

## THE PROBLEM OF CANONICAL AMBIGUITY IN *ALI V. FEDERAL BUREAU OF PRISONS*

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*No single ideal of exactness has been laid down; we do not know what we should be supposed to imagine under this head—unless you yourself lay down what is to be so called. But you will find it difficult to hit upon such a convention; at least any that satisfies you.*<sup>1</sup>

Textualists seem to like textual canons of statutory construction<sup>2</sup> and with apparently good reason. Canons seem to make apparently sparse text more determinate. Such “intrinsic aids” also apparently do not require courts to inquire into evidence of statutory purpose extrinsic to the statute’s text. I will suggest below, however, that the Court’s decision in *Ali v. Federal Bureau of Prisons*<sup>3</sup> illustrates how these textualist advantages of textual canons might more apparent than real. *Ali* illustrates how the intelligent application of the canons requires inquiry into extra-textual statutory purpose. Moreover, the purposive character of the canons is unrelated to Karl Llewellyn’s famous claim that “there are two opposing canons [of statutory construction] on almost every point.”<sup>4</sup> One could not eliminate this essentially purposive character, even if one pruned the list of canons to eliminate the more purposive ones, as suggested by Justice Scalia. One also could not make the canons less purposive by refusing to fine-tune them for specific statutes, as suggested by Adrian Vermeule.<sup>5</sup> The problem is not that suggested by Llewellyn—i.e., that textualist and purposivist canons conflict with each other. Instead, the problem is that we do not know what it would mean to apply any canon mechanically without regard to a particular statute’s purposes. Even when we know which canon to apply, that canon nevertheless itself can constitute an ambiguous rule that requires interpretation. If one insists that the canon must function as a mechanical algorithm, then one will be forced to create meta-canons to govern the canons’ own

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1. Ludwig Wittgenstein, *Philosophical Investigations* 42<sup>c</sup> § 88 (G.E.M. Anscombe trans., MacMillan Co. 1958).

2. Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 25 (Princeton U. Press 1997) (“Textualism is often associated with rules of interpretation called the canons of construction—which have been widely criticized, indeed even mocked, by modern legal commentators.”).

3. 128 S. Ct. 831 (2008).

4. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*, 3 Vand. L. Rev. 395, 401 (1950).

5. Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. Rev. 74, 140–41 (2000).

application in ambiguous cases—and such a meta-canon will itself encounter ambiguities requiring yet further refining rules, and so on, *ad infinitum*. As I shall suggest below, this prospect of an infinite regress suggests that the mechanistic view of canons is a misstep. Instead, canons are better seen as exemplars of the essentially purpose-driven character of language: They are rules of thumb reminding us that grammatical etiquette is always tightly connected to linguistic mission. Seen as purposive rules, canons are useful tools, but they are not tools from which hard-core textualists should take much comfort. Canons create as much textual ambiguity as they resolve; one can reasonably view canons as serving precisely the function of surfacing ambiguities in text that courts might otherwise overlook, thereby creating opportunities for the court to consider the purpose of the enactment lying behind the text.

#### I. EJUSDEM GENERIS IN *ALI V. BUREAU OF PRISONS*

At the heart of *Ali* is a three-way debate about how to apply the *ejusdem generis* canon. Two of the opinions (Justice Kennedy’s four-vote dissent and Thomas’ majority opinion) ~~attempt to apply this canon~~ without saying much about the purpose of the Federal Tort Claims Act, which was the underlying statute being construed. This debate between Justices Kennedy and Thomas reproduces the sense of legalistic futility conveyed by Llewellyn’s famous columns of mutually contradictory canonical “thrusts” and “parries.”<sup>6</sup> Justice Breyer’s dissent, by contrast, plays the role of Karl Llewellyn himself, sidestepping the canonical debate entirely by focusing instead on extrinsic evidence of statutory purpose without reference to the proper application of the canon.

The specific issue in *Ali* was whether the exception to the Federal Tort Claims Act’s waiver of immunity for claims arising out of the “detention” of property covered prison officials who lost *Ali*’s prayer rug and Quran on the ground that those officials constituted “any officer of customs or excise or any other law enforcement officer” referred to by the waiver exception.<sup>7</sup> Justice Thomas emphasized that the ordinary meaning of the term “any . . . law enforcement officer” encompassed prison guards.<sup>8</sup> The *Ali* majority refused to read this phrase narrowly to encompass only law enforcement officers acting in the capacity of customs or excise officers because such a reading rendered the residual catchall clause superfluous. According to the majority, any official who carried out customs or excise duties was likely “any officer of customs or excise” by virtue of their duties, irrespective of whether they were formally employed by the Department of the Treasury.<sup>9</sup> The residual clause’s reference to “any law enforcement officer,” therefore, served no purpose unless it expanded the coverage of the exception beyond officers acting in the capacity of “any officer of customs or excise.”

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6. To illustrate the indeterminacy of the canons, Llewellyn listed twenty-eight canons in two parallel columns, the right-hand column labeled “[t]hrust” and the left-hand column labeled “[p]arry.” The “thrusts” tended to be maxims urging the judge to stick with the text, while the “parries” tended to be exhortations to read text in light of some purpose that bare text slighted. Any lawyer, Llewellyn implied, would be able to draw on one or the other columns to achieve whatever interpretive result they desired. Llewellyn, *supra* n. 4, at 401–06.

7. 128 S. Ct. at 834.

8. *Id.* at 836–38.

9. *Id.* at 835–37, 839–41.

The majority also noted that the Civil Assets Forfeiture Reform Act, which reinstated the waiver of immunity for all claims by innocent co-owners of property detained by “any . . . law enforcement officer” seizing property “under any provision of Federal law,”<sup>10</sup> was superfluous if the exception to the waiver applied only to officials acting like “officer[s] of customs or excise,” because such officers do not enforce any laws except excise or customs laws. As for rendering superfluous the reference to “any officer of customs or excise,” the Court dismissed this objection to a broad reading of the catchall phrase by observing that the phrase “may have simply intended to remove any doubt that officers of customs or excise were included in ‘law enforcement officers.’”<sup>11</sup>

Justice Kennedy’s dissent, by contrast, observed that, if one construed the term “any . . . law enforcement officer” literally, then the clause’s reference to “any officer of customs or excise” would seem to be superfluous, because customs and other revenue officers were surely no less “law enforcement officers” than prison officials.<sup>12</sup> To preserve some role for the reference to customs and excise, therefore, Justice Kennedy’s dissent for four justices invoked the *ejusdem generis* canon: The apparently general reference to all law enforcement officers must be construed to refer only to law enforcement officers in the same genre as “officers of customs or excise”—say, Drug Enforcement Agency officials confiscating contraband at the border.<sup>13</sup> Justice Kennedy insisted that this narrow reading of the catchall reference to “any . . . law enforcement officer” would not render it surplusage because there were some officers (for instance, in the Drug Enforcement Agency or Coast Guard) who enforced revenue or contraband laws even though they were not formally “officer[s] of customs or excise.”

