

2013

## Decision Theory and Babbitt v. Sweet Home: Skepticism About Norms, Discretion, and the Virtues of Purposivism

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### Recommended Citation

Victoria F. Nourse, *Decision Theory and Babbitt v. Sweet Home: Skepticism About Norms, Discretion, and the Virtues of Purposivism*, 57 St. Louis U. L.J. (2013).

Available at: <https://scholarship.law.slu.edu/lj/vol57/iss4/4>

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**DECISION THEORY AND *BABBITT v. SWEET HOME*: SKEPTICISM  
ABOUT NORMS, DISCRETION, AND THE VIRTUES OF  
PURPOSIVISM**

VICTORIA F. NOURSE\*

ABSTRACT

In this writing, I apply a “decision theory” of statutory interpretation, elaborated recently in the Yale Law Journal, to Professor William Eskridge’s illustrative case, *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.<sup>1</sup> In the course of this application, I take issue with the conventional wisdom that purposivism, as a method of statutory interpretation, is inevitably a more virtuous model of statutory interpretation. First, I question whether we have a clear enough jurisprudential picture both of judicial discretion and legal as opposed to political normativity. Second, I argue that, under decision theory, *Sweet Home* is a far easier case than either Justice Stevens’s or Justice Scalia’s opinions reveal. Finally, I critique both opinions for failing to rely on norms borrowed from Congress’s actual decisions in the 1982 Endangered Species Act Amendments. The question then, is not “norms or not,” but whose norms, Congress’s or the courts’, should apply.

INTRODUCTION

Professor Eskridge has given us an extraordinarily erudite lecture on jurisprudence. The notion of the normative “toggle” is an important way of understanding the struggle between the positivist and normative impulses in statutory interpretation and in particular within legal process theory. In this brief writing, I aim to tell a somewhat different jurisprudential and legislative story, one not so much focused on the past, but on what I believe lies in the future of statutory interpretation. Applying rule-based decision theory, I argue that both Justice Stevens and Justice Scalia misunderstood Congress’s

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\* Professor Victoria F. Nourse, Georgetown Law School; Executive Director, Center on Congressional Studies at Georgetown Law. My special thanks to the students who organized the conference, to Professor Joel Goldstein who invited Professor Eskridge to give the prestigious Childress Lecture, and to the other panelists: Jim Brudney, Karen Petroski, Ted Ruger, Scott Shapiro, and Doug Williams.

1. 515 U.S. 687, 688, 708, 714 (1995). Justice Stevens wrote for the Court, with Justice Scalia in vigorous dissent. Justice O’Connor concurred.

decisionmaking process, turning what might have been an easier case into a harder one. At a more theoretical level, I question whether the notion of normativity itself is under-theorized in the legal literature, and whether it is an inevitable virtue of purposivist analysis.

I begin by considering some of the broader jurisprudential issues raised by Professor Eskridge's account,<sup>2</sup> arguing that normative discretion should not be confused, as it sometimes is, with out-and-out judicial legislating. After all, norms come in many varieties, some legal, and others borrowed from religion, cooking, sport and even beekeeping. The question of discretion and normativity itself deserves greater academic attention and articulation. In my own view, norms are institutionally sustained; they are how institutions "think." More work must be done to articulate the norms belonging to the judiciary, and those more characteristic of a legislature.

In Part II, I interpret *Sweet Home*'s statute differently from either Justice Stevens or Justice Scalia, based on what I have elsewhere dubbed a "decision theory" of statutory interpretation (to distinguish it both from textualist and purposivist approaches).<sup>3</sup> Decision theory does not view Congress as an institution with a mystical or unified "intent," but as one which reaches decisions over time through a sequential, institutionalized process, later decisions trumping earlier ones. Decision theory begins with text but, to ensure that this textualist reading does not simply "pick and choose" text, decision theory advocates a "second opinion"—confirmatory legislative history.<sup>4</sup> Because this search looks for congressional decisions, it reverse-engineers legislative history focusing on the materials necessary to understand Congress's textual decision. In this case, I argue that Justice Stevens was right but that both opinions could have been a good deal simpler. I also lay out a case based on four to six pages of legislative history that strongly confirms my textual reading and Justice Stevens's result.

