count, there are over 400 opinions citing *Reading Law* from our court, the Supreme Court of the United States, and courts within the Eleventh Circuit—though some of these citations come from special writings rather than main opinions.

[86] Last year, my law clerks and I put together a field guide that indicates whether and to what extent our court has relied on (or rejected) each of the canons described in *Reading Law*. I've included that document as an appendix to the original version of this article, in the hopes that Alabama judges and practitioners might find it useful. *See* Jay Mitchell, *Textualism in Alabama*, 74 ALA. L. REV. 1089, 1117 (2023), *available at* https://www.law.ua.edu/lawreview/files/2023/05/4-Mitchell-1089-1133.pdf. I urge readers from other states to consider compiling similar documents for their own jurisdictions.

D. Alabama's Plain-Meaning Rule: "Construe Only If Ambiguous"

All this discussion about canons of construction brings us to another feature of textualism in Alabama: the so-called "plain-meaning rule." The plain-meaning rule is a canon created by judges, for judges. It essentially says that courts shouldn't resort to "judicial construction" when interpreting a law if the law's text is "unambiguous."[87] Or, to put the same point differently, if the text's meaning is "plain" then "there is no room for judicial construction."[88]

The plain-meaning rule is often described as the most important feature of textualism in Alabama,[89] but the meaning of that rule is—well—not exactly plain.[90] Several features of the rule can make it difficult for litigants (and judges) to navigate.

To begin, the name of the rule itself is confusing. The "plain-meaning rule," as our court has described it, is *not* the same thing as the principle, discussed in Part II.B, above, that words should be given their "plain" (as in, "natural" or "commonly understood") meaning. Rather, according to our Court, the plain-meaning rule functions as a bar on certain types of outside sources by telling judges not to consider those sources unless the law's "plain" (as in "clear" or "obvious") meaning is ambiguous.[91] The rule effectively operates in Alabama as a two-step injunction:

> Step 1: Read the text and decide—without engaging in "construction"—whether the meaning of the text is plain.

[87] *Ex parte* McCormick, 932 So. 2d 124, 132 (Ala. 2005).

[88] *Id.*

[89] *See* Marc James Ayers, *Unpacking Alabama's Plain-Meaning Rule of Statutory Construction*, 67 ALA. LAWYER 31, 32 (2006) ("In Alabama, while all of the various canons are certainly recognized, one has achieved 'primary' status: the Plain Meaning Rule.").

[90] Something similar may be true of the version of the "plain-meaning rule" applied in federal courts. *See, e.g.*, Arthur W. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1308 (1975) (arguing that federal "courts have no clear idea about what the plain meaning rule is . . . . Indeed, it frequently seems that some courts feel that recitation of the plain meaning rule in one of its forms is a compulsory rite, the meaning of which is lost in antiquity" and which "is essentially meaningless" in practice).

[91] *See* DeKalb County LP Gas Co. v. Suburban Gas, 729 So. 2d 270, 275 (Ala. 1998) ("If the language of the statute is unambiguous, then there is no room for judicial construction. . . ."); *id.* at 277 ("[W]e must look first to the plain meaning of the words the legislature used. We should turn to extrinsic aids to determine the meaning of a piece of legislation only if we can draw no rational conclusion from a straightforward application of the terms of the statute.").

> Step 2: If the meaning is plain, apply it. If not, resort to judicial "construction" to help illuminate its meaning.

That formulation raises two additional difficulties. The first is that the rule seems circular. Any act of ascribing meaning to words requires the reader to construe those words.[92] Telling a judge "don't construe a statute unless it's ambiguous," is a bit like telling your accountant, "don't check my math unless it's wrong." Neither command makes much sense. Just as your accountant can't know whether your math is wrong until she's checked it, a judge can't know what a law means—let alone whether that meaning is "plain"—until he's construed it.

The way our court has avoided this circularity is by tacitly drawing a distinction between "interpretation" on the one hand, and "construction," on the other. Interpretation—that is, the bare act of looking at written words and intuiting their meaning—is something all people do automatically whenever we read language. But "construction" (at least for purposes of our court's plain-meaning-rule cases) involves something extra—some additional work or some extra considerations on the part of the judge—which judges are supposed to avoid unless the text is ambiguous.