In short, Justice Thomas’s and Kennedy’s opinions seemed to confirm Karl Llewellyn’s prediction: The *ejusdem generis* canon was essentially indeterminate because either a broad or narrow reading of “any . . . law enforcement officer” would render some text superfluous, thereby violating the spirit of the canon. As if channeling from Llewellyn himself, Justice Breyer’s dissent dismissed the canons as “simply crystalliz[ing] what English speakers already know”<sup>14</sup> and, in any case, likely to be “countered . . . by some maxim pointing in a different direction.”<sup>15</sup> Justice Breyer instead urged the Court to look to the larger purpose of the underlying statute, echoing Llewellyn’s admonition that, “[i]f a statute is to make sense, it must be read in the light of some assumed purpose.”<sup>16</sup> According to Justice Breyer, quite apart from the textual details of the clause, it simply made no sense to bury a general immunity for all executive officers in an obscure provision that was manifestly concerned with revenue laws.<sup>17</sup> By contrast, it made perfect sense to provide tort immunity only to officers who executed revenue laws because “[o]ther statutes already provided recovery for plaintiffs

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10. 28 U.S.C. § 2680(c)(1) (2006).

11. *Ali*, 128 S. Ct. at 840.

12. *Id.* at 841–49 (Kennedy Stevens, Souter & Breyer, JJ., dissenting).

13. *Id.* at 843–44.

14. *Id.* at 850 (Breyer & Stevens, JJ., dissenting).

15. *Id.* (quoting *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001)).

16. Llewellyn, *supra* n. 4, at 400.

17. *Ali*, 128 S. Ct. at 849–52 (Breyer & Stevens, JJ., dissenting).

harmd by federal officers enforcing customs and tax laws but not for plaintiffs harmed by all other federal officers enforcing most other laws.”<sup>18</sup>

*Ali*’s three opinions, in short, are together a familiar example of a classic legal set piece—the debate between the purposivist and textualist over how to construe the law. This sort of debate is as ancient as St. Paul’s warning that “the letter killeth, but the spirit giveth life.”<sup>19</sup> But one should not let the familiar battle between the letter and spirit of the law to obscure the unusual aspect of *Ali*. Both Justices Thomas and Kennedy are statutory literalists, invoking (for the most part<sup>20</sup>) only sources approved by textualism. Their disagreement, therefore, reveals more about the internal difficulties of textualism than Justice Breyer’s sidebar on why text must be supplemented by extrinsic sources.

## II. THE PROBLEM OF CANONS WITH AMBIGUOUS APPLICATION

At the core of Kennedy and Thomas’s disagreement is the problem of canons with ambiguous application—what I shall call “canonical ambiguity.” As an example of canonical ambiguity, consider ~~the~~ *ejusdem generis*. The intuition underlying *ejusdem generis* is that the legislature wants every term in a series of nouns to make a difference to meaning. Therefore, an enumeration of both specific and general categories should construe the latter narrowly in order to give independent effect to the former, by converting the list of narrower terms into an implicit principle limiting the broader term. For instance, the Court reads “any other class of workers engaged in . . . commerce” to refer only to workers engaged in transportation-related activities in order to give some independent effect to the preceding reference to “seamen” and “railroad employees.”<sup>21</sup>

So understood, *ejusdem generis* is prone to two sorts of ambiguities. First, one has to infer some unwritten limiting principle from a series of specific terms; second, one has to minimize the wastage of words in applying the canon even when any interpretation of a statute will inevitably waste words. It is difficult to imagine how one can intelligibly resolve these ambiguities without referring to the purposes of the statute that one is construing.

Consider, for instance, how *ejusdem generis* would apply to the series “Plesiosaurus, Brachiosaurus, Ceratosaurus, or any other dinosaur.” The reference to “any . . . dinosaur” seems to make superfluous the three references to particular species of dinosaurs, thereby calling for application of the canon. However, one could infer several different limiting principles from those three references: Each specific species is, for instance, a word of five syllables as well as a dinosaur from the Jurassic period. Which limiting principle is the “correct” one? Presumably, one would want to know the purpose of the series: If the series is being used as part of a rule in a spelling bee, then the number of syllables might be more relevant than if the series is part of a rule for an archeological dig.

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18. *Id.* at 851.

19. II *Corinthians* 3:6 (King James).

20. Justice Kennedy briefly alludes to legislative history at *Ali*, 128 S. Ct. at 847, but his opinion is otherwise innocent of references to purposive sources extrinsic to statutory text.

21. *Cir. City Stores, Inc.*, 532 U.S. at 113–15 (quoting 9 U.S.C. § 1 (2000)).

As a real-life instance of this problem of inferring a common principle from a series of terms, consider *Begay v. United States*.<sup>22</sup> *Begay* held that the series of crimes listed in the Armed Career Criminal Act's ("ACCA") definition of "violent felony"<sup>23</sup> "all typically involve purposeful, 'violent,' and 'aggressive' conduct"<sup>24</sup> and, therefore, do not include the offense of driving while intoxicated. However, the inference that purposeful violence is the most relevant common attribute of "burglary, arson, . . . extortion, [or any crime that] involves [the] use of explosives"<sup>25</sup> requires a defense. Why not, instead, rely on the magnitude of the risks created by the enumerated offenses rather than the intentions of the criminals who produce those risks? It seems odd to answer this question without attempting to consider the purpose of the series. If the point of the provision is to deter firearm possession by anyone who has been convicted of criminally risky activities, then the manner by which the risk is produced seems irrelevant. If the purpose of the provision is to impose extra punishments on especially culpable conduct, then the nature as well as the consequences of that conduct ought to matter. Accordingly, the majority referred to the purpose of the ACCA as manifested in its title and legislative history to support its inference that the specific terms' most relevant common attribute was purposeful violence against persons.<sup>26</sup>

In short, if one is engaged in the enterprise of inferring unwritten common attributes from a series of written terms, then one must necessarily have recourse to some principle outside of text to choose between the competing attributes that characterize the written series equally well. The best candidate for such a principle is statutory purpose. *Ejusdem generis* is, at its heart, a purposive canon.