In Part III, I question the claim that purposivism is necessarily virtuous because it forces judges to be candid about norms. It has been the general academic and jurisprudential wisdom that the Hart & Sacks purposivist formula is inevitably preferable for this reason.<sup>5</sup> If judges believe it inevitable

2. See William N. Eskridge, Jr., *Nino's Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms*, 57 ST. LOUIS U. L.J. 865, 870–71 (2013) ("... I shall now argue that the positivist judge in the hard cases finds it natural to invest statutory meaning with her or his interpretation of the moral or normative context of the statute, and then to justify such judgments based upon conventional sources.").

3. Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 75 (2012) [hereinafter Nourse, *Decision Theory*].

4. Adrian Vermeule, *Second Opinions and Institutional Design*, 97 VA. L. REV. 1435, 1435 (2011).

5. As Professor Einer Elhauge has explained: "The dominant answer given in modern American law schools is that when the legal materials fail to specify the statutory meaning, you

that they apply their own normative visions, then judges may lose sight of the one constant in the field of statutory interpretation—deference to Congress. One need not deny that hard cases exist. Nor, however, should one deny the risk of moral hazard, that searching for norms and purposes will make judges believe that they are Hercules (Ronald Dworkin’s fictional judge)<sup>6</sup> and entitled to impose their views on a public powerless (short of impeachment) to oust them. At the margin (or perhaps even at the core), candor may turn out to be an excuse for laziness, contempt for democratic institutions, and judicial arrogance.

To illustrate this, I argue that it was not necessary for Justice Stevens or Justice Scalia to invoke the normative visions Professor Eskridge finds in the opinions. In fact, both of the normative visions he identifies are quite problematic compared to the congressional norms contained in the Endangered Species Act Amendments of 1982’s text and legislative history. Rather than concentrating on the 1973 Endangered Species Act, Justice Stevens would have been far better off invoking Congress’s 1982 normative “balancing act” between industry and environmentalists, one documented in the 1982 legislative history. Justice Scalia’s normative vision fares less well, having almost no relationship to Congress’s actual 1982 decision. Indeed, Justice Scalia’s “takings” norm is based on a common but pervasive mistake about the history of property rights, a normative vision that finds little support in the 1982 Act’s text or legislative history. Both opinions would have been better off had they stuck closer to Congress’s decisions and Congress’s norms.

#### I. JUDGES ARE NOT LEGISLATORS

Last month I was asked to write a response to a lecture given by Judge Posner at Duquesne University in which he openly declared that as a judge, in hard cases, he was a legislator.<sup>7</sup> This is the gist of the so-called Hartian move described by Eskridge—that there are gaps in the law, and judges, like legislators, fill in that gap.<sup>8</sup> With all due respect, I disagree, albeit not because I believe that there are no gaps. I say this because I believe most lawyers, and most law professors, have very little idea about what it is to be a *legislator*. As Jeremy Waldron once put it: “We *think* we know how legislators argue; but do we really?”<sup>9</sup> I have known some legislators in my life, and I have participated

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as judge have no choice but to exercise your own normative judgment about which statutory interpretations would be best . . . .” EINER ELHAUGE, *STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION* 3 (2008).

6. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 105 (1978).

7. Richard Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts—One Judge’s Views*, 51 DUQ. L. REV. 3, 4–5 (2013).

8. H.L.A. HART, *THE CONCEPT OF LAW* 272 (2d ed. 1994).

9. JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 25 (1999).

in the collective action we know as legislating, although this is rare for a law professor.<sup>10</sup> Based on all I know from that experience, there is a very, very large divide between the institution we know as Congress and the institution we know as the judiciary, and the roles we properly ascribe to those institutions.

Let us start with pragmatics and institutional structure. A judge is a relatively passive actor who must decide a case or controversy that comes to him without any action on his or her part. He cannot stand up and close Guantanamo or eradicate the Department of Education. I have given to telling my students that to argue that a judge is a legislator confuses a mouse-like jurisdiction with an elephantine one. Judges do not decide to go to war; they do not decide the budget. When they do make decisions that even appear of this scope, as in *Bush v. Gore*,<sup>11</sup> they are roundly criticized.<sup>12</sup> The very notion that such a case was a gross deviation from standard judicial operating procedure implies that the average case of legal decisionmaking is supposed to be a banal, depoliticized affair.

“Legislating” in the sense I will define it is not “interstitial lawmaking.”<sup>13</sup> Equating the two commits the fallacy of the mouse and the elephant. Today, it is believed by many that, in the 1930s and earlier, some academics dubbed “realists” proclaimed that there was very little difference between law and politics.<sup>14</sup> Even jurists who are resolutely positivist, sticking to the letter of the law, acknowledge that in hard cases judges must fill gaps.<sup>15</sup> Modern positivists aimed to cabin skepticism about law’s autonomy by moving politics to the margins, the interstices.<sup>16</sup> In my view, there is a distinct line between

10. Dakota S. Rudesill, *Closing the Legislative Experience Gap: How a Legislative Law Clerk Program Will Benefit the Legal Profession and Congress*, 87 WASH. U. L. REV. 699, 706 (2010).

