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# Is It Time for a Restatement of Statutory Interpretation?\*

Lawrence M. Solan<sup>†</sup>

## INTRODUCTION

This article suggests that a book that no one has asked for should not be written. Well, almost. In 2003, appellate lawyer Gary O'Connor wrote an article suggesting that the American Law Institute (ALI) compile a *Restatement (First) of Statutory Interpretation*.<sup>1</sup> O'Connor's article has been cited in the law review literature, and downloaded from the Social Science Research Network more than 1,500 times. This is a good time to look once again at O'Connor's suggestion because some recent developments in the field of statutory interpretation suggest a growing convergence, notwithstanding embattlement on a few well-studied issues.

Three developments lead to this reason for optimism. First is the excellent work of Abbe Gluck, who has argued persuasively that there is quite a bit of consensus on how to go about statutory interpretation, especially in the state courts, where most of the statutory interpretation occurs.<sup>2</sup> The acrimonious debates between Justice Antonin Scalia and his detractors over the use of legislative history in statutory interpretation sometimes obscure the significant amount of agreement that does exist. Second, there is the work of Scalia himself. He and Bryan Garner have published a book, *Reading Law*, that reads like a traditional

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<sup>1</sup> Gary E. O'Connor, *Restatement (First) of Statutory Interpretation*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 333 (2004).

<sup>2</sup> Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L. J. 1750 (2010).

legal treatise, bold face and all.<sup>3</sup> Is there enough coherence for it to form the basis of a description of standard methodology in statutory interpretation? The authors surely intend it to be so. And third, some scholars in substantial disagreement with Scalia and his textualist methods have observed that despite appearances, most everyone is in agreement about what to consider in interpreting statutes. Moreover, the most dramatic area of disagreement—the use of legislative history as evidence of legislative intent—rarely plays anything resembling a dispositive role in determining cases. It would be difficult to identify a single judge who routinely uses legislative history to trump a statute’s plain language.

This article describes these positions and in each case argues that there is less consensus than meets the eye. It concludes that absent actual agreement on both method and results in a large body of cases, a *Restatement of Statutory Interpretation* would enable judges to create the illusion of certainty in a world in which they have more discretion than they are comfortable acknowledging. The article further comments on why other Restatements—the *Restatement of Contracts* in particular—can better avoid some of these pitfalls.

## I. CONSENSUS ABOUT CONSENSUS IN STATUTORY INTERPRETATION

Notwithstanding vibrant disagreement about a few issues, especially the use of legislative history in statutory interpretation,<sup>4</sup> the literature shows more and more acknowledgement of what various positions have in common. Judge Frank Easterbrook came close to acknowledging this growing consensus about consensus in his foreword to Scalia and Garner’s book: “Professional norms—including norms about interpretive method—produce much more consensus than would be expected if judges’ decisions mirrored the disagreement in legislative bodies or political debates.”<sup>5</sup>

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<sup>3</sup> ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

<sup>4</sup> *Compare, e.g.*, ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1998) (anti-history), *with* STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005) (pro-history).

<sup>5</sup> Frank H. Easterbrook, Foreword to SCALIA & GARNER, *supra* note 3, at xxiv. The consensus is not complete, as Easterbrook acknowledges. He goes on to suggest that there would be more consensus if Scalia and Garner’s methods were “more widely followed.” *Id.* Of course, consensus would also increase if Scalia and Garner’s methods were more widely rejected in favor of another method.

William Eskridge's review of Scalia and Garner begins with a similar observation:

[Scalia's] judicial opinions, speeches, articles, and books have generated great debates, which have (ironically) revealed a substantial consensus about the ground rules for statutory interpretation. Thus, virtually all theorists and judges are "textualists," in the sense that all consider the text the starting point for statutory interpretation and follow statutory plain meaning if the text is clear. However, Justice Scalia's new book, coauthored with linguist Bryan Garner, reveals that virtually all theorists and judges are also "purposivists," in the sense that all believe that statutory interpretation ought to advance statutory purposes, so long as such interpretations do not impose on words a meaning they will not bear. And virtually all theorists and judges insist that statutory context is important in discerning the meaning of statutory texts.<sup>6</sup>

I have made similar points in my own writing,<sup>7</sup> as has Jonathan Molot.<sup>8</sup>

The strongest evidence of consensus in statutory interpretation comes from Abbe Gluck's study of state court interpretive decisions.<sup>9</sup> With respect to the Supreme Court of the United States, she argues, contrary to the writers mentioned above, that there is no consensus about interpretive methodology.<sup>10</sup> Nor is there agreement on the methods of interpretation from state to state. Nonetheless, in a careful study of five states, Gluck shows serious efforts from both courts and legislatures to create hierarchies of interpretive instruments designed to bring uniformity to the state's interpretive methodology. Her analysis suggests that it is possible for a common-law based legal system to take statutory interpretation seriously, and to develop methods that will be generally followed. Sometimes these methods come from the legislature, sometimes from the courts. Sometimes there is tension between the two branches. Nonetheless, in example after example, Gluck shows that once a methodology has been established, it is typically followed by the courts. Even those judges who do not agree with it nonetheless reluctantly apply the methodology.

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<sup>6</sup> William N. Eskridge, Jr., *The New Textualism and Normative Canons*, (reviewing SCALIA & GARNER, *supra* note 3), 113 COLUM. L. REV. 531 (2013).

<sup>7</sup> LAWRENCE M. SOLAN, *THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION* 51 (2010) ("Gone largely unnoticed in the battles between these camps during the past quarter century is the fact that both sides in the debate agree upon almost everything when it comes to statutory interpretation.").

<sup>8</sup> Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 36-48 (2006).

<sup>9</sup> Gluck, *supra* note 2.

<sup>10</sup> *Id.* at 1765-66.

To take one example, in 2004 the Supreme Court of Wisconsin articulated a methodology of modified textualism,<sup>11</sup> which remains good precedent today. Basically, courts are to consider the language of the statute in context, and not to look to extrinsic sources absent a finding of ambiguity. Once ambiguity is discovered, however, it is fair game for courts to look to legislative history and other extrinsic sources of information about the statute's purpose and the legislature's intent. Only after failing to resolve the ambiguity at that stage do substantive canons of construction come into play, largely as tie-breakers.

Scalia and Garner are themselves more combative in their tone than the remarks of Easterbrook or Eskridge would suggest. They conceptualize their volume in terms very much in the tradition of the American Law Institute's Restatements of the law. They say: "We believe that our effort is the first modern attempt, certainly in a century, to collect and arrange only the valid canons (perhaps a third of the possible candidates) and to show how and why they apply to proper legal interpretation."<sup>12</sup> To be sure, the book unfolds as a description and defense of Scalia's brand of textualism, and an out-and-out rejection of competing approaches, such as purposivism and consequentialism.