There is a temptation to decry such a purpose-based choice as a violation of textualist tenets. But this accusation should be directed against *any* use of the *ejusdem generis* canon because *ejusdem generis* necessarily requires one to draw a non-textual attribute from a written series. In his concurrence, Justice Scalia decried what he took to be the *Begay* majority's "piecemeal, suspenseful, Scrabble-like approach to the interpretation of this statute" that, in Justice Scalia's opinion, "engrafts" a non-textual limit against the letter of the law.<sup>27</sup> According to Justice Scalia, the majority wimped out of the austere demands of textualism by taking "ever-ready refuge from the hardships of statutory text" in "the (judicially) perceived statutory purpose" of deterring intentionally violent crime.<sup>28</sup>

But Justice Scalia's criticism seems simply to reject the very premise of the *ejusdem generis* canon, which is that fidelity to written text requires courts to infer unwritten limiting principles from specific written terms in order to prevent the latter from being rendered nugatory. Justice Scalia urged in his *Begay* concurrence that the

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22. 128 S. Ct. 1581 (2008).

23. 18 U.S.C. § 924(e)(2)(B) (2006).

24. 128 S. Ct. at 1586 (citing *U.S. v. Begay*, 470 F.3d 964, 980 (10th Cir. 2006) (McConnell, J., dissenting in part)).

25. 18 U.S.C. § 924(e)(2)(B).

26. *Begay*, 128 S. Ct. at 1585–86.

27. 128 S. Ct. at 1589 (Scalia, J., concurring).

28. *Id.* at 1590 (Scalia, J., concurring).

only relevant factor in determining whether an offense qualified as a “violent felony” was whether the offense created a sufficiently high risk of serious physical injury to another person.<sup>29</sup> But Justice Scalia’s interpretation of the statutory definition in the ACCA rests wholly on the text of the definition’s broad residual clause’s reference to any crime that “otherwise involves conduct that presents a serious potential risk of physical injury to another.”<sup>30</sup> It is hard to perceive what the preceding enumeration (burglary, arson, extortion, or use of explosives) adds to this residual clause, if the implicit common attribute of these specific terms is precisely what the broad residual clause specifically references—i.e., a “serious potential risk of physical injury.” Under Justice Scalia’s definition, those specific illustrative crimes serve no purpose, rather, they are mere surplusage. Indeed, Justice Scalia concedes as much when he declares that “the canon against surplusage has substantially less force when it comes to interpreting a broad residual clause like the one at issue here.”<sup>31</sup>

~~Who, then, wimped out of textualism—the *Begay* majority, which inferred a non-textual purpose from a series of statutory terms, or Justice Scalia’s dissent, which threw four specific statutory terms under the bus of surplusage? Is it more of a textualist error to commit sins of omission or commission—that is, to kick textual terms out of the statute (as Justice Scalia does) or to adopt non-textual terms into the statute (as does the *Begay* majority)? *Ejusdem generis* declares that creating “orphan” text is a violation of the norms of ordinary usage. Justice Scalia is free to denounce this canonical version of textualism, but he cannot do so by invoking fidelity to plain text.~~

The opinions in *Ali* reproduced precisely this debate among textualists. Justice Thomas urges a broad reading of “any . . . law enforcement officer,” while Justice Kennedy urges a narrow reading. The former seems to render the term “any officer of customs or excise” superfluous; the latter seems to leave little for the broad residual clause to do. There is no textualist resolution to the impasse: The canon’s injunction against wasted words means that textual principles will be sacrificed no matter how one reads the text.

This is not to say that one cannot resolve the impasse in *Ali*, but only that any resolution will have to be rooted in some account of Congress’ likely purpose in enacting the provision. Indeed, Justice Thomas admits as much when he argues that a broad interpretation of the residual clause would not render the preceding terms superfluous: “Congress may have simply intended to remove any doubt that officers of customs or excise were included in ‘law enforcement officers.’”<sup>32</sup> Such speculation about purpose is a grudging acknowledgment that *ejusdem generis*’s demand that every bit of text count requires a purposive response. ~~To satisfy the canon, one must attribute some purpose to terms that otherwise seem unnecessary. Justice Thomas’ speculation about statutory purpose, however, is pointless unless there is some doubt about the scope of the general term that the preceding specific terms are supposed to clarify. Absent some reason to~~

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29. *Id.* at 1588, 1589, 1591.

30. *Id.*; 18 U.S.C. § 924(e)(2)(B)(ii).

31. *Begay*, 128 S. Ct. at 1591 (Scalia, J., concurring).

32. *Ali*, 128 S. Ct. at 840.

~~believe that “any . . . law enforcement officer” would not include “any officer of customs or excise.” Justice Thomas’ subjunctive attribution of a doubt-clarifying purpose to Congress seems like an empty gesture.~~

~~Taking Justice Thomas at his word, one needs to figure out whether there is any doubt that the specific preceding terms could conceivably clarify.~~ Which term is in need of more clarification by the other term—“any officer of customs or excise” or “any . . . law enforcement officer”? It is hard to imagine a non-purposive approach to answering this question: The degree to which any term needs clarification depends on the purpose of the term. As Wittgenstein notes, “[t]he sign-post is in order—if, under normal circumstances, it fulfil[l]s its purpose.”<sup>33</sup> It is not imprecise to express the distance between the earth and sun in miles rather than inches, because measurement in inches would serve no intelligible purpose in astronomy. Likewise, unless clarifying the scope of “any . . . law enforcement officer” with a reference to “any officer of customs or excise” would serve some purpose relevant to the statute, it is unintelligible to say that such a reference removes any doubt. *Ali* needs to explain why there is any doubt that customs or excise officers are “law enforcement officers” for the purposes of enjoying immunity when they lose or damage detained property. By failing to offer any such explanation, Justice Thomas indicates that his reference to Congress’ possible purpose is really a peremptory effort to disregard some text for the sake of other text. As in *Begay*, this might be a perfectly legitimate mode of interpretation, but there is nothing especially textualist about it.