11. 531 U.S. 98, 111 (2000).

12. RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* 198–220 (2001) (recounting, but criticizing, the outcry of law professors regarding *Bush v. Gore*).

13. On filling gaps, see HART, *supra* note 8 (“If in such cases the judge is to reach a decision and is not, as Bentham once advocated, to disclaim jurisdiction or to refer the points not regulated by the existing law to the legislature to decide, he must exercise his *discretion* and *make* law for the case instead of merely applying already pre-existing settled law.” (emphasis in original)).

14. Andrew Altman, for example, writes that “the master theme of legal realism” was “that of the breakdown of any sharp distinction between law (adjudication) and politics.” Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205, 206 n.4 (1986). In fact, as Brian Leiter has argued, this was not the theme actually adopted by legal realists themselves so much as a theme imposed upon them later by the critical legal studies movement. See Brian Leiter, *In Praise of Realism (and Against “Nonsense” Jurisprudence)*, 100 GEO. L.J. 865, 871–75 (2012).

15. See HART, *supra* note 8, at 272.

16. *Id.* at 273.

politics and law that is important to preserve: there is an identifiable difference between law and politics as institutions (or more particularly what lawyers do in cases and legislators do in legislating), and this difference applies even in hard cases of so-called “interstitial lawmaking.” Modern legal positivists have done little to alter that vision except to call politics “norms,” (which renders everything from sports to religion a form of politics) and then move normativity to the outskirts, rather than to the core of the legal project.<sup>17</sup>

Not all normative claims are alike and not all normative claims are political claims. Some norms are based in law and some norms are grounded in baseball or music or religion. Only at the extremes, when a judge clearly goes outside the bounds of legal normativity—takes a poll, consults matters outside the record, relies upon matters demonstrably false, cites the wrong cases—can we say that the judge has “gone political.” Then it is proper to criticize the judge for legislating. This does not mean that we cannot, as I do below, criticize the norms used by courts; norms may be deeply contested within law, as *Sweet Home* and many other cases reflect. It does mean that to say that law is normative is not to say that it is inherently “political” in any meaningful sense, but that judges can in fact act in ways that violate the norms of their institution by following “political norms.”

The Constitution defines a legislator as a representative.<sup>18</sup> We must take this word literally. To be a representative is to “re-present.” The Senator or Representative must stand in the shoes of others—voters. Now sometimes this is viewed in crass terms and other times it is viewed in idealistic ones. In crass terms, it means to pander; in idealistic ones, to sound the clarion call of the public good. But, in both cases, the member is standing in for *someone else*, namely *lay citizens*. Legislative normativity is tied to representation: a proposition is normatively correct if it is a proper re-presentation of others’ views. A correct normative position within the legislature is one that satisfies some or all of the public, whether that normative position is legal, moral, arbitrary, or incoherent. Put in other terms, I am suggesting that different kinds of institutions have norms, and the legislature has a very different measure of the propriety of its norms than do courts.

If this is our most basic definition of a legislator, then judges are not legislators. They have no constituents and their normativity is not to be based on the degree to which it agrees with non-experts in the public, in groups small or large. Judges do not take polls; they do not consult their party leaders. That, of course, is the point of their job and of the isolation imposed upon them by the Constitution. They are not supposed to act for their buddies in the law firm or their former prosecutor friends or their political party. Indeed, the very

17. *See id.* at 271–75.

18. *See* U.S. CONST. art. I, §§ 1–3; U.S. CONST. amend. XVII.

structure of appellate panels makes it unlikely that, even if they wanted to act in such a way, it would be routinely successful in changing results.<sup>19</sup>

Having said this about the normativity of the legislator, let me also say that Professor Eskridge is surely correct that judges often decide based on normative visions. But it does not follow that normativity entails judicial activism, natural law or legislating. Yes, both judges and legislators have norms and values, but these are inarticulate terms: norms and values are shared by priests and umpires and political pundits. Institutions determine the rationality and legitimacy of norms. As Mary Douglas and others have shown, normativity is institutional, and because it is institutional, it follows from the radically different institutional natures of legislatures and courts that their visions of normativity will differ.<sup>20</sup> At the very least, these are the kinds of questions—questions about the nature of normativity—that jurisprudential experts must take more seriously. With the exception of Jeremy Waldron,<sup>21</sup> however, the standard jurisprudential debates in law reviews are almost entirely unwilling to grapple with the institutional and normative differences between courts and legislatures.<sup>22</sup>