Nonetheless, the book contains a great number of generalizations that would be considered acceptable generally, even by the authors' opponents. Among them is that courts typically turn first to a statute's language in determining its application;<sup>13</sup> that purpose nonetheless matters in resolving vagueness and ambiguity;<sup>14</sup> that vagueness is far more commonplace than ambiguity as the source of interpretive problems;<sup>15</sup> that *stare decisis* applies to statutory decisions;<sup>16</sup> and that even easy cases require interpretation, although the interpretation is so obvious that the interpretive process is often not apparent.<sup>17</sup> Moreover, while Scalia and Garner would give principles such as the rule of lenity<sup>18</sup> and the avoidance of constitutional problems<sup>19</sup> higher priority than they would

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<sup>11</sup> State *ex rel.* Kalal v. Circuit Court for Dane County (*In re* Criminal Complaint), 681 N.W.2d 110, 122-27 (Wis. 2004).

<sup>12</sup> SCALIA & GARNER, *supra* note 3, at 9 (footnote omitted).

<sup>13</sup> *Id.* at 56-58.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 31-33.

<sup>16</sup> *Id.* at 5.

<sup>17</sup> *Id.* at 53-55.

<sup>18</sup> *Id.* at 296-302.

<sup>19</sup> *Id.* at 247-51.

purpose, their tool box is not very different from that of the Supreme Court of Wisconsin, putting aside the eschewal of legislative history as a legitimate source of information for statutory interpretation.

Thus, while there is not total consensus about statutory interpretation, there appear to be mainstream views, shared even among people who disagree with one another on some basic issues. These views put language first, then consider the statute's purpose, apply *stare decisis*, engage various canons of construction, and so on.

I do not mean to trivialize the differences, such as the use of legislative history and the point in the analysis in which purpose comes into play. However, the passion concerning debate over legislative history, to my mind, exceeds its doctrinal importance.<sup>20</sup> It is easy enough to find cases in which legislative history is used to lend additional support to a position justified in part on other grounds, especially linguistic grounds. It is difficult, in contrast, to find cases in which a court uses legislative history to justify a reading that the language of the statute does not permit. *Church of the Holy Trinity v. United States*,<sup>21</sup> decided in 1892, is often brought out as the poster child for such practices.<sup>22</sup> But that case is now more than 120 years old. Should it not by now have spawned at least a single poster grandchild? There appears to be enough in common, even among those who disagree, to take seriously the possible benefits of restating the law as it exists now, with forthright acknowledgement of those areas of disagreement. That is what Gary O'Connor suggested a decade ago. Let us look at the arguments in support of such a project.

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<sup>20</sup> SOLAN, *supra* note 7, chapter 3.

<sup>21</sup> 143 U.S. 457, 459 (1892) (relying in part on legislative history in determining that a statute prohibiting the payment of transportation into the United States of a person performing "labor or service of any kind" does not apply to a church's paying the expenses of its new clergyman moving from London to New York).

<sup>22</sup> See ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 89 (2006). I do not agree with the position that *Holy Trinity Church* illustrates the triumph of history over language. Rather, I have argued that the case is better explained as a classic application of the ordinary meaning canon. See SOLAN, *supra* note 7 at 54-55.

## II. THE ATTRACTIVENESS OF A UNIFIED APPROACH TO STATUTORY INTERPRETATION

### A. *Statutory Interpretation by Treatise*

Gary O'Connor's 2002 article advocating for a *Restatement of Statutory Interpretation*<sup>23</sup> observes that common law principles of statutory interpretation are not likely to yield consistent results even within the same court, are less likely to yield consistent results across courts within a jurisdiction, and are still less even likely to do so across different court systems in different jurisdictions.<sup>24</sup>

O'Connor proposes that the American Law Institute publish a Restatement as a solution to all of the chaos in statutory interpretation. His main argument that such a project would likely be successful is by analogy with the *Restatement (Second) of Contracts*, which contains many sections dealing with the interpretation of authoritative legal texts. These include issues such as the relevance of the intent of the parties,<sup>25</sup> the use of extrinsic evidence to determine intent,<sup>26</sup> and a hierarchy of evidentiary proof.<sup>27</sup> The issues are not precisely the same as those facing statutory interpreters, but the analogous provisions are surely pertinent.<sup>28</sup>

Quoting a suggestion made by Peter Strauss, O'Connor wisely suggests that the new *Restatement* not be based on the most contentious of cases decided by the U.S. Supreme Court, but rather on an assessment of ordinary practice.<sup>29</sup> As for the question of legislative history, which has remained a matter of strong disagreement among scholars and judges alike, O'Connor

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<sup>23</sup> O'Connor, *supra* note 1, at 334.

<sup>24</sup> *Id.* at 336.

<sup>25</sup> RESTATEMENT (SECOND) OF CONTRACTS § 201 (1981).

<sup>26</sup> *Id.* at § 213.

<sup>27</sup> *Id.* at §§ 219–22.

<sup>28</sup> For comparison of the jurisprudence of statutory and contractual interpretation, see Stephen F. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and its Implication for New Textualist Statutory Interpretation*, 87 GEO. L.J. 195 (1998).

<sup>29</sup> O'Connor, *supra* note 1 at 354. Interpretive practices in contexts other than the U.S. Supreme Court have recently generated attention in the academic literature. For discussion of statutory interpretation in state courts, see Gluck, *supra* note 2; Jeffrey A. Pojanowski, *Statutes in Common Law Courts*, 91 TEX. L. REV. 479 (2013); Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 U. CHI. L. REV. 657 (2013); Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the Erie Doctrine*, 120 YALE L.J. 1898 (2011). For discussion of statutory decisions in the lower federal courts, see Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433 (2012); Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317 (2005).

presents several alternative approaches, the most promising of which is to acknowledge the disagreement and to write the relevant Restatement sections in the alternative.<sup>30</sup>

Along similar lines, but with an entirely different institutional perspective, Nicholas Rosenkranz has proposed unifying the principles of statutory interpretation through legislation that would enable the adoption of the Federal Rules of Statutory Interpretation, much along the lines of other federal rules, such as the Federal Rules of Evidence, the Federal Rules of Criminal Procedure, and the Federal Rules of Civil Procedure.<sup>31</sup> Rosenkranz has more to say about why this is the right institutional distribution than he does about what such a set of laws should actually say, although he does suggest some especially contentious areas that would benefit from a uniform set of rules of interpretation.