### III. ELIMINATING CANONICAL AMBIGUITY BY MINIMIZING DECISION COSTS

One might concede that ambiguities in canons’ application cannot be resolved textually but still insist on a resolution of canonical ambiguity that does not look to the statute’s purpose. Professor Adrian Vermeule, for instance, has urged that courts avoid focusing on statutory purpose as a way of minimizing decision costs.<sup>34</sup> Like other meta-canons used to resolve canonical ambiguity, however, Vermeule’s principle of minimizing decision costs is itself ambiguous. It is often not obvious how to minimize decision costs, and interpreting laws to minimize decision costs invites expensive litigation about which interpretation of a statute will be less expensive. In this sense, the meta-canon of minimizing decision costs is a self-defeating theory—that is, a principle that will be defeated if people consciously follow its demands.<sup>35</sup> Such a theory is not a helpful meta-canon for deciding how to resolve canonical ambiguity.

According to Professor Vermeule, the benefits of trying to gauge how the median member of Congress uses language or what that member intended by a particular choice of words are extremely uncertain.<sup>36</sup> Given the limits of their knowledge and training, judges are likely to err in reaching answers to these questions. By contrast, the costs of these efforts to find the “right” interpretation of a statute (whatever “right” might mean)

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33. Wittgenstein, *supra* n. 1, at 41° § 87.

34. Vermeule, *supra* n. 5.

35. Derek Parfit, *Reasons and Persons* 5 (Oxford U. Press 1984).

36. *See* Vermeule, *supra* n. 5, at 112–13.

are easy to ascertain and likely to be high: Decisions are delayed, dockets are crowded, and lawyers' fees are increased by litigation over complex rules of statutory interpretation in ways that judges can easily predict. Therefore, Vermeule urges what one might call the "KISS principle": keep it simple, stupid, and thereby minimize the costs of reaching decisions, which are the only costs that a judge can be confident about predicting.<sup>37</sup> Applied to the canons of statutory interpretation, the KISS principle urges judges to focus on consistency over getting the right answer: Just pick a canon and stick with it. This strategy of canon-picking "will conserve all the costs of argument over the content of the canons" while allowing Congress "over time, [to] incorporate the content of the background rules into its anticipations of judicial behavior."<sup>38</sup>

As Vermeule concedes, this canon-picking strategy does not address the problem of choosing how to apply a canon with vague triggering conditions.<sup>39</sup> We already know that *ejusdem generis* applies to the exception to the immunity waiver in *Ali*: The dispute in *Ali* is about deciding *how* and not *whether* *ejusdem generis* applies. One might, however, solve this problem by creating mechanical meta-canons to define how a canon like *ejusdem generis* applies in ambiguous situations. One could, for instance, decide that the canon will never be used whenever the list of specific terms preceding the general catchall term has fewer than three members. Under this meta-canon, *Ali* would be easy to decide: "[O]fficer of customs or excise" contains, at most, two terms, such that the canon would not apply to limit the general catchall term "any . . . law enforcement officer." On Vermeule's reasoning, the choice of meta-canon would not be important, just so long as it was easy to apply. According to Vermeule, "the gains from identifying the very best default rule, in any particular setting, will be overwhelmed by the costs of making the identification."<sup>40</sup> Rather than worry about which canons (or meta-canons) to adopt, courts should just "fix[] the system of canons with a minimum of fuss."<sup>41</sup>

However, fuss may be inevitable, because there might be no easy way to choose which meta-canon is cheapest to apply. Take, once more, *ejusdem generis*: Any rule governing its application could end up being very costly. For instance, if one applies this canon frequently, then one will narrowly construe the catchall clause at the end of a series of terms by inferring some limiting principle from that series. This limiting principle, being unwritten and vague, will tend to invite costly litigation. In this sense, *ejusdem generis* always increases decision costs. The desire to avoid these costs was one of the reasons that *Ali* gave for disregarding the canon.<sup>42</sup> On the other hand, if one simply enforces the catchall term literally by ignoring the list of more specific nouns preceding that term, then one will tend to sidestep controversies over the meaning of the implicit limiting principle but only at the expense of expanding the reach of the statute.

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37. *See id.* at 128.

38. *Id.* at 140.

39. *Id.* at 140 n. 262.

40. *Id.* at 141.

41. Vermeule, *supra* n. 5, at 141.

42. 128 S. Ct. at 839 ("[I]t is not apparent what common attribute connects the specific items in § 2680(c). Were we to use the canon to limit the meaning of 'any other law enforcement officer,' we would be required to determine the relevant limiting characteristic of 'officer of customs or excise.'").

Expansive readings of statutes that shift the status quo will increase decision costs simply by creating more issues for courts to decide: By opening the court's doors to claims that could have been cheaply barred with a narrower reading of the statute, the broad reading floods the courts and litigants with a higher volume of judicial business. In short, there is no easy way to determine whether it is administratively cheaper to encourage narrower statutes confined by vague principles or broader statutes confined by bright-line rules.

*Caminetti v. United States*<sup>43</sup> illustrates the dilemma. In *Caminetti*, the Court was confronted with two possible applications of *ejusdem generis* to the Mann Act, each of which could plausibly be said to minimize decision costs. The Mann Act prohibited the transportation of “any woman or girl” across state lines for “prostitution or debauchery, or for ‘any other immoral purpose.’”<sup>44</sup> Drew Caminetti had taken his lover across state lines for a tryst: Had he violated the statute? If “any . . . immoral purpose” were construed to mean only purposes similar to prostitution, i.e., purposes to engage in actions involving financial exchange, then the indictment of Drew Caminetti could be quashed, saving the expense of a criminal trial and blocking future similar prosecutions. Justice McKenna in dissent urged such a reading of the statute, to avoid blackmail of persons who cross state lines with lovers-turned-informants seeking non-commercial sexual adventures.<sup>45</sup> The majority also invoked *ejusdem generis*, but the Court derived its limiting principle from the statute's general focus on sexuality, construing “any . . . immoral purpose” to cover any purpose related to sexual immorality.<sup>46</sup> This construction saved the government the cost of proving whether a particular sexual escapade was financially motivated, saving the prosecution and court some significant costs of additional proof. But the interpretation also opened up the court to a stream of criminal prosecutions that could otherwise have been avoided. By the 1920s, a majority of Mann Act prosecutions were brought against unmarried persons who crossed state lines to have sexual intercourse deemed to be immoral.<sup>47</sup> In effect, the Court had predictably unleashed a “[m]orals [c]rusade,” burdening the judiciary with a flood of cases that earlier U.S. Attorneys General had believed belonged in state court.<sup>48</sup>

Vermeule could respond that increasing the business of the judiciary does not count as a “decision cost” if the purpose of the statute was indeed to shift the status quo through expanded judicial power. (As it turns out, Representative Mann congratulated the *Caminetti* Court for correctly capturing his purpose in drafting the statute<sup>49</sup>). But the same could be said for the costs of interpreting vague statutes that take the form of extensive briefing and lengthy docket time: If Congress really intended to enlist the

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43. 242 U.S. 470 (1917).