Thus, it is not normativity per se but particular forms of normativity that should distinguish legislating from judging. When politicians legislate they are entitled to rely upon entirely selfish norms (“Iowa supports corn subsidies”) and entirely arbitrary norms (“please exempt Oklahoma from this law because I need to be reelected”). It is not the job of judges to impose “selfish norms”—norms that only they themselves (or their friends) accept. They must appeal to

19. Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 837–41 (2008) (identifying “panel effects” that moderate the influence of politics since democrat and republican appointees on panels must agree).

20. MARY DOUGLAS, *HOW INSTITUTIONS THINK* 4 (1986); see also W. Richard Scott, *Institutional Theory: Contributing to a Theoretical Research Program*, in GREAT MINDS IN MANAGEMENT: THE PROCESS OF THEORY DEVELOPMENT 460, 464–65 (Ken G. Smith & Michael A. Hitt eds., 2004).

21. See WALDRON, *supra* note 9, at 25 (overtly asking questions that indicate distinctions between normative and institutional differences by shedding light on the gap between the institutional process of creating law and the weight that law carries).

22. See generally Victoria F. Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119 (2011) [hereinafter Nourse, *Misunderstanding Congress*] (arguing for a “public meaning” theory of statutory interpretation based on a representational concept of the separation of powers in place of various strict textualist approaches); see also Jeremy Waldron, *The Dignity of Legislation*, 54 MD. L. REV. 633, 644 (1995) (“My point then is not that legislatures are suffering from overall academic neglect, but that, in jurisprudence at any rate, we have not bothered to develop any idealistic or normative picture of legislation. Our silence here is deafening compared to our philosophical loquacity on the subject of courts. There is nothing about legislatures or legislation in modern philosophical jurisprudence remotely comparable to the discussion of decision-making by judges.”).

norms that have some basis in a more general law, even if that law is contested. No one would have thought it an appropriate normative claim in *Sweet Home*, for example, for Justice Scalia to write that he liked ranchers better than environmentalists. This violates the basic meta-norms of the judicial institution. In this sense, both Justice Scalia and Justice Stevens were not legislating simply by invoking norms; the question is whether their norms departed so far from standard legal reasoning that we can confidently say that they have crossed the line toward invoking the kind of norms considered legitimate in the political sphere, but not in the legal sphere. One measure of that, in the field of statutory interpretation, is the degree to which judges attempt to understand and remain faithful agents of Congress.

## II. *SWEET HOME*'S STATUTORY CLOSET

Professor Eskridge has emphasized that norms were closeted in the opinions of both Justice Stevens and Scalia. In fact, norms were sometimes quite open;<sup>23</sup> what was really closeted was the relevant statute—the Endangered Species Act of 1982.<sup>24</sup> Let us briefly recap the progression of legislative events. The 1973 Endangered Species Act barred the “taking” of any endangered species and defined “take” to include a variety of actions including “harm” to a species.<sup>25</sup> In 1975, the Secretary of the Interior issued a regulation governing significant habitat modification as a form of statutory “harm.”<sup>26</sup> In 1978, the Supreme Court decided a highly controversial case, *TVA v. Hill*, involving habitat modification: whether the snaildarter could stop a dam—and the court ruled in favor of the fish’s habitat and against the dam.<sup>27</sup> In 1982, after “heated debates”<sup>28</sup> between environmental interest groups and industry, Congress finally came to a bipartisan compromise, aiming to resolve

23. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 714–15 (1995) (Scalia, J., dissenting). Justice Scalia’s opinion, for example, opens with the obviously normative claim that the majority’s ruling “imposes unfairness to the point of financial ruin.”

24. Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, 96 Stat. 1411 (1982) (codified as amended at 16 U.S.C. § 1531 (2006)).

25. 16 U.S.C. § 1538(a)(1); *id.* § 1532(19). Section 9(a)(1) of the Act provided that it was “unlawful for any person” to take any such species within the United States, and § 14 defined “take” as follows: “The term ‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* § 1532(14).

26. 50 CFR pt. 17.3 (1994) (as quoted in *Sweet Home*, 515 U.S. at 691). “The Secretary has promulgated a regulation that defines the statute’s prohibition on takings to include ‘significant habitat modification or degradation where it actually kills or injures wildlife.’” *Id.* at 690.

27. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 172–73 (1978).

28. 128 CONG. REC. 26,189, 26,187 (1982) (calling legislation “explosive”) (statement of Rep. John B. Breaux) (statement made upon passage of Conference Report text).



the conflicts the statute had created and to simplify and streamline its operation.<sup>29</sup>

#### A. *The Proper Text*

As I have written elsewhere, there is no more mistaken notion in the field of statutory interpretation than that the term “history” in the phrase “legislative history” should be taken literally.<sup>30</sup> Congress makes decisions moving forward, not backward. It decides at Time One and may change that decision entirely at Time Two. To understand what happened at Time Two it is not always necessary to start at Time One; in fact, it may distort Congress’s ultimate decision by suggesting a coherent and causal narrative that does not exist. Congresses change with the political winds; members are entirely warranted in violating all sorts of logical propositions favored by lawyers. Decision theory thus posits that the most important decisions in a sequential congressional process are the last decisions.<sup>31</sup> In this case, that means that the judicial focus should have been on the *1982 Act*. Instead, the Stevens and Scalia opinions in *Sweet Home* rely to a large degree on the purposes and meanings of the *1973 statute*.

Before we go any further, let us remember that we are talking about real time. Think about the difference between 1973 and 1982 for a moment. Ten years in House-of-Representatives-time is *five* (count ‘em *five*) election cycles.<sup>32</sup> The 1973 Act was passed during the height of the Watergate scandal; the 1982 amendments two years after President Reagan was elected. As the ranking House minority member on the bill stated in considering the 1982 law, “We have come a long way since the Endangered Species Act of 1973.”<sup>33</sup> And, in fact, the country had changed quite considerably. A President had resigned in disgrace, the Vietnam War had generated active public resistance, and a conservative revolution had been launched. If nothing else, real life history and common sense<sup>34</sup> should tell us that legislative decisions taken in 1982 need not have much to do with those taken in 1973.

The central question for decision theory is the meaning of *the 1982 statute*, a text considered but not featured in either the majority or dissenting

29. *Id.* at 26,187–89 (statement of Rep. Walter Jones).

30. See Nourse, *Decision Theory*, *supra* note 3, at 98 (discussing this misconception).

31. *Id.* at 110.

32. The House appears to have taken the lead on these issues. See *supra* notes 28–29 and *infra* notes 76–77.

33. 128 CONG. REC. 26,188 (statement of Rep. Norman Lent) (on passage of the Conference Report in the House).

34. On the role of common sense in statutory interpretation, see generally Richard D. Cudahy, *Steer Clear of the Twilight Zone and Apply Common Sense: A Few Thoughts on Statutory Interpretation*, 57 ST. LOUIS U. L.J. 997 (2013).

opinions.<sup>35</sup> In the 1982 statute, Congress authorized permits for actions otherwise violating the “take” provision, “if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.”<sup>36</sup> Justice Stevens noted this provision after extended discussion of the 1973 law, offering it a supporting, rather than a starring, role.<sup>37</sup> Justice Scalia, too, left the 1982 text to the end of his textual discussion, as if it were something of an afterthought, preferring to focus on the text of the original 1973 Act and its prohibition of “takings.”<sup>38</sup> Both opinions failed to spotlight the most relevant statutory text.

The 1982 text provides permits for private actors who incidentally take species.<sup>39</sup> The text contemplates a vision of “take” broad enough to include non-intentional harm, which in turn is reasonable enough to support the Secretary’s regulation on significant habitat modification (the Secretary’s interpretation need not be the only one, only a “reasonable” one under standard rules of deference to agencies).<sup>40</sup> Once “take” includes non-intentional harm, Justice Scalia’s emphasis on intentional takings of individual animals faces a seemingly insuperable obstacle—it renders superfluous the 1982 “incidental” takings provision. As the majority opinion explains: “[R]espondents would read ‘harm’ so narrowly that the permit procedure would have little more than [an] absurd purpose.”<sup>41</sup> Put in other words, Justice Scalia’s view would cover the burning of a forest for the express purpose of eradicating the spotted owl—a rather unlikely event if one really wants to do away with a vanishing species and one in which the owl-obsessed predator is hardly likely to stop to take out a permit.