O'Connor and Rosenkranz both recognize that common law reasoning is not likely to bring uniformity to statutory interpretation. There are too many judges saying too many things, and too much room for judges to make choices in their decision making that lead to inconsistent results. O'Connor, though, presents a number of reasons for preferring a Restatement to a set of federal rules, many of which have persuasive force. The most practical one is perhaps the most powerful: adoption of a set of federal rules requires the cooperation of all three branches of government, making it unlikely to happen absent the perception of some compelling reason.<sup>32</sup> It is not likely that both houses of Congress perceive such a compelling reason. Moreover, a set of federal rules is just that: federal. A Restatement, in contrast, may be used by state and federal courts alike.<sup>33</sup>

Enter Scalia and Garner, who refer to their book as a treatise. And a treatise it is. The book is an effort to restate what is important in the realm of statutory interpretation for lawyers, judges, and academics alike. For the past century, the treatise on statutory interpretation that has been recognized as most complete is J.G. Sutherland's 1891 treatise, *Statutes and Statutory Construction*,<sup>34</sup> the seventh edition of which was edited

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<sup>30</sup> O'Connor, *supra* note 1, at 355.

<sup>31</sup> Nicholas Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002).

<sup>32</sup> O'Connor, *supra* note 1, at 356-57.

<sup>33</sup> *Id.* at 356.

<sup>34</sup> J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION INCLUDING A DISCUSSION OF LEGISLATIVE POWERS, CONSTITUTIONAL REGULATIONS RELATIVE TO THE FORMS OF LEGISLATION AND TO LEGISLATIVE PROCEDURE: TOGETHER WITH AN EXPOSITION AT LENGTH OF THE PRINCIPLES OF INTERPRETATION AND COGNATE TOPICS (1891).



by Norman J. Singer and J.D. Shambie Singer in 2007.<sup>35</sup> In saying this, I mean no disrespect for the many books published on statutory interpretation over the years.<sup>36</sup> But most, like Eskridge's *Dynamic Statutory Interpretation*,<sup>37</sup> have as their principal goal the defense of a particular perspective on the subject, necessarily omitting a great deal of doctrine that is important to practitioners and judges, but not central to the debates in which the particular book engages.

Scalia and Garner have broader aspirations for their book, which is replete with bold-faced print and examples illustrating each of the 57 doctrines they espouse and the 13 they reject. Their goal is to provide the first new reference book in a century for those engaged in statutory interpretation. What influence their book will have remains to be seen. What is clear now, however, is that *Reading Law* contains a great many controversial claims scattered among those about which there is relative consensus, as the perceptive review by Eskridge<sup>38</sup> demonstrates.

#### B. *What Should a Restatement Say?*

I do not wish to devote much space here to what a *Restatement of Statutory Interpretation* should include. Suffice it to say that there is enough consensus about the interpretation of laws to make it clear that there would be plenty to say that is not enormously controversial. An ALI committee would be responsible for structuring the project. That task should be doable. For example, O'Connor suggests a table of contents for the Restatement, and Scalia and Garner have an actual table of contents, which organizes their discussion of the issues. It is instructive to compare the two in order to see how much they have in common.

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<sup>35</sup> NORMAN J. SINGER & J.D. SHAMBIE SINGER, *STATUTES AND STATUTORY CONSTRUCTION* (7th ed. 2010). For discussion of the history of this treatise, including interesting biographical information about Sutherland, see O'Connor, *supra* note 1, at 340-44.

<sup>36</sup> For an example of a recent excellent book that refers to much of the relevant literature, see KENT GREENAWALT, *STATUTORY AND COMMON LAW INTERPRETATION* (2013). For a very nice summary of the various canons and principles intended for students but useful to others, see WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* (2006).

<sup>37</sup> WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994). My own book, *THE LANGUAGE OF STATUTES*, *supra* note 7, is limited in this same way: It discusses those documents relevant to its main arguments, especially the centrality of intent in statutory interpretation. Taking views quite at odds with those of Eskridge is VERMEULE, *supra* note 22. It, too, focuses on those doctrines germane to the book's chief argument, which is relatively better competence of the administrative state to make interpretative decisions now delegated to judges.

<sup>38</sup> See Eskridge, *supra* note 6.

O'Connor's proposed Restatement would begin with language-internal principles, shift to external considerations, and subsequently present principles applicable to different kinds of legislation.<sup>39</sup> Scalia and Garner, in contrast, organize their canons around principles applicable to all texts, and principles applicable to government prescriptions. The former consist largely of grammatical canons, contextual canons, and what they call basic principles, the most important of which is principle of the primacy of language. The latter consist largely of substantive canons relating to government action, such as the rule of constitutional avoidance and the rule of lenity, and canons that deal with such questions as retroactivity, private rights of action, and repeal by implication.

O'Connor's proposal is organized somewhat less conceptually than Scalia and Garner's book, but the substantial overlap in coverage is obvious. If one compares O'Connor's suggested list of topics with the table of contents in Scalia and Garner's book, one will not find a sense of controversy over what should be covered in a treatise that attempts to treat statutory interpretation thoroughly.

With this level of agreement about what should be covered, and with Scalia and Garner taking positions that are sufficiently controversial to render their book inappropriate as a substitute for a Restatement whose content is vetted and debated by people with different perspectives, it would seem that a *Restatement of Statutory Interpretation* is a good idea. And to that extent, it *is* a good idea. At the very least it can serve to separate the great deal that is agreed upon from the

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<sup>39</sup> O'Connor, *supra* note 1, at 354:

- Chapter I: Intrinsic or Grammatical Aids to Interpretation
- Chapter II: Extrinsic Aids to Interpretation
- Chapter III: Interpretive Presumptions—General
- Chapter IV: Interpretation of Repealing Acts, Amending Acts, and Acts Incorporating Other Statutes
- Chapter V: Interpretation of Consolidating and Codifying Acts
- Chapter VI: Interpretation of Particular Kinds of Statutes
  - § 601 Appeals, Statutes Authorizing  
Statutes authorizing appeals are to be strictly construed.
  - § 602 Deportation, Statutes Authorizing  
Ambiguities in deportation statutes are to be construed in favor of aliens.
  - § 603 Penal Statutes  
Punitive sanctions are not to be applied if there is ambiguity as to underlying criminal liability or penalty.
  - § 604 Tax Statutes  
Exemptions from federal taxation are to be construed narrowly.

controversial issues that remain in contention, articulating both sides in the latter case.