So what is the plus-factor that transforms (necessary) interpretation into (forbidden) construction? Our precedents do not give a clear answer. Some of our cases seem to indicate that a judge is engaged in forbidden "construction" whenever he consults any source other than the isolated statutory provision.[93] Other cases suggest that the plain-meaning rule prevents judges from engaging in policy considerations or consulting subjective-intent evidence unless the text is ambiguous, but that it does not prohibit judges from considering sources that shed light on the text's objective semantic meaning (such as historical context, related statutory

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[92] *Construe*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("To analyze and explain the meaning of"); *see also* SCALIA & GARNER, *supra* note 1, at 13–15 (explaining that "construction" and "interpretation" are "interchangeabl[e]").

[93] *See, e.g.*, *DeKalb County LP Gas*, 729 So. 2d at 276–77 (declaring several semantic canons, including the rule that all provisions of a statute should be construed together, off-limits to judges unless the provision read in isolation is ambiguous).

provisions, semantic canons of construction, and so on).[94] That inconsistency permeates our plain-meaning-rule jurisprudence.[95]

The second difficulty with the plain-meaning rule is that there is no agreed-upon threshold for determining whether a statute's meaning is ambiguous.[96] Justice Brett Kavanaugh once observed that some judges "apply something approaching a 65-35 rule," meaning that if the judges are moderately confident in their understanding of a statute's meaning then they will declare the statute "clear and reject reliance on [post-interpretive] canons."[97] Meanwhile, other judges "apply more of a 90-10 rule," requiring a statute's meaning to be *overwhelmingly* obvious before they are willing to "call it clear."[98] As far as I can tell, our court has never explored this issue.

I discuss the plain-meaning rule more below, but for now the key takeaway is that the rule, whatever its drawbacks, is unavoidable in Alabama law. Litigants must be prepared to discuss the rule and its application anytime there's a dispute about statutory or constitutional interpretation. Marc Ayers has published an excellent practitioner's guide on the plain-meaning rule, in which he explains that Alabama litigants who want to rely on an external source or canon to advocate for their preferred interpretation of a text typically must convince the court either that: (1) the source or canon is a tool to determine the text's plain meaning, rather than a gloss applied on top of (or in contravention to) that plain meaning; or (2) the text is ambiguous on its face; or (3) the text is incoherent or absurd on its face.[99] That guide was published almost two decades ago, but it is still—and, barring a major shift

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[94] *See, e.g.*, State Farm Fire & Cas. Co. v. Lambert, 285 So. 2d 917, 918 (Ala. 1973) (holding that questions of statutory interpretation "cannot be answered apart from the historical context within which the statute was passed"); Bean Dredging, L.L.C. v. Ala. Dep't of Revenue, 855 So. 2d 513, 517 (Ala. 2003) (stating that interpretation requires courts to read statutes "as a whole," rather than reading single provisions in isolation); Winner v. Marion Cnty. Comm'n, 415 So. 2d 1061, 1064 (Ala. 1982) (applying a semantic canon—the associated-words canon—without a threshold finding of ambiguity); *Ex parte* Emerald Mountain Expressway Bridge, L.L.C., 856 So. 2d 834, 843 (Ala. 2003) (applying a clear-statement canon before making a threshold determination of ambiguity).

[95] *See* Ayers, *supra* note 89, at 36 n.5 (giving examples of cases that purport to rely on *DeKalb County* yet reach a contrary result).

[96] United States v. Turkette, 452 U.S. 576, 580 (1981) ("[T]here is no errorless test for identifying or recognizing 'plain' or 'unambiguous' language."); *see also, e.g.*, Easterbrook, *supra* note 61, at 62 ("There is no metric for clarity.").

[97] Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2137–38 (2016) (book review).

[98] *Id.*

[99] *See generally* Ayers, *supra* note 89.

in our jurisprudence, will long remain—an important tool for navigating the plain-meaning rule in this state.

III. Ongoing Debates and Open Questions

No article about textualism in Alabama would be complete if it didn't acknowledge the gaps and incongruities in our court's jurisprudence. Below is a list of some particularly important unresolved questions about how our court does—or should—approach legal interpretation. My hope is that practitioners and scholars will keep these questions in mind and, in appropriate cases, suggest sensible answers.