The 1982 statutory *text*, not to mention the 1973 *text*, supports this reading. The very notion of “endangering” a species implies a definition of harm that fits poorly with Justice Scalia’s preference for “intentional takings.”<sup>42</sup> The dictionary tells us that danger includes a state of vulnerability or a risk of harm.<sup>43</sup> As Justice Stevens noted in a footnote, to intentionally take “any

35. See *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 698–700, 704–705 (1995) (mentioning the 1973 law and its central purpose); *id.* at 700–01, 707–08 (referencing the 1982 statute); *id.* at 726–29 (Scalia, J., dissenting) (discussing the 1973 law in attempts to rebut the majority’s reliance on it); *id.* at 729–31 (discussing the 1982 statute and similarly rejecting its applicability to the majority’s analysis).

36. 16 U.S.C. § 1539(a)(1)(B) (1982).

37. *Sweet Home*, 515 U.S. at 707.

38. *Id.* at 729–31 (Scalia, J., dissenting).

39. 16 U.S.C. § 1539(a)(1)(B).

40. 50 C.F.R. pt. 17.3; *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984).

41. *Sweet Home*, 515 U.S. at 700–01.

42. *Id.* at 717–22 (Scalia, J., dissenting).

43. AMERICAN HERITAGE DICTIONARY 460 (4th ed. 2000).

[endangered] *species*” would be “a formidable task for even the most rapacious feudal lord.”<sup>44</sup>

Moreover, in 1982, “habitat modification” was hardly a new idea, going all the way back to the very first 1966 endangered species protection law.<sup>45</sup> In 1978, Congress had amended the law to require that the Secretary define “critical habitat” when designating an endangered species.<sup>46</sup> In 1982, Congress returned to the definition of critical habitat—a central part of the 1982 bill: 16 U.S.C. § 1533 was amended to require that the Secretary, when listing a species as endangered, “designate any habitat of such species which is then considered to be critical habitat.”<sup>47</sup> A statute so focused on “critical habitat” is unlikely to have assumed that individual harm to animals was the sole focus of the Act.

Critics will reply that the Secretary wrote the regulation in 1975, before the 1982 Act. This is no answer because 1982 provides the best evidence of Congress’s most recent decisionmaking process. When Congress ratifies meanings supporting a regulation, it would be silly and wasteful to strike the regulation just so that the agency could reissue the very same regulation under the later-enacted law.<sup>48</sup> Just imagine if the majority struck down the Secretary’s habitat regulation, only to have the Secretary reenact it, based on the 1982 law. This would waste both judicial and agency resources.

Critics will also insist, as did Justice Scalia, that critical habitat was to be saved by a land acquisition program, not by the takings provision.<sup>49</sup> This too focuses on the wrong statute. Justice Scalia relies upon some 1973 legislative

44. *Sweet Home*, 515 U.S. at 698 n.10.

45. S. REP. NO. 97-418, at 1 (1982) (“[D]evelopment of the current ESA programs to conserve endangered and threatened species can be traced back to 1966. . . . [T]he 1966 Act . . . authorized the acquisition of endangered species habitat.”).

46. *Id.* at 3 (“Congress also amended the 1973 Act to require the designation of critical habitat as part of the listing process.”).

47. H.R. REP. NO. 97-835, at 2 (reporting the text decided on by the 1982 conference and passed later by both houses); S. REP. NO. 97-418, at 4 (1982) (“The 1978 amendments to the ESA required the designation of critical habitat as part of the listing process.”). This 1982 conference report states that, after 1978, these provisions had “failed on two grounds. First, it is not being designated. Second, it has improperly delayed listings.” *Id.* As a result, the 1982 Act was an attempt to rectify these process deficiencies in habitat designations. H.R. REP. NO. 97-835, at 3 (amending 16 U.S.C. § 1533 to require that the Secretary address in a timely fashion various claims or revisions about “habitat designation”); *id.* at 5 (requiring that the Secretary issue a designation of “critical habitat” when the final regulation is issued concerning “endangered” status, and providing time limits for the extension of time to determine “critical habitat.”).

48. Justice Scalia argues that the statute was not reenacted and therefore should not ratify the Secretary’s interpretation, presumably meaning that Congress did not reenact the “takings” provision. *Sweet Home*, 515 U.S. at 729 (Scalia, J., dissenting). This misunderstands congressional process. Once the definition in an Act is created, that definition remains the law; unlike authorizations of money, there is no need to “repass” definitional provisions.