### III. WHERE A RESTATEMENT CANNOT HELP AND MAY DO HARM

In this section, I express concerns about creating a Restatement. In evaluating my arguments, one should keep in mind the legitimate purposes that such a project might serve.

My doubts about creating a Restatement summarizing the world of intellectual harmony in the arena of statutory interpretation described above is not whether there is enough agreement to summarize; it is not even whether the disagreements are so passionate that there can be no resolution at the margins. Rather, the real problem with supporting an effort to restate this field is that someone might actually read it. The field is so politicized that an authoritative, black letter text is likely to be used by judges as yet more cover for the positions they wish to take in close cases.

Here I present three basic reasons for why so many legal actors, even those with different political orientations, can agree on how to interpret statutes generally, but not agree on the resolution of particular cases. First, and most importantly, people can agree on the principles of interpretation, but disagree on what weight to give each consideration in a particular case. There is no agreed-upon set of principles setting such priorities, although Cass Sunstein attempted to develop a hierarchy many years ago,<sup>40</sup> Einer Elhauge<sup>41</sup> has done so more recently, and both Gluck<sup>42</sup> and Eskridge<sup>43</sup> address the issue to at least some extent. Second, as a number of researchers (including Scalia and Garner) have noted, most statutory cases are about vagueness—the accordion-like nature of concepts that can be construed at various levels of generality and abstraction (“use a firearm” for example). It is very difficult to come up with a predictive rule or set of rules that will predict results in such cases. Third, one can interpret language either in terms of the outer boundaries of a statutory term, or in terms of ordinary usage. Judges vacillate between the two

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<sup>40</sup> See generally CASS SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* (1990).

<sup>41</sup> See generally EINER ELHAUGE, *STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION* (2008).

<sup>42</sup> Gluck, *supra* note 2 devotes much of her article to describing the competing priorities that various states assign to the various interpretive methods.

<sup>43</sup> See Eskridge, *supra* note 6 (commenting on the various roles that language, purpose and canons should play under a reasonable interpretive regime).

approaches, and there is no reason to expect them to stop. I deal initially with the first of these issues, and then with the second two in combination.

A. *Not Knowing When to Talk about What*

More than 60 years ago, Karl Llewellyn observed that judges appear to pick and choose among canons of construction, often selecting a canon that leads to one result, instead of selecting an equally available canon that would have led to the opposite result.<sup>44</sup> His “thrust and parry” table of canons<sup>45</sup> is still widely cited today.<sup>46</sup> For the most part, the selective use of canons should not be troubling when there is general uniformity in the manner of selection. Judge Posner likens their use to the use of proverbs. Generally, no one gets upset at the fact that we use them to tell people to hurry up (“a stitch in time saves nine”) and to slow down (“haste makes waste”).<sup>47</sup> We take them for granted as rules of thumb that should be used sensibly in context. Taken that way, they work pretty well. But if you are trying to get on a New York subway car and the doors close right in front of you, “haste makes waste” really is the wrong thing for someone to say to you.

Posner may go a little too far in his analogy because while canons are in a sense proverbial, they are also robed with authority: They typically come from the analysis presented by appellate courts as justification for their interpretation of a statute whose application is in dispute. Yet their sheer number makes it difficult to take the canons’ authority seriously. Thus, when Gluck speaks of “methodological *stare decisis*,” she refers more to fairly broad decisions about the relative roles of a statute’s language, exploration into its purpose using legislative history and other extrinsic information, and the canons taken as a whole, than to the obligation to choose one canon over another.<sup>48</sup>

Scalia and Garner get it right in their third canon of construction, which they list among the “fundamental principles” of statutory interpretation: “No canon of construction is absolute.

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<sup>44</sup> See generally 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 (1950).

<sup>45</sup> *Id.* at 401-06.

<sup>46</sup> The article was cited in law reviews 20 times in 2012, and 25 times in 2013. As of that date, Lexis lists 595 citations to the article, dating back to 1982. Obviously, the 32 years prior to Lexis’s coverage period contains many more citations.

<sup>47</sup> RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 280 (1993).

<sup>48</sup> Gluck, *supra* note 2, at 1772.

Each may be overcome by differing principles that point in other directions.”<sup>49</sup> To them, this problem can be solved, at least in large part by the principle that language almost always trumps any extrinsic evidence of legislative meaning, and the principle that the purpose of a statute is relevant, but is to be derived only from the language of the statute itself.

It is here that things begin to collapse, more or less in the way the legal realists said they would. Take the case of *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,<sup>50</sup> discussed by Scalia and Garner,<sup>51</sup> and a focal point of Eskridge’s review of that book.<sup>52</sup> In that case, the U.S. Department of the Interior, pursuant to authority granted under the Endangered Species Act, had issued regulations to protect endangered species, including the northern spotted owl. The statute made it illegal to “take” an endangered species,<sup>53</sup> and included the word “harm” in the definition of “take.”<sup>54</sup> The regulation then defined “harm” as including habitat modification “where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.”<sup>55</sup> In everyday English, damage to an animal’s habitat is a far cry from “taking” the animal, which generally means killing the animal. The conflicting opinions—Stevens for the majority upholding the regulation, Scalia for the dissent—read like the last round of a boxing match in which the two fighters have remained standing, but have thrown and absorbed all of the punches that their strength and endurance would allow.

The majority relied on, among other things, the *Chevron* doctrine (giving deference to the agency to whom regulatory authority has been delegated),<sup>56</sup> the statutory definition,<sup>57</sup> the purpose of the statute (stated in the text of the law itself),<sup>58</sup> the rule against surplusage,<sup>59</sup> the legislative history,<sup>60</sup> the language

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<sup>49</sup> SCALIA & GARNER, *supra* note 3, at 59.

<sup>50</sup> *Babbitt v. Sweet Home Chapter of Cmty. for a Great Oregon*, 515 U.S. 687 (1995).

<sup>51</sup> SCALIA & GARNER, *supra* note 3, at 300-02.

<sup>52</sup> Eskridge, *supra* note 6, at 536-38.

<sup>53</sup> 16 U.S.C. § 1538(a)(1) (1994).

<sup>54</sup> 16 U.S.C. § 1532(19) (1994).

<sup>55</sup> 50 C.F.R. § 17.3 (1994).

<sup>56</sup> *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984).

<sup>57</sup> *Babbitt v. Sweet Home Chapter of Cmty. for a Great Oregon*, 515 U.S. 687, 703 (1995).

<sup>58</sup> *Id.* at 697-98.