A. What Is the Meaning of the Plain-Meaning Rule?

As just discussed, the plain-meaning rule simultaneously requires a judge to *interpret* a law (which he must do in order to assess whether it is "plain") and prohibits him from *construing* that law (unless it is not "plain"). In order for the plain-meaning rule to make sense, then, there must be some dividing line between ordinary "interpretation," which the rule requires, and "construction," which it restricts. What is that line?

Our earliest cases suggest that the type of "construction" prohibited by the plain-meaning rule was only the type of construction that "enlarged" or "extended" a statute beyond its natural meaning.[100] On that early understanding of "construction," then, the plain-meaning rule may have been just another way of reminding judges not to subordinate a statute's objective semantic meaning to the legislature's perceived background purpose (or to the judge's own policy goals). In other words, "don't make it up."

"Don't make it up" is as unobjectionable a principle as you'll find in the law. Indeed, it captures the entire textualist philosophy in a nutshell. But our

[100] *See, e.g.*, Nashville & D.R. Co. v. State, 30 So. 619, 622 (Ala. 1901) ("[T]he courts have no power to enlarge or diminish [a statute] by construction or amendment."); E. Tennessee, Va. & Ga. R.R. Co. v. Bayliss, 77 Ala. 429, 434 (1884) ("The statute ought not to be extended by construction to cases not included in its clear and unambiguous terms."); Noles v. State, 24 Ala. 672, 696 (1854) ("This statute . . . may not be enlarged, by construction, beyond the plain import of the terms in which it is couched."); State v. Adams, 2 Stew. 231, 243 (Ala. 1829) (Taylor, J.) (condemning "[t]he practice of extending statutes far beyond their legitimate meaning, indeed of often giving them a construction directly in opposition to the plain intention of those who made them"); *id.* at 246 (Saffold, J.) ("Courts have no authority, in order to carry into effect their own notions of expediency, to extend the operation of statutes, by construction, to persons or things not within their legitimate meaning, though they be equally within their reason."); White v. St. Guirons, Minor 331, 337 (Ala. 1824) ("[A statute's] operation cannot by construction be extended to matter not mentioned.").

modern cases have expanded the plain-meaning rule beyond that simple command. Some of our modern cases seem to assume that the type of "construction" prohibited by the plain-meaning rule is the reliance on *any* source apart from the provision at issue read in isolation.[101] On that view, the plain-meaning rule prohibits judges from relying on "outside" evidence of semantic meaning, even if that outside evidence reveals that a law's original public meaning is different from the meaning that modern judges would ascribe to the law after reading it in isolation. (I have doubts about whether that formulation is coherent in theory or workable in practice; I tend to agree with Judge Henry Friendly that it is "illogical to hold that a 'plain meaning' shuts off access to the very materials that might show it not to have been plain at all."[102])

A competing line of cases suggests that the plain-meaning rule's limitation on "construction" applies only to policy-oriented canons of construction[103]—also called "normative canons" or "substantive canons"[104]—and to reliance on intent-focused evidence,[105] but does not apply to semantic canons. For example, our court has suggested that it is always appropriate to consult related statutory provisions,[106] historical context,[107] and certain clear-statement canons.[108] Under this latter line of cases, then, the plain-meaning rule prohibits judges from entertaining hardship or policy arguments if the

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[101] *See supra* note 93.

[102] *See* William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539, 548 (2017) (quoting Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* BENCHMARKS 196, 206 (1967)) (internal alteration marks omitted); *see also, e.g.*, Frankfurter, *supra* note 28, at 541 ("If the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded.").

[103] *See, e.g.*, *Ex parte* Ankrom, 152 So. 3d 397, 419–20 (Ala. 2013) (describing the plain-meaning rule as a restriction on consequentialist or policy-oriented reasoning).

[104] *See supra* Part II.C.

[105] *See, e.g.*, *$223,405.86*, 203 So. 3d at 830–40 (describing the plain-meaning rule as "a response to the constitutional mandate of the doctrine of the separation of powers set out in Art. III, § 43, Alabama Constitution of 1901," and indicating that the rule operates as a bar on "legislative history" and similar subjective-intent-focused evidence).