49. *Id.* at 727.

history<sup>50</sup> for the proposition that there was a sharp division between provisions aimed at addressing habitat problems—to be rectified by acquiring critical habitat—and provisions aimed at “taking” individual animals.<sup>51</sup> The legislative history cited is not terribly persuasive as it occurs prior to the final Act language even in 1973.<sup>52</sup> In fact, the same page of debate provides contrary evidence: Senator Tunney explains that the 1973 Act covers “harmful” actions to species which presumably explains the statutory term “harm” and its addition.<sup>53</sup> But whatever one thinks about the 1973 Act, the text of the statute enacted in 1982 reflects no such strong distinction. As Justice Stevens made clear, there is no evidence that Congress in 1982 had decided that the habitat acquisition provision would be an exclusive, rather than an additional, remedy.<sup>54</sup>

All of this suggests that Justice Stevens might well have written a shorter and more pointedly textualist opinion than he did. It also explains why Justice Scalia is at pains to avoid the 1982 text. There is some irony in this, of course, as Justice Scalia is considered the Supreme Court’s high textualist. As Professor Eskridge rightly notes, Justice Scalia’s opinion is interesting precisely because it appears to be a highly textualist opinion making all sorts of claims about how his intentional “taking” version explains the structure of the 1973 statute. In fact, it departs quite overtly from standard textualist premises by invoking in its very first paragraph a striking normative vision of the law conscripting the lonely farmer into environmental war: with characteristic verve, Justice Scalia opens his opinion asserting that the law “imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use.”<sup>55</sup>

As a good lawyer, I appreciate a slippery slope argument, and as a voter I might have voted for it. But, in this case, the textualist irony is compounded: textualists typically reject this particular form of argument. The “simplest farmer” rhetoric implies that the statute can reach absurd limits. Typically,

50. *Id.* (citing 119 CONG. REC. 25,669 (1973)). Justice Scalia also argues that the “takings” provision originally included language relating to habitat that was struck in committee. *Id.* Given that this occurs months if not years before the relevant final text, this textual move is not in fact a “smoking gun,” see Eskridge, *supra* note 2, at 879, but rather a smoking irrelevancy. See also Nourse, *Decision Theory*, *supra* note 3, at 115.

51. *Sweet Home*, 515 U.S. at 727–29 (Scalia, J., dissenting).

52. The statements cited are made in July 1973. 119 CONG. REC. pt. 20.

53. In the same 1973 floor speech by Senator John Tunney cited by Justice Scalia as evidence for a sharp distinction between acquisition programs and the taking provision, Senator Tunney explains that the statute was aimed at preventing actions “harmful” to species, a statement that supports the later, noncontroversial addition of “harm” to the statute in 1973, as well as the Secretary’s regulation. 119 CONG. REC. 25,669.

54. *Sweet Home*, 515 U.S. at 706, 707 n.19 (majority opinion).

55. *Id.* at 714 (Scalia, J., dissenting).

textualists are wary of deploying the absurdity canon<sup>56</sup> precisely because it is the “mother” of all consequentialist canons<sup>57</sup>—it is a version of purposivism in canon guise. Whether or not we want to lump Justice Scalia in with Professor Dworkin (the original odd couple) as a jurisprudential matter,<sup>58</sup> Professor Eskridge is surely right that the *Sweet Home* dissenting opinion is decidedly Janus-faced, with one foot in the textualist camp and the other in the not-so-closeted purposivist camp.

### B. *A Second Opinion: A Brief Legislative History*

Decision theory begins but does not end with text, because it recognizes that judges may “pick and choose” texts, and that textual ambiguity is “structurally-induced.”<sup>59</sup> One should never begin with the assumption that a statute’s meaning will be plain from its text.<sup>60</sup> Given such worries, it seems only sensible that one would want to “check” or “confirm” a “textual” choice by looking at any available evidence supporting or detracting from that choice—in short, the legislative history.<sup>61</sup> Let us also assume, per decision theory, that we reverse-engineer Congress’s decision. The best legislative history is the last legislative history, the legislative history nearest the text—here, the legislative history immediately preceding the enactment of the 1982 Act. That means the best history is the 1982 conference report text, the conference report’s joint explanation,<sup>62</sup> and later debate in each House on the conference report.

The conference report’s joint explanation explains that private habitat modification was covered by the 1982 Act as the central example of an “incidental” taking<sup>63</sup> (the term “habitat” was used over fifty times in a thirty-five page report<sup>64</sup>). In discussing the “incidental takings” provision of the 1982

56. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390–91 (2003).