<sup>59</sup> *Id.* at 698.

of the legislated definitions,<sup>61</sup> and the structure of the statute as reflected in the role of various provisions.<sup>62</sup> The dissent relied on dictionary definitions,<sup>63</sup> the enactment history (the order in which various provisions were introduced),<sup>64</sup> the consequences to loggers of upholding the regulation,<sup>65</sup> the structure of the statute as reflected in the role of various provisions, and grammatical canons of construction, especially *noscitur a sociis*.<sup>66</sup>

Putting aside the use of legislative history, there is really little or no controversy about the legitimacy of the canons used by both sides. Yet the opinions, taken together, look like an advertisement for Llewellyn's position, now about two-thirds of a century old. One can reduce much of the disagreement to politics. Scalia begins his dissent by lamenting the plight of the logger; Stevens focuses on the congressional policy of saving endangered species. If deference to the interpretation of statutes by regulatory agencies were every judge's priority, this would have been an easy case for the majority position. Even if the agency did not adopt the best interpretation of the statutory language, it certainly is a possible interpretation, to which deference would be due if deference were the most important interpretive value. The dissent, in contrast, offered some compelling arguments about the structure of the statute, including the fact that the statute specifically offers remedies that do not include the banning of logging.

But it is not good enough to claim that this case is really about taking *Chevron* seriously. Let us say that a Restatement adopts Adrian Vermeule's proposal to increase deference to agencies and decrease the discretion of judges more or less across the board.<sup>67</sup> Empirical research shows that judges apply the doctrine of deference to administrative agencies differentially, depending upon whether the current president is of the same party that was in power when the judge was appointed to the bench. It is not that the system is corrupt to the core. Rather, judges, like the rest of us, have a tendency to give the benefit of the doubt to positions that they find attractive. On the margins,

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<sup>60</sup> *Id.* at 705-06.

<sup>61</sup> *Id.* at 697-98 n.10.

<sup>62</sup> *Id.* at 702-03.

<sup>63</sup> *Id.* at 717 (Scalia, J., dissenting).

<sup>64</sup> *Id.* at 729-31.

<sup>65</sup> *Id.* at 714.

<sup>66</sup> *Id.* at 720-21 (a canon calling for the meanings of words in a list to be construed as consistent with its neighboring words).

<sup>67</sup> VERMEULE, *supra* note 22.

then, it matters who the judges are in such cases.<sup>68</sup> The game is an easy one to play: declare an agency action (typically a regulation) unambiguously outside the scope of the statute empowering the agency to regulate in order to strike it down, or declare the empowering statute ambiguous or murky with respect to the agency action in order to uphold the agency. In *Babbitt*, Scalia never came out and said that the statutory language unambiguously precluded the agency action. But he came as close as he could to saying it by focusing on the everyday uses of the statutory language, notwithstanding congressional definitions broadening the scope of the terms.

If *Babbitt* illustrates the application of the *Chevron* doctrine to uphold a regulation in the teeth of instrumentalist arguments for why the regulation was a bad idea, *MCI v. AT&T*<sup>69</sup> illustrates the application of the *Chevron* doctrine to strike down a regulation in the teeth of fairly good linguistic arguments in support of its validity. A provision of the Federal Communications Act requires telephone companies to publish all of their tariffs regularly.<sup>70</sup> Because there were so many tariffs, and because they changed regularly to meet changing market conditions, this requirement was sufficiently burdensome that it could potentially act as a market barrier, making it more difficult for new entrants in the telecommunications industry to succeed. The statute also authorizes the Federal Communications Commission (FCC) to “modify” this requirement.<sup>71</sup> The FCC did just that, by exempting small carriers from the publication requirement.

AT&T cried foul, claiming that the authority to “modify” the requirement did not include the authority to eliminate it for a group of carriers. A divided Supreme Court agreed with AT&T, and struck down the regulation as exceeding the agency’s authority. Writing for the majority, Justice Scalia relied heavily on dictionary definitions of “modify” that supported his position that only small changes can be considered modifications. A

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<sup>68</sup> See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1104 (2008); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 826 (2006). For an empirical study outside the realm of the *Chevron* doctrine expressing a similar account, see James Brudney & Cory Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231 (2009).

<sup>69</sup> *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994).

<sup>70</sup> 47 U.S.C. § 203(a) (2013).

<sup>71</sup> *Id.* 203(b)(2).

dictionary definition that tended to support a broader reading, and relied upon by the dissent, was dismissed as “peculiar.”<sup>72</sup>

The dictionary analysis did not do a very good job here. It is entirely possible to make relatively minor changes to a rule by eliminating its application to a small group to whom it would otherwise apply. A high school, for example, may require all students to eat lunch on campus, and then “modify” the requirement to permit graduating seniors to eat lunch off campus in their last month of school.

Looking at these two cases together, one might ask: What is the relative strength of the *Chevron* doctrine and the choice of dictionaries used to determine the clarity of an agency’s regulatory authority? And what is the relationship between the value of keeping coherent a statute’s overall structure and deferring to an agency’s interpretation of a law? And how much should the economic consequences of a regulation play into the analysis of what is reasonable? And where does the purpose of a statute enter the analysis?

Assuming that all of these considerations—among the others brought out by the various opinions in these cases—are legitimate ones, and I believe they are, it will never be possible to come up with a hierarchy that will rank all of the considerations in such a way as to have the ranking apply across a broad range of cases. This is because various factors can be stronger or weaker from case to case and judges require enough flexibility to take this into account. For example, the strong statement of statutory purpose in the Endangered Species Act,<sup>73</sup> while not an important factor to the dissenters, played a significant role in the majority opinion, reinforcing its conclusion that the language of the statute permitted such regulation under a reasonable interpretation.<sup>74</sup> Had the statutory language been the same, but the stated purpose of the law was to limit interference with the development of the logging industry, the relative weightings may well have been different for some of the justices.

This point is a serious one. For if there can never be consensus about the weight to assign various factors in deciding a case, then there can be no consensus to restate in a Restatement. The consensus discussed earlier is at a more general level of analysis: language trumps purpose, the rule of

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<sup>72</sup> *MCI*, 512 U.S. at 227.

<sup>73</sup> 16 U.S.C. § 1531(b) (2012).

<sup>74</sup> *Babbitt v. Sweet Home Chapter of Cmty. for a Greater Oregon*, 515 U.S. 687, 698 (1995).



lenity should be applied one way or another, interpretations that make the code more coherent are to be preferred over interpretations that make the code less coherent, and so on. But when it comes to the details, it all falls apart.<sup>75</sup> As *Babbitt* illustrates, the discussion never even reaches enough coherence to call it disagreement. Rather, the disagreement is over *ad hoc* weightings of factors whose relevance in legal analysis is largely undisputed, but whose role in an individual case can be likened to a hockey puck in a face-off at center ice.