44. *Id.* at 485; White Slave Traffic (Mann) Act, Pub. L. No. 61-277, 36 Stat. 825 (1910) (codified as amended as 18 U.S.C. § 2421 (2000)).

45. *Id.* at 502 (referring to risk that, under a broad reading of statute, “[b]lackmailers of both sexes have arisen, using the terrors of the construction now sanctioned by this court as a help—indeed, the means—for their brigandage”).

46. *Id.* at 486–87 (citing *U.S. v. Bitty*, 208 U.S. 393 (1908)).

47. David J. Langum, *Crossing Over the Line: Legislating Morality and the Mann Act* 150 (U. Chi. Press 1994).

48. *Id.* at 139.

49. *Id.* at 119.

courts to grapple with difficult policy questions embodied in vaguely worded statutes, then judicial efforts to grapple with these questions do not constitute a cost at all but rather a positive benefit of conferring judicial wisdom (such as it is) on knotty policy problems). Both sorts of costs are equally within (or outside) the power of courts to predict. Based on Vermeule's theory of making decisions under conditions of uncertainty, both ought to have equal weight (or weightlessness) in influencing the court's theory of statutory interpretation. But, assuming as Vermeule does, that courts lack the capacity to make difficult empirical decisions correctly, it is difficult to understand why a court will be able to balance the costs of expanding a statute's reach (by rejecting *ejusdem generis*) against the costs of contracting its reach (by invoking *ejusdem generis*). The decision costs of considering decision costs, in short, are prohibitive. Decision costs, then, will have limited utility as a meta-canon for determining how to apply canons.

#### IV. ELIMINATING CANONICAL AMBIGUITY BY RESPECTING LEGISLATIVE DEALS

Professor John Manning offers a second justification for avoiding purposive resolutions of canonical ambiguity, arguing that purposive interpretation—what he calls attentiveness to “policy context”—does not adequately respect the details of legislative deals.<sup>50</sup> By looking to how a reasonable policymaker would carry out the general purposes of a statute, purposivists overlook that Congress is not a single reasonable policy-maker but rather a collection of actors with warring purposes who make policy through messy compromises. These compromises often have no overarching rationality beyond the desire to assemble a winning coalition to pass legislation.<sup>51</sup> By contrast, “semantic detail offers a singularly effective medium for legislators to set the level of generality at which policy will be articulated—and thus to specify the limits of often messy legislative compromises.”<sup>52</sup> Minorities who exploit the vetogates of the congressional law-making process can insure that the concessions that they extract as the price of their support will be honored when text is honored, because those compromises are most accessibly memorialized in text.<sup>53</sup>

The idea that adherence to textual detail honors legislative deal-making is a longstanding theme of textualists,<sup>54</sup> but it does not provide one with much traction in addressing the problem of canonical ambiguity. The canons, after all, are precisely the sort of semantic context that, according to Professor Manning, is supposed to reflect the legislative bargain. What does one do when the application of these linguistic norms seems mired in ambiguity? The textualist's easy answer is to treat canonical ambiguity as sufficient to justify recourse to extra-textual evidence of statutory purpose.<sup>55</sup> In *Ali*,

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50. John F. Manning, *What Divides Textualists from Purposivists?* 106 Colum. L. Rev. 70, 70, 76, 91, 96, 99 (2006).

51. *Id.* at 102–03.

52. *Id.* at 77.

53. *Id.* at 104 (“Semantic meaning provides the most—if not the only—reliable way for legislators to identify the scope and limits of the policies they wish to adopt.”).

54. See e.g. Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 546–47 (1983).

55. Manning, *supra* n. 50, at 84 (“when a statute is ambiguous, textualists think it quite appropriate to resolve that ambiguity in light of the statute's apparent overall purpose” (footnotes omitted)).

for instance, the debate between Justices Kennedy and Thomas over the proper application of *ejusdem generis* suggests that Justice Breyer's purposivist response was correct as a matter of textualism. Given the pervasiveness of canonical ambiguity, however, this concession takes much of the force out of the textualist call to focus on semantic context: If this commitment can be overturned by canonical ambiguity, then it is a weak commitment indeed.

Quite apart from its practical limits, there are theoretical reasons to doubt the truth of Professor Manning's claim that statutory text reflects legislative deals more nearly than other evidence of legislative purpose. Professor Manning's claim rests on an exceptionally narrow definition of what it means to consult legislative purpose, identifying "purposivism" solely with "the work of Professors Hart and Sacks" and their "celebrated Legal Process materials" containing "a highly influential rationalist approach to legal analysis in general and statutory interpretation in particular."<sup>56</sup> As Manning correctly notes, Hart and Sacks offer an anemic model of the legislative process that is unlikely to reflect the details of legislative compromises.<sup>57</sup> Rather than focus how interest groups resolve conflict, Hart and Sacks urge judges to identify the statute's general policy goals and fill in the details of the scheme by imagining how a rational policymaker would accomplish those vaguely specified statutory objectives.<sup>58</sup> While this idealization of the legislative process is actually rooted in realistic skepticism about the impossibility of discerning the collective subjective intent of a multi-member body,<sup>59</sup> it is not well-calculated to unearth all of the side-deals that are necessary to secure passage of a law. These deals might not make the best rational public policy, but, without them, the legislative business might grind to a halt.<sup>60</sup> If one focuses only on the general goal in the title of a statute, one might ignore the critical compromises (say, a short statute of limitations, a annoying requirement to exhaust administrative remedies, or an otherwise bafflingly narrow definition of prohibited conduct) that greased the wheels sufficiently to get the law enacted in the first instance.