[106] *See* Ala. Dep't of Revenue v. Greenetrack, Inc., No. 1200841, 2022 WL 2387030, at *7 (Ala. June 30, 2022) (collecting cases).

[107] *See, e.g.*, *Lambert*, 285 So. 2d at 918 (holding that questions of statutory interpretation "cannot be answered apart from the historical context within which the statute was passed").

[108] *See, e.g.*, *Ex parte Emerald Mountain*, 856 So. 2d at 843 (applying an anti-exemption canon without a threshold finding of ambiguity); *Ex parte* Jenkins, 723 So. 2d 649, 651 (Ala. 1998) (applying the anti-retroactivity canon without a threshold finding of ambiguity).

text is unambiguous, but it does not prohibit judges from consulting outside sources that shed light on the text's semantic meaning.

In my own view, this latter line of cases makes more sense than the former. It is also more consistent with our earliest plain-meaning jurisprudence and with the separation-of-powers rationale that is often cited in support of the plain-meaning rule.[109] But it still leaves the question of whether it is *ever* appropriate for judges to decide cases based on either policy considerations or subjective-intent evidence. On the textualist account, policy determinations belong to the legislature alone—and that is true whether a law's text is "ambiguous" or not.[110] Textualists recognize that legislative history and certain "substantive" canons[111] can be used to shed light on the social and linguistic conventions that prevailed at the time of a law's enactment (because those conventions affect the law's original public meaning).[112] But—at least on the typical textualist account[113]—those tools cannot be used to reach a result at odds with the most plausible semantic meaning of the text,[114] nor can they be used to supply meaning to a text that is incoherent.[115]

B. What Is a Principled Dividing Line Between "Plain Meaning" and "Ambiguity"?

By restricting reliance on certain canons to cases of "ambiguity," the plain-meaning rule requires judges to make threshold determinations about whether a statute's language is clear. How much clarity is enough? Our cases don't say. Sometimes our court will try to articulate a standard of clarity by

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[109] *See supra* note 105.

[110] *See* Baude & Doerfler, *supra* note 102, at 541 ("[I]rrelevant information shouldn't become useful just because the text is less than clear.").

[111] *See supra* note 71.

[112] *See* Matter of Sinclair, 870 F.2d 1340, 1342–43 (7th Cir. 1989) (Easterbrook, J.) (explaining that legislative history may be used to illuminate semantic meaning, including by shedding light on how words are typically used in a particular historical context, but cannot be used to show private intent at variance with the text); *see also supra* note 71.

[113] Justice Amy Coney Barrett has argued that the standard textualist account is too quick to discount substantive canons. *See generally* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV 109, 110 (2010) (arguing that certain substantive canons are permissible exercises of "the judicial power" as that phrase was originally understood).

[114] *See* SCALIA AND GARNER, *supra* note 1, at 343 (rejecting "[t]he false notion that the spirit of a statute should prevail over its letter"); *see generally* Bamzai, *supra* note 2 (arguing that the modern substantive principle of deferring to administrative agencies has no basis "in traditional interpretive methodology" or in "the views of the Framers").

[115] *See* SCALIA AND GARNER, *supra* note 1, at 134 ("An unintelligible text is inoperative.").

saying something like, "a statute is ambiguous when it is of doubtful meaning,"[116] but that just raises the same question in different form—how much doubt is enough?

The reality is that most laws that produce litigation are at least a little unclear—at least *somewhat* susceptible to multiple interpretations. This is not to say that all interpretations are equally plausible (they rarely are), just that colorable arguments can often be made on both sides. Litigation is expensive, and most people know better than to throw away a small fortune pursuing pie-in-the-sky legal theories. So if a little bit of unclarity were enough to render a text "not plain," then there wouldn't be much point to the plain-meaning rule because the ambiguity-dependent canons could be invoked in every non-frivolous case.

If a little bit of ambiguity is not enough, how much is? Should courts try to quantify the amount numerically, as Justice Kavanaugh did when he wrote that some judges apply a 90-10 rule while others apply something closer to 65-35?[117] Or perhaps there are other heuristics for assessing clarity, such as whether a competing interpretation has been adopted by other courts (if many other judges disagree about what a statute means, perhaps that in itself is proof that the meaning isn't clear).