*B. Why Determining Word Meaning is Too Hard to Restate*

It is not unusual to speak of a statute's meaning, but determining meaning is not really the task at hand in statutory interpretation. What judges do in deciding statutory cases is to make a judgment about whether a law applies to the facts of a case and, if so, how it applies. Characterizing the meaning of a term may help in performing that task, but it is not necessary in principle. A judge deciding whether driving under the influence qualifies as a "violent felony" for purposes of interpreting a law that defines that term as a criminal act that includes physical force or "is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another"<sup>76</sup> need not define the word "otherwise" to reach a decision.<sup>77</sup> Moreover, it is not the least bit easy to define even the most ordinary-seeming words. The reader might try to define the verb "paint" as a thought experiment and note the difficulties encountered.<sup>78</sup>

Most cases of word meaning are about borderline situations, or vagueness.<sup>79</sup> Certainly most of the classic cases in American jurisprudence are cases of vagueness: Should an airplane count as a vehicle with respect to applying a statute

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<sup>75</sup> Others observe similarly. See Richard Ekins, *The Nature of Legislative Intent* 260 (2012).

<sup>76</sup> 18 U.S.C. § 924 (e)(2)(B) (2013).

<sup>77</sup> *Begay v. United States*, 553 U.S. 137 (2008). Actually, the Supreme Court did rely, at least in small part, on a dictionary definition of "otherwise" in that case, but could have shed the reference without any serious compromise in its reasoning. *Id.* at 144. For discussion, see James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries, in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 553-54 (2013).

<sup>78</sup> This fact has been observed by philosophers of language. For a seminal work, see J.A. Fodor et al., *Against Definitions*, 8 COGNITION 263, 339 (1980).

<sup>79</sup> This observation is important, but not new. See SOLAN, *supra* note 7, ch. 3. For that matter, Scalia and Garner make this point. See SCALIA & GARNER, *supra* note 3, at 31-33.

enacted in 1919?<sup>80</sup> Does a minister perform labor?<sup>81</sup> Does the ordinary meaning of “use a firearm” include trading an unloaded machine gun for some drugs?<sup>82</sup>

How should courts resolve these cases? By definition, the language is not dispositive. In all of these cases, it is possible to answer the question affirmatively, but there is reason to question whether the enacting legislature would have wished the statute to apply to such outlying situations. The problem has been observed since Aristotle:

[E]very law is laid down in general terms, while there are matters about which it is impossible to speak correctly in general terms. Where it is necessary to speak in general terms but impossible to do so correctly, the legislator lays down that which holds good for the majority of cases, being quite aware that it does not hold good for all. The law, indeed, is none the less correctly laid down because of this defect; for the defect lies not in the law, nor in the lawgiver, but in the nature of the subject matter, being necessarily involved in the very conditions of human action.<sup>83</sup>

But Aristotle’s solution is easier to state in general terms than it is to apply in particular cases. How can one determine which situations fit within the law’s contemplation, and which do not?

The U.S. Supreme Court makes significant use of the ordinary meaning canon, which says that the courts should assume the legislature to have expected statutory terms to be construed in their ordinary sense.<sup>84</sup> However, while courts sometimes apply this canon, at other times they do not, opting instead for a broader reading, based on their assessment of how well the ordinary meaning captures the intent of the legislature. *Smith v. United States* is such an example. The Court decided that using a gun as an item of barter counts as “using a firearm” for statutory purposes, albeit an unusual use of a firearm.

An even stronger illustration is *Chisom v. Roemer*,<sup>85</sup> a 1991 case interpreting a section of the Voting Rights Act. The act required states to hold elections in such a way as not to afford protected classes less opportunity “to elect representatives

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<sup>80</sup> *McBoyle v. United States*, 283 U.S. 25, 25-26 (1931).

<sup>81</sup> *Church of the Holy Trinity v. United States*, 143 U.S. 457, 458 (1892).

<sup>82</sup> *Smith v. United States*, 508 U.S. 223, 225 (1993).

<sup>83</sup> ARISTOTLE, *NICOMACHEAN ETHICS* bk. 5, ch. 10 (F. H. Peters trans., 5th ed. 1893) (c. 384 B.C.E.). For discussion, see FREDERICK SCHAUER, *PROFILES, PROBABILITIES AND STEREOTYPES* 42-48 (2003).

<sup>84</sup> See *Dolan v. United States Postal Serv.*, 546 U.S. 481, 486 (2006); *Small v. United States*, 544 U.S. 385, 406 (2005); *Smith v. United States*, 508 U.S. at 242 (Scalia, J., dissenting).

<sup>85</sup> *Chisom v. Roemer*, 501 U.S. 380, 383-84 (1991).

of their choice.”<sup>86</sup> In this case, citizens complained that a state’s electoral scheme for electing judges made it more difficult to elect African American judges.<sup>87</sup> Both the history and purpose of the statute strongly suggest that the legislature had no reason to limit this rule’s application to prototypical representatives, that is, legislators. On the contrary, it would almost appear to be a cruel rejection of the legislation’s goals for a court to determine that Congress sanctioned the racist election of local judges when it enacted the statute.

As Justice Scalia pointed out in his dissenting opinion, however, the ordinary meaning of “representative” surely does not include judges.<sup>88</sup> We do not think of judges as representatives. So the question was whether the court should stretch the meaning of “representative” beyond its ordinary meaning to include judges, and that is exactly what the Court did. Such interpretive dilemmas illustrate more than a conflict among canons of the sort Llewellyn presented. These conflicts reflect serious disagreement over the nature of word meaning itself, making consistency in decision making especially difficult to achieve.

Even when there is general agreement over the method of finding the meaning of a statute, there is no agreed-upon way of finding that meaning in individual cases. An excellent example comes forward in Judge Posner’s review of Scalia and Garner’s book<sup>89</sup> (minus the vitriol that ensued). Scalia and Garner praise a state court judge in Massachusetts for concluding that a shopping center’s leasing space for a Mexican restaurant serving tacos, burritos, and quesadillas would not violate its obligations to Panera under a lease that, which prohibited the landlord from leasing space to a business, 10% of whose projected revenue would consist of the sale of sandwiches.<sup>90</sup> Scalia and Garner praise the judge not for the result of the case, but for having decided the case by looking up “sandwich” in a dictionary and accepting its definition as “two thin pieces of bread, usually buttered, with a thin layer (as of meat, cheese, or savory mixture) spread between them.”<sup>91</sup>

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<sup>86</sup> 42 U.S.C. § 1973(b) (2011).