One can endorse Manning's criticism of Hart and Sacks's model of the legislative process and yet reject his prescription of textualism. The Legal Process School, after all, hardly exhausts the menu of alternatives to hard-core textualism. Manning may be correct to note that Hart and Sacks's "materials have come to represent the canonical statement of purposivism."<sup>61</sup> But it might also be that law and political science can do

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56. *Id.* at 86 (footnotes omitted).

57. *Id.* at 76, 78, 86, 90.

58. See Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1374–80 (William N. Eskridge, Jr. & Philip P. Frickey eds., Found. Press 1994). This approach to interpretation is hardly unique to Hart and Sacks. Identifying general ends and then approving means that seem well-suited to those ends fairly describes Chief Justice John Marshall's theory of constitutional interpretation in *M'Culloch v. Md.*, 17 U.S. 316, 407 (1819) ("[The Constitution's] nature . . . requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.").

59. John F. Manning, *Legal Realism and the Canons' Revival*, 5 Green Bag 2d 283 (2002).

60. Daniel B. Rodriguez & Barry R. Weingast, *The Paradox of Expansionist Statutory Interpretations*, 101 Nw. U. L. Rev. 1207 (2007) (noting that the prospect of judicial expansion of a statute's scope can deter the legislature from enacting the statute).

61. Manning, *supra* n. 50, at 86 (footnote omitted).

better than the canonical versions of either textualism and purposivism.

In particular, judges could think like “reasonable deal-makers” as well as reasonable policymakers. They could go beyond abstract statements of statutory purpose to look for evidence of the legislative bargains that permitted the enactment of the legislation in the first place. Barry Weingast and Daniel Rodriguez have pressed for a “sophisticated intentionalism” in which judges determine the position of key representatives exercising potential veto power over bills.<sup>62</sup> This sort of “bargain-friendly” version of Hart and Sacks’s Legal Process theory would ask whether there is any actual evidence that an interpretation of a statute aroused any opposition or even interest from interest groups capable of influencing the law-making process.

*United States v. Hayes*<sup>63</sup> presents a good illustration of how such “sophisticated intentionalism” might be effective in resolving canonical ambiguity. In *Hayes*, the Court was confronted with an ambiguity in the Gun Control Act of 1968’s prohibition on possession of a firearm by any person convicted of “a misdemeanor crime of domestic violence.”<sup>64</sup> In 1994, Edward Hayes had been convicted of battery in West Virginia state court. In 2004, Hayes was arrested and charged with illegal possession of a firearm under the Gun Control Act after the police searched his house in response to a 911 call reporting domestic violence and discovered a rifle.<sup>65</sup> The earlier assault had been committed against Hayes’ former spouse, but the state battery offense of which Hayes was convicted did not make this relationship an element of the offense. The question, therefore, arose whether Hayes had been convicted of “misdemeanor crime of domestic violence” by being convicted of a simple battery.<sup>66</sup> The Gun Control Act’s definition of “misdemeanor crime of domestic violence” did not specify whether the predicate misdemeanor identify as an element of the crime a domestic relationship between aggressor and victim. If the defendant had been convicted of simple assault that, as a matter of fact, been committed against a domestic relation, then would such a conviction qualify under the statute?

The “last antecedent rule,” a grammatical canon of construction applying modifiers only to the immediately preceding antecedent noun, was relevant to the question because the statutory definition of “misdemeanor crime of domestic violence” contained a modifier, the placement of which rendered the definition ambiguous.<sup>67</sup> According to the Gun Control Act:

[T]he term ‘misdemeanor crime of domestic violence’ means an offense that—(i) is a misdemeanor under Federal, State, or Tribal law; and (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, or guardian, or by a person similarly situated to a

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62. Rodriguez & Weingast, *supra* n. 60, at 1229–33.

63. 129 S. Ct. 1079 (2009).

64. *Id.* at 1082 (citing 18 U.S.C. § 922(g)(9) (2000)).

65. *Hayes*, 129 S. Ct. at 1082–83.

66. *Id.* at 1083.

67. *Id.* at 1086–87.

spouse, parent, or guardian of the victim.<sup>68</sup>

Did the modifier “committed by a current or former spouse” modify “an offense” or “the use or attempted use of physical force”? If the former interpretation was correct, then Hayes was covered by the Gun Control Act; if the latter, then Hayes was not covered.

In his dissenting opinion, Chief Justice Roberts noted that, under “last antecedent” canon, “committed by” modified “use” rather than “offense,” because “use” was much closer to, and contained within the same clause as, “committed by.”<sup>69</sup> Moreover, the phrase “an offense that . . . committed by a spouse” was nonsensical without the addition of the verb “was.” By contrast, it was not nonsensical (although it was ungainly) to refer to “the use . . . of physical force. . . committed by a . . . former spouse.” The “last antecedent rule,” therefore, seemed to suggest a narrow interpretation of “misdemeanor crime of domestic violence” to refer to only those predicate offenses that made the existence of a domestic relationship between the victim and perpetrator a necessary element of the crime. According to Chief Justice Roberts, enforcing this limit was important to respect the possible legislative compromise that led to the enactment of § 922(g)(9):

Legislative enactments are the result of negotiations between competing interests; ‘the final language of the legislation may reflect hard-fought compromises.’ Even if there were sufficient sentiment to extend the gun ban, individual legislators might have disagreed on the appropriate reach of the new provision. Some members might well have been willing to extend the ban beyond individuals convicted of felonies, but only if the predicate misdemeanor by its terms was addressed to domestic violence.<sup>70</sup>

In short, the technical text may have reflected a legislative deal that a broad reading of the statute would ignore.

The difficulty with Chief Justice Roberts’ deal-based justification for the “last antecedent” rule is that it ignored the canonical ambiguity inherent in § 922(g)(9). The literal “last antecedent” before “committed by a current or former spouse” is “the threatened use of a deadly weapon.” As both the lower court and the majority noted,<sup>71</sup> if one applied the modifier only to the antecedent immediately preceding it, then the statute would only apply to ~~defendants who were convicted of “the threatened use of a deadly weapon” and would exclude defendants~~ who were convicted of the “use or attempted use of physical force.” ~~Why not assume that this distinction between perpetrators who threaten with weapons but do not use force is the result of~~ some unspoken legislative bargain?