If the answer to these questions is that there's no way of drawing a principled and useful dividing line between plain meaning and ambiguity, then perhaps—as Justice Kavanaugh[118] and others[119] have suggested—our court should do away with the plain-meaning rule and replace it with a simpler maxim: "If an outside source helps ascertain the original public meaning, consider it; if not, don't."

C. What Assumptions Should Judges Make About the "Reasonable" or "Ordinary" Reader?

I've now mentioned several times that textualism requires judges to ask themselves how a reasonable person would understand the law's text. That raises an obvious question—what are the attributes of such a person? Is he the average person on the street? Probably not—our cases say he must be

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[116] S & S Distrib. Co. v. Town of New Hope, 334 So. 2d 905, 907 (Ala. 1976).

[117] *See* Kavanaugh, *supra* note 97, at 2137–38.

[118] *Id.*

[119] *See, e.g.*, Baude & Doerfler, *supra* note 102, at 541 ("The plain meaning rule . . . has not been justified, and perhaps cannot be."); Frankfurter, *supra* note 28, at 541 ("If the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded.").

"reasonably well informed."[120] Fair enough. But what does it mean for a reader to be reasonably well informed? Are judges to assume that a well-informed reader would have consulted a dictionary? Would have consulted case books? Our precedents do not give a clear answer. There is not even a consensus among textualists about this point.[121] But the answer matters a great deal to legal interpretation, particularly when it comes to provisions that employ technical terms whose significance might not be at all apparent to the average person.[122]

D. Are Certain Descriptive Canons Faulty?

I've already expressed skepticism about the legitimacy of normative canons and won't rehash those concerns here.[123] The controversy surrounding normative canons is a philosophical one—a fundamental dispute about the scope of judicial power. Descriptive canons do not raise that sort of philosophical concern (everyone agrees that judges can consult objective indicia of meaning when interpreting texts), but they do raise empirical concerns. Because descriptive canons are supposed to be objective, they are only as useful as they are accurate. A rule telling judges "*may* is mandatory, and *shall* is permissive" would qualify as a descriptive canon (because it purports to describe how people use language), but it would be an inaccurate, worse-than-useless one.

In recent years, lawyers and linguists have questioned whether certain well-known descriptive canons accurately capture how people use language. A particular focus of criticism has been the series-qualifier canon, which purports to describe how postpositive modifiers normally attach to antecedents.[124] There may be reasons to doubt the empirical validity of other

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[120] *See, e.g.*, *S & S Distrib. Co*, 334 So. 2d at 907 (quotation marks and citation omitted).

[121] *Compare, e.g.*, Easterbrook, *supra* note 30, at 82 (a law means what the "median voter" would take it to mean) *with* Easterbrook, *supra* note 61, at 61, 65 (a law means what "a skilled, objectively reasonable user of words" who was "thinking about the same problem" as the legislature would take it to mean); *compare* SCALIA AND GARNER, *supra* note 1, at 69 (a law means what "common" people would reasonably understand it to mean) *with id.* at 324 (a law means what "the members of the bar practicing in that field reasonably enough assume" that it means).

[122] One common example of such a term is "person"—a term which, when used in the legal context, almost always includes corporations and other "artificial persons" in addition to human persons.

[123] *See supra* Part III.A.

[124] *See Facebook*, 141 S. Ct. at, 1174 (Alito, J., concurring in the judgment).

canons as well.[125] These empirical concerns are worth taking seriously. They also serve as a useful reminder that litigants must do their homework when they rely on a canon of construction because not all descriptive canons apply in all situations, and some descriptive canons might be so misguided that they should never apply at all.