<sup>87</sup> *Chisom*, 501 U.S. at 384-85.

<sup>88</sup> *Id.* at 410 (Scalia, J., dissenting).

<sup>89</sup> Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Aug. 24, 2012), <http://www.newrepublic.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism>.

<sup>90</sup> *White City Shopping Ctr., LP v. PR Rest., LLC*, 21 Mass. L. Rptr. 565 (Mass. Supp. 2006).

<sup>91</sup> WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2011 (1993) (defining “sandwich”).

This is a very limited notion of sandwich, though. As Posner asks, what about a club sandwich, or an open-faced sandwich? But there are even bigger problems. Are wraps sandwiches under the lease? If so, then it will be hard to distinguish between a wrap and a burrito, since the former is derivative of the latter.<sup>92</sup> The two are visually very similar, suggesting that their main difference may be how our culture perceives them, rather than physical characteristics subject to definition.<sup>93</sup> If the court were to limit itself to the dictionary definition, then submarine sandwich shops would also be permitted. Much more can be said about what constitutes a sandwich at the margins, but even these few examples suggest that it is a less simple feat than one might think. And once one gets that far, one must decide whether the parties intended to restrict only prototypical sandwiches, or sandwiches as broadly construed. Among the arguments set forth by the judge was the fact that there were Mexican restaurants near the shopping center, suggesting that if the tenant wished to require their preclusion, it would have said so. Does this mean that context trumps ordinary meaning, that ordinary meaning is hard to discover, or that it is not a simple matter to decide whether to commit to the prototype or to the broad interpretation of statutory language, absent contextual information? I believe it illustrates all three of these contingencies.<sup>94</sup>

For similar reasons, even where a uniform methodology has been established, there may be little consensus about how to apply it in individual cases. Thus, in Wisconsin, where a hierarchy of considerations has been judicially established,<sup>95</sup> it is not clear how much this consensus can bring about agreement among judges as to the proper result in an individual litigation. The Wisconsin court leaves a lot to be decided on a case-by-case basis, a point Chief Justice Abrahamson made in her concurring opinion.<sup>96</sup> For instance, it is not clear how uncertain meaning

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<sup>92</sup> The Wikipedia entry for “sandwich wrap” recites this history. sandwich wrap, WIKIPEDIA, [http://en.wikipedia.org/wiki/Sandwich\\_wrap](http://en.wikipedia.org/wiki/Sandwich_wrap) (last updated Nov. 7, 2013).

<sup>93</sup> See Marjorie Florestal, *Is a Burrito a Sandwich? Exploring Race, Class, and Culture in Contracts*, 14 MICH. J. RACE & L. 1, 32 (2008) (perceptively asking, “Does a Burrito Have a Race?”). For a good summary of the arguments in the case and their broader interpretive ramifications, see CHRISTOPHER HUTTON, WORD MEANING AND LEGAL INTERPRETATION: AN INTRODUCTORY GUIDE 91-94 (forthcoming 2014).

<sup>94</sup> For further discussion of the selection between ordinary and definitional meaning, see SOLAN, *supra* note 7, ch. 3; see also Brian C. Slocum, *Linguistics and ‘Ordinary Meaning’ Determinations*, 33 STATUTE L. REV. 39 (2012).

<sup>95</sup> State *ex rel.* Kalal v. Circuit Court for Dane County (*In re Criminal Complaint*), 681 N.W.2d 110, 122-27 (Wis. 2004), discussed *supra* note 11.

<sup>96</sup> *Id.* at 127-28 (Abrahamson, C.J., concurring).

must be before a judge declares a statute ambiguous, triggering further inquiry. Although the court defines ambiguity, it proposes an objective test without indicating which facts should feed the analysis. The court says:

It is not enough that there is a disagreement about the statutory meaning; the test for ambiguity examines the language of the statute “to determine whether ‘well-informed persons *should have* become confused,’ that is, whether the statutory . . . language *reasonably* gives rise to different meanings.”<sup>97</sup>

Thus, judges, using their own intuitions about meaning, will have to decide what makes an interpretation a reasonable one. This is not always an impossible task. However, individual judges, as speakers of English, have their own sense of a term’s meaning. Without knowing the extent to which people reasonably disagree with one another on the application of a word in borderline cases—such as the ones litigated at the appellate court level—there will likely not be consensus on whether a statutory term is ambiguous or not, thus triggering disagreement about which tools are appropriate to use in an individual case.<sup>98</sup>

Gluck recognizes that there is a difference between agreeing on methodology and agreeing on the results of that methodology’s application in individual cases. Scalia and Garner likewise emphasize that recognition of an appropriate interpretive method is not sufficient to render interpretive decisions easy ones. This, they correctly point out, stems from the fact that so many statutory adjudications involve the resolution of borderline cases, which are by their very nature close calls.

#### CONCLUSION: SHOULD WE GIVE IT A TRY?

Where does all of this leave us? It is both possible and feasible to assemble a Restatement that recites most of what statutory interpreters do every day in cases that are largely not controversial. This would accomplish quite a bit. It would in essence, be a more complete version of what Scalia and Garner have attempted—i.e., cataloging and illustrating legitimate canons—and a manageable replacement of Sutherland, based

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<sup>97</sup> *Id.* at 124 (citations omitted) (majority opinion).

<sup>98</sup> For discussion of this pervasive problem, see Lawrence M. Solan, Terri Rosenblatt & Daniel Osherson, *False Consensus Bias in Contract Interpretation*, 108 COLUM. L. REV. 1268 (2008); Lawrence M. Solan, *Pernicious Ambiguity in Contracts and Statutes*, 79 CHI.-KENT L. REV. 859 (2004).

on a more modern taxonomy of issues, along the lines that O'Connor suggested.<sup>99</sup>

But there are problems, and the problems are magnified by the prestige of the ALI Restatements. For one thing, while there is general consensus about the basic elements of statutory interpretation (putting aside the nagging battles over the use of legislative history), there is no consensus about the hierarchy of the various categories. Although there is consensus about such things as the role of the canons of interpretation as a general matter, there is no generally accepted practice for preferring one canon over another. Furthermore, so much of statutory interpretation focuses on the meaning of statutory language. There is no consensus about how to find that meaning, with judges applying competing methods without even acknowledging the problem. Making matters more difficult, there is little reason for a Restatement to insist upon one meaning over another. Sometimes, a broad interpretation of words seems appropriate, at other times a narrow one. These are not the only problems that drafters of a new Restatement will face, but they are daunting ones.