The obvious reason is that such a grammar-based distinction makes no sense from the perspective of a likely rational deal-maker, let alone a rational policymaker. The only interest group likely to oppose a broad reading of section 922(g)(9) were advocates of rights to firearms like the National Rifle Association. However, imposing special

68. *Id.* at 1084 (quoting 18 U.S.C. § 921(a)(33)(A) (2000)).

69. *Id.* at 1089–91 (Roberts, CJ. & Scalia, J., dissenting).

70. *Hayes*, 129 S. Ct. at 1092 (Roberts, CJ. & Scalia, J., dissenting) (citations omitted).

71. *Id.* at 1086 n. 6 (majority) (citing *U.S. v. Hayes*, 482 F.3d 749, 755 (4th Cir. 2007)).

punishments on those who threaten with weapons but not on those, for instance, who beat their victims with their fists, hardly seems like a likely goal of advocates of gun rights. One can agree with Judge Easterbrook that “statutes have length as well as direction” and still insist that limits on a statute’s “length” make sense as a coherent compromise.<sup>72</sup> Indeed, even textualists like Chief Justice Roberts and his co-dissenter, Justice Scalia, were willing to ignore the implausible application of the “last antecedent” rule to § 922(g)(9) without believing that they were thereby refusing to enforce the terms of bargain.

In sum, an emphasis on semantic context provides no way of distinguishing deals from linguistic accident. If one applies canons like the “last antecedent” rule mechanically, then one can generate limits on statutory scope that are simply too preposterous to resemble the product of any intelligible deal. In such a case, it is hard to believe that there are no advantages to more purpose-based reasoning. One need not engage in Hart-and-Sacks style invocation of abstract policy rationality when deciding whether the grammatical details make sense. Instead, one could view the grammatically correct reading through the lens of a rational dealmaker, asking whether any intelligible array of interests could be imagined to have insisted on the canonical limit as a price of their support.

Viewed by Rodriguez and Weingast’s “sophisticated intentionalist,” the *Hayes* majority’s reading of § 922(g)(9) seems less like the evasion of a legislative bargain and more like an avoidance of grammatical inadvertence. The majority paid deference to textualism by suggesting a couple of textual arguments against the dissent’s and lower court’s invocation of the “last antecedent” rule.<sup>73</sup> But the majority’s more convincing argument was that the dissent’s narrow view of § 922(g)(9) “would frustrate Congress’ manifest purpose.”<sup>74</sup> According to the majority, a narrow reading of § 922(g)(9) would render the statute a “dead letter” in two-thirds of the states upon enactment, because when § 922(g)(9) was enacted, two-thirds of the states as well as the federal government lacked any law specifically forbidding domestic violence.<sup>75</sup> “[W]e find it highly improbable,” the majority concluded, “that Congress meant to extend § 922(g)(9)’s firearm possession ban only to the relatively few domestic abusers prosecuted under laws rendering a domestic relationship an element of the offense.”<sup>76</sup>

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72. Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 Harv. J.L. & Pub. Policy 59, 63 (1988) (“[L]aws are born of compromise. Different designs pull in different directions. To use an algebraic metaphor, law is like a vector. It has length as well as direction. We must find both, or we know nothing of value. To find length we must take account of objectives, of means chosen, and of stopping places identified. All are important.”).

73. The majority noted that “element” was a singular noun that did not obviously refer to two elements (i.e., (1) use of force that is (2) committed by a person with a domestic relationship to the victim) and that “commit[ting] a ‘use’ of force was an awkward turn of phrase. *Hayes*, 129 S. Ct. at 1086–87. But neither of these arguments seem much more than weak make-weights. As Chief Justice Roberts’ dissent noted, the Dictionary Act called for singular nouns to be treated as plural nouns, and, in any case, it is not obvious that use of person against a particular class of victims counts as two distinct elements. Moreover, “use of force . . . committed by a former spouse” is at least intelligible, while “an offense that . . . committed by a . . . former spouse” is simply incoherent. *Id.* at 1090 (Roberts, C.J., dissenting).

74. *Id.* at 1087 (majority).

75. *Id.* (quoting *Hayes*, 482 F.3d at 762 (Williams, J., dissenting)).

76. *Id.* at 1087–88.

Of course, as Chief Justice Roberts suggested, these limits on the scope of § 922(g)(9) could be the result of some bargain reflected only in the technical recesses of the “last antecedent” rule. But such a bargain seemed improbable even to justices sympathetic to textualism.<sup>77</sup> As the majority noted, there was zero evidence of any such deal in the legislative record. No member of Congress actually called for limiting the provision’s scope based on the technical elements of the underlying conviction. Indeed, it seems fanciful to believe that any member of Congress would draw a distinction between spouse-beaters based on whether or not their indictment alleged the fact of their marriage to their victim. Such a requirement would have the advantage (from a gun advocate’s point of view) of delaying the implementation of § 922(g)(9) in a state until that state enacted the necessary domestic violence laws. But it is not obvious why an advocate of gun-owners rights would want to tie the cause of gun rights to the cause of spouse beaters, nor could any of the briefs cite evidence that advocates of rights to firearms had opposed laws imposing special penalties on domestic violence. Further, it is hard to see why insisting on proof of a domestic relationship would do much to safeguard the right to bear arms, given that proving up such a relationship would generally be a trivial matter.

Why should consideration of these extra-textual policy reasons be barred by an exclusive focus on the norms of grammar and style—what Professor Manning calls “semantic context”?<sup>78</sup> There is no *a priori* reason why the terms of deals are best memorialized in the details of grammar that most legislators are likely in any case to overlook. Why assume that interest groups strike deals based on commas and semicolons rather than based on colloquies on the floor of Congress? If a canon like the “last antecedent” rule leads to a limit on a statute that does not make much sense as a plausible bargain, then it is not obvious why a court interested in enforcing such bargains would not be well-advised to check the legislative history to determine whether anyone actually contemplated such a deal. At the very least, the court might adopt the stance of a “sophisticated intentionalist” and ask whether the grammar-based limit would make sense from the point of view of any known interest group or political movement.