E. What Is the Role of Stare Decisis?

Textualism does not always mesh neatly with stare decisis. Textualism teaches that the text of a law *is* the law. But the doctrine of stare decisis suggests that judicial precedent is also law—perhaps even a higher law. Robust versions of stare decisis, such as the one currently favored by the United States Supreme Court, allow judges to adhere to their past interpretation of enacted text even if the judge realizes that the prior interpretation is objectively wrong. This incongruity is what led Justice Scalia to declare that "stare decisis is not part of my [textualist] philosophy; it is a pragmatic exception to it."[126] Justice Thomas, meanwhile, believes the exception is unwarranted: "If a prior decision demonstrably erred in interpreting such a law," he has argued, "judges should exercise the judicial power—not perpetuate a usurpation of the legislative power—and correct the error. A contrary rule would permit judges to 'substitute their own pleasure' for the law."[127]

My experience indicates that, in practice, the Alabama Supreme Court tends to adhere more closely to Justice Thomas's approach to stare decisis, though we haven't said so explicitly. Just last year, we overruled multiple precedents because litigants demonstrated that those precedents were "not

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[125] Judges often disagree about the semantic weight that should be attached to a statute's title. *Compare, e.g.*, Yates v. United States, 574 U.S. 528, 552 (2015) (Alito, J., concurring in the judgment) *with id*. at 558-59 (Kagan, J., dissenting); *see also* Tobias A. Dorsey, *Some Reflections on* Yates *and the Statutes We Threw Away*, 18 GREEN BAG 2D 377, 379, 386–90 (2015) (noting that all parties and all the justices in *Yates* overlooked a federal law that prohibits courts from assigning interpretive weight to a statute's title); *Ex parte* N.G., 321 So. 3d 655, 661 (Ala. 2020) (Mitchell, J., dissenting) (making a similar point with respect to Alabama's statutory prohibition on assigning interpretive value to titles and headings). To give another example, I recently questioned whether courts' heavy reliance on the prior-construction canon is appropriate and noted some circumstances in which that canon "may not be justified" as an empirical matter. *Ex parte* Mobile Pub. Libr., No. SC-2022-0450, 2022 WL 4007503, at *2 n.2 (Ala. Sept. 2, 2022) (Mitchell, J., concurring specially).

[126] SCALIA, *supra* note 5, at 140.

[127] Gamble v. United States, 139 S. Ct. 1960, 1985 (2019) (Thomas, J., concurring) (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)).

supported by the text,"[128] "not plausible" readings of the text,[129] or impermissibly "substitute[d] our [court's] judgment for that of the Legislature."[130] Even so, some of our older decisions describe stare decisis as a doctrine of "great[] potency," and have indicated that our court may choose to prioritize its own precedents over enacted text if it wishes.[131] These conflicting approaches have not been reconciled, so the key questions about the limits of stare decisis—"Is the doctrine legitimate with respect to cases interpreting statutory and constitutional text?[132] And if so, in what circumstances?"—call out for definitive resolution.

IV. Conclusion

In this article, I have provided an overview of textualism and done my best to explain how textualist principles have been applied by the Alabama Supreme Court. But for any questions this article may have answered, many more remain. I've flagged some of these open questions in Part III, above, but that section is not exhaustive. By thinking carefully about such questions and proposing sensible answers to them, practitioners and scholars can help courts refine legal interpretation in Alabama and, I hope, across the nation.

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[128] *Ex parte* Pinkard, No. 1200658, 2022 WL 1721483, at *5 (Ala. May 27, 2022).

[129] State v. Grant, No. 1210198, 2022 WL 4115310, at *6 (Ala. Sept. 9, 2022).

[130] *Id.* (internal quotation and alteration marks omitted).

[131] *See, e.g.,* Hexcel Decatur, Inc. v. Vickers, 908 So. 2d 237, 242 (Ala. 2005) (refusing to consider whether prior precedent was erroneous because "[i]n a contest between the dictionary and the doctrine of stare decisis, the latter clearly wins") (quotation marks and citation omitted).

[132] A more robust version of stare decisis may be appropriate in common-law cases, because "the common law included 'established customs,'" and common-law judges were required to issue judgments "according to the known . . . customs of the land." *Gamble*, 139 S. Ct. at 1982–83 (2019) (Thomas, J., concurring) (quoting 1 William Blackstone, Commentaries on the Laws of England *68–69 (1765)) (internal alteration marks omitted). In other words, judges in common-law cases generally were expected to adhere to longstanding precedents because those precedents helped form the law the judges were tasked with applying. *Id.* at 1983 (Thomas, J., concurring). But even "the common law did not view precedent as unyielding when it was 'most evidently contrary to reason' or 'divine law.'" *Id.* (quoting 1 Blackstone, Commentaries *69–70).