What is both true and troubling about the prospect of a *Restatement of Statutory Interpretation* is this defense of the project by Gary O'Connor:

The Restatement process may be able to provide the "time-honored acceptance" that scholarly work by individuals may not be able to provide. Restatements are familiar to almost all attorneys. In many areas of law, such as torts and especially contracts, they have a high degree of acceptance with courts. A Restatement could serve as a bridge between the scholarly and judicial worlds in this area and provide a means for scholarly canons to gain judicial acceptance.<sup>100</sup>

Bridging the gap between scholarship and practice is obviously a laudable goal. But there are many ways to build a bridge. The bridge that provides methodology to a judge wishing to do things "right" and that actually enables that judge to judge according to a widely accepted set of jurisprudential values is one that both judges and practitioners will welcome enthusiastically. In contrast, the bridge that gives judges exercising discretion in accordance with their own values the opportunity to take further cover in authoritative material may not be a bridge to nowhere, but it is not a bridge worth building. A new Restatement will by its very nature build both kinds of bridges, and will have no

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<sup>99</sup> See O'Connor, *supra* note 1 and accompanying text.

<sup>100</sup> *Id.* at 359.

mechanism for forcing any given judge to traverse one bridge or the other in any given case.

My sense, then, is that a Restatement is feasible, and would have value. But it is also likely to become yet another vehicle for supporting one or another argument in controversial cases. This reluctance is bolstered by the fact that similar problems occur with the interpretive sections of the *Restatement (Second) of Contracts*, although the problems are not as severe. For example, Section 213 contains the parol evidence rule, which says that prior agreements that are inconsistent with an integrated written agreement are inoperative.<sup>101</sup> The well-known problem with this rule is how to determine whether the prior agreement is inconsistent with the current one. The more closely one examines contextual information the less work is being accomplished by the parol evidence rule itself. Thus, some states employ a “hard parol evidence rule” by which little or no contextual analysis is permitted if the language appears plain on its face, while others employ a “soft parol evidence rule” by which courts conduct an examination of the language in context as a preliminary matter when the parol evidence rule is adduced.<sup>102</sup>

Other interpretive sections do not enjoy the wide acceptance and prestige that the Restatement generally carries. For example, Section 211 excludes from standardized agreements terms that are outside the reasonable expectations of the non-drafting party.<sup>103</sup> This section is not widely applied by courts<sup>104</sup> outside the interpretation of insurance policies, and even there the results are mixed.<sup>105</sup> Similarly, Section 201(3)<sup>106</sup> states that when the parties do not understand the language of a contract the same way, and neither party has taken advantage of the other’s different understanding, then there is no contract. This has been the result in some celebrated cases, which make

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<sup>101</sup> RESTATEMENT (SECOND) OF CONTRACTS § 213 (1981).

<sup>102</sup> For discussion of these doctrinal choices, see Russell Korobkin, *The Borat Problem in Negotiation: Fraud, Assent, and the Behavioral Law and Economics of Standard Form Contracts*, 101 CALIF. L. REV. 51 (2013); Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533, 536 (1998).

<sup>103</sup> RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1981).

<sup>104</sup> See, e.g., *Rory v. Cont’l Ins. Co.*, 703 N.W.2d 23, 26 (Mich. 2005).

<sup>105</sup> See Jeffrey W. Stempel, *Unmet Expectations: Undue Restriction of the Reasonable Expectations Approach and the Misleading Mythology of Judicial Role*, 5 CONN. INS. L.J. 181 (1998).

<sup>106</sup> RESTATEMENT (SECOND) OF CONTRACTS § 201(3) (1981).

their way into every contracts casebook.<sup>107</sup> But the courts are generally reluctant to hold that there is no contract when both parties believe that there is one.

On the other hand, there are some doctrines of contract law that are far better-established than are their counterparts in the realm of statutory interpretation.<sup>108</sup> Chief among them is Section 203, which dictates a hierarchy of extrinsic evidence.<sup>109</sup> This is exactly what is missing in the canons of statutory interpretation: a ranking of various canons. The difference, no doubt, lies in the fact that there are comparatively few players in the contract formation process, and a limit to the kinds of historical information likely to be relevant: the history between the parties, the usage in the trade, and so on. Even in this well-established realm of contract law, however, recent empirical scholarship by Lisa Bernstein suggests that the evidence presented to courts is sufficiently uneven to undermine consistent decision making.<sup>110</sup>

There is consensus significant enough to motivate serious consideration of a *Restatement of Statutory Interpretation*. However, there are obstacles to creating universal procedures in statutory interpretation, and even greater obstacles to creating procedures that are both universal and reliable in producing the same result regardless of who applies them. How can there be so much agreement about how to go about an activity and so little

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<sup>107</sup> See *Frigalimint Imp. Co. v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960); *Raffles v. Wichelhaus*, 2 H. & C. 906, 159 Eng. Rep. 375 (Ex. 1864).

<sup>108</sup> Stephen F. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation*, 87 GEO. L.J. 195 (1998).

<sup>109</sup> RESTATEMENT (SECOND) OF CONTRACTS § 203. Standards of Preference in Interpretation. In the interpretation of a promise or agreement or a term thereof, the following standards of preference are generally applicable:

- (a) an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect;
- (b) express terms are given greater weight than course of performance, course of dealing, and usage of trade, course of performance is given greater weight than course of dealing or usage of trade, and course of dealing is given greater weight than usage of trade;
- (c) specific terms and exact terms are given greater weight than general language;
- (d) separately negotiated or added terms are given greater weight than standardized terms or other terms not separately negotiated.

<sup>110</sup> Lisa Bernstein, *Trade Usage in the Courts: The Flawed Conceptual and Evidentiary Basis of Article 2's Incorporation Strategy* (Univ. of Chicago Pub. Law & Legal Theory Working Paper No. 452), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2366533](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2366533).



agreement about what the process should produce? My own sense is that statutory interpretation becomes a self-conscious enterprise only in hard cases. The major doctrines of contract, torts, property, and so many of the restated areas of law, in contrast, are about *all* cases. Contract interpretation, however, is very much like statutory interpretation, albeit with fewer institutional issues arising. That is why the interpretive portions of the *Restatement of Contracts* are so problematic, in the context of a project that has, for decades, been rightly seen as a resounding success. That is also why a useful *Restatement of Statutory Interpretation* would be a difficult task to accomplish.