Applied to *Ali*, this purpose-based theory would ask whether there is any evidence that any interest group ever sought blanket immunity for all law enforcement officers from claims arising out of the detention of property. If there is no indication anywhere of interest in such immunity in the legislative history, then one might find it odd to infer such immunity from a general clause embedded in an exception to an immunity waiver that is otherwise focused entirely on “officers of customs and excise” and “claim[s]

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77. When Justice Scalia suggested the possibility of such a deal based merely on the idea that opponents simply wanted to weaken the bill as much as possible, Justice Alito (among others) reacted with apparent skepticism. Compare Oral Argument at \*4, *U.S. v. Hayes*, 2008 WL 4892844 (“Justice Scalia: Well, Respondent says that may be because a lot of people in Congress wanted it to be a dead letter. They would have wanted the whole thing to be a dead letter. There are a lot of people who didn’t like this statute because it was a gun control statute.”) with *id.* at \*36 (“Justice Alito: Other than a desire to weaken this bill as much as possible, can you think of any reason why Congress would have drawn the distinction that you’re drawing between States that have specific statutes relating to domestic violence misdemeanor statutes and those that don’t?”). For Alito’s textualism, see Elliott M. Davis, Student Author, *The Newer Textualism: Justice Alito’s Statutory Interpretation*, 30 Harv. J.L. & Pub. Policy 983 (2007).

78. Manning, *supra* n. 50, at 70.

arising in respect of the assessment or collection of any tax or customs duty.” Manning might reasonably object that this sort of sophisticated intentionalism is costly and prone to error, because it is unrealistic to believe that judges will be able comprehensively to review such sources to detect every possible unwritten deal that drove the enactment of legislation. But resolving canonical ambiguity does not require judges to uncover every legislative bargain. Judges need only look for bargains relevant to the particular canonical ambiguity at issue in the case. For instance, in trying to figure out whether to read the catchall clause broadly, the *Ali* Court could ask whether there was any indication in any relevant source—the *Congressional Record*, private groups’ testimony, committee reports, op-ed pieces, interest groups’ websites, and so on—that anyone focused on providing all “law enforcement officers” with immunity from liability for damaging or losing property in their possession. If there is a total absence of any such evidence of a legislative bargain in extra-textual sources, then why infer such a deal from stray words in a clause that is ambiguously subject to *ejusdem generis*?

#### V. WHAT IS THE FUNCTION OF TEXTUAL CANONS?

Why use canons at all? If canonical ambiguities ought to be resolved through examination of statutory purpose, then why not just cut to the chase and start with purpose, as Justice Breyer suggests in his *Ali* dissent?<sup>79</sup> As this essay suggested above, canons are not especially well-suited to reducing ~~the costs of reaching decisions or insuring the enforcement of legislative bargains.~~ Canons are not ways to reduce decision costs or memorialize legislative deals. They do not make interpretation more mechanical but less so. They are not rules that fix the meaning of rules, for any such canonical code would be a self-contradictory paradox, given that such rules would need further rules to fix *their* meaning. Why refer to them at all?

It is worth considering the possibility that textual canons are devices for making manifest the latent ambiguities in text that courts might otherwise overlook. As I have argued above, canons that focus on the need to avoid wasted words such as *noscitur a sociis* and *ejusdem generis*, for instance, do not actually reduce the ambiguity of text but instead create new ambiguities, by imposing unwritten limits on phrases that, read in isolation, seem clear and expansive. The statutes in *Begay* and *Ali*, for instance, seem textually “plain” to Justices Thomas and Scalia simply because they decide to set *ejusdem generis* aside. *Ejusdem generis* creates ambiguity by suggesting that “any” really does not mean “any.” But even canons, like the “last antecedent” rule, that do nothing more than offer grammatical rules for matching modifiers with nouns create ambiguity in the sense that, in cases like *Hayes*, they cannot be applied mechanically without giving rise to absurdities.

Canons that bring latent ambiguities to the surface act as gate-keepers for purposive readings of statutes. It remains settled doctrine even among judges and scholars who support examination of statutory purpose that text has lexical priority over other sources.<sup>80</sup> Even those opinions criticized most heavily by textualists for

79. 128 S. Ct. at 850 (Breyer, J., dissenting).

80. Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 Colum. L. Rev. 1, 32–33 (2006).

prematurely consulting extra-textual evidence of statutory meaning make gestures towards absurdities or, at least, oddities in the literal text before they invoke such extra-textual evidence.<sup>81</sup> On the opposite extreme, the priority of text over rival sources is, of course, the central tenet of textualism, which permits those other sources to be consulted only after the text has been declared to be absurd or ambiguous.<sup>82</sup>

By bringing ambiguities to the surface, canons create an opening for even textualist judges to consider extra-textual evidence of statutory purpose (including the purpose of enacting a legislative compromise) without licensing a wholesale abandonment of text for free-wheeling judicial policymaking. Canons focus such purpose-based inquiries on a few loose terms—for instance, dangling modifiers or expansive concluding terms in a series of nouns—giving the court a reason based in semantic usage to consider the policy context of a law. Thus, canons simultaneously create the opportunity and cabin, judicial inquiry into statutory purpose. For judges who do not fear judicial discretion to range over extra-textual materials, this cabining will seem unnecessary.<sup>83</sup> For moderate textualists, however, the canons provide a text-bound opportunity, rooted in ordinary usage, to go beyond text.

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81. *Public Citizen v. DOJ*, 491 U.S. 440, 454 (1989) (stating that “[w]here the literal reading of a statutory term would ‘compel an odd result,’ *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509 (1989), we must search for other evidence of congressional intent to lend the term its proper scope,” but conceding that “the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing” (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945), *aff’d*, 326 U.S. 404 (1945))).

82. *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 66–67 (2004) (Kennedy, J., concurring) (“I agree with the Court’s decision to proceed on the premise that the text is not altogether clear. That means that examination of other interpretive resources, including predecessor statutes, is necessary for a full and complete understanding of the congressional intent. This approach is fully consistent with cases in which, because the statutory provision at issue had only one plausible textual reading, we did not rely on such sources.”).

83. *Id.* at 65 (Stevens, J., concurring) (“In recent years the Court has suggested that we should only look at legislative history for the purpose of resolving textual ambiguities or to avoid absurdities. It would be wiser to acknowledge that it is always appropriate to consider all available evidence of Congress’ true intent when interpreting its work product.” (footnote omitted)).