57. Jane S. Schacter, *Text or Consequences?*, 76 BROOK. L. REV. 1007, 1011 (2011).

58. See Eskridge, *supra* note 2, at 901–07 (urging that Justice Scalia becomes a Dworkinian).

59. Nourse, *Decision Theory*, *supra* note 3, at 137 (“Just as legislative history is subject to ‘picking and choosing,’ so too is text.”); Nourse, *Misunderstanding Congress*, *supra* note 22, at 1128–34.

60. See Nourse, *Misunderstanding Congress*, *supra* note 22, at 1119.

61. See Vermeule, *supra* note 4, at 1435–72. I have used professor Vermeule’s work here in a way he might find inconsistent with his own view of statutory interpretation. See generally ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006) (arguing for deference to administrative agencies, not courts).

62. For those unfamiliar with congressional procedure, a conference report first reports the text on which the conference has agreed; the “joint explanation” is the explanation, and hence the legislative history associated with the conference.

63. 16 U.S.C. § 1536(b)(4)(C)(i).

64. Using Find function for “habitat” as applied to H.R. REP. NO. 97-835 (1982) (Conf. Rep.).

bill, the specific example used was private habitat modification.<sup>65</sup> The joint explanation of the conference report explains:

This [incidental takings] provision is modeled after a *habitat conservation plan* that has been developed by three Northern California cities, the County of San Mateo, and *private* landowners and developers to provide for the conservation of the *habitat* of three endangered species and other unlisted species of concern within the San Bruno Mountain area of San Mateo County.<sup>66</sup>

The committee explanation continues:

This provision will measurably reduce conflicts under the Act and will provide the institutional framework to permit cooperation between the public and *private* sectors in the interest of endangered species and habitat conservation.

The terms of this provision require a unique partnership between the public and *private* sectors in the interest of species and *habitat conservation*. However, it is recognized that significant development projects often take many years to complete and permit applicants may need long-term permits.<sup>67</sup>

In discussing the need for permits as long as thirty years to protect industry reliance, the conference committee joint explanation continues: “The Secretary, in determining whether to issue a long-term permit to carry out a conservation plan should consider the extent to which the conservation plan is likely to enhance the *habitat* of the listed species or increase the long-term survivability of the species or its *ecosystem*.”<sup>68</sup> The committee then went on to dub the San Bruno project involving endangered butterflies as a model for “incidental takings” involving habitat degradation:

Because the San Bruno Mountain plan is the model for this long term permit and because the adequacy of similar conservation plans should be measured against the San Bruno plan, the Committee believes that the elements of this plan should be clearly understood. Large portions of the *habitat* on San Bruno Mountain are privately owned . . . .

1. The Conservation Plan addresses the *habitat* throughout the area and preserves sufficient *habitat* to allow for enhancement of the survival of the species. The plan protects in perpetuity at least 87 percent of the *habitat* of the listed butterflies;
2. The establishment of a funding program which will provide permanent ongoing funding for important *habitat* management and enhancement activities. Funding is to be provided through direct interim payments from landowners

65. This legislative history directly contradicts Justice Scalia’s claim that the statute’s takings provision only applied to “public” lands. See *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 728–29 (1995) (Scalia, J., dissenting).

66. H.R. REP. NO. 97-835, at 30–31 (1982) (Conf. Rep.) (emphasis added).

67. *Id.* at 31 (emphasis added).

68. *Id.* (emphasis added).

and developers and through permanent assessments on development units within the area;

3. The establishment of a permanent institutional structure to insure uniform protection and conservation of the *habitat* throughout the area despite the division of the *habitat* by the overlapping jurisdiction of various governmental agencies and the complex pattern of private and public ownership of the *habitat*.<sup>69</sup>

I do not think the legislative history could be shorter or clearer. Lest these two pages of legislative history not convince, however, one need only go one step further to cement this understanding of Congress's 1982 decision. In the brief three-page debate in which the House considers and passes the conference report (so much for voluminous legislative history),<sup>70</sup> we find habitat problems center stage. The House Sponsor, Representative Breaux, in his opening remarks about the controversies surrounding the original 1973 Act, made specific reference to the *TVA v. Hill* habitat case, noting that "visions of snail darters haunted us."<sup>71</sup> Representative Jones, a republican, echoed the sentiment: "There is probably no one here today who has not heard of the snail darter—the little fish that fought a dam all the way to the Supreme Court and won—temporarily."<sup>72</sup> If there was no one on the House floor who did not know of the snail darter, it is impossible that there was no one who did not know that the case involved habitat modification.

If there remains doubt about whether the 1982 law applied to private entities, consider Representative Breaux's statements referring to the San Mateo development project on the day in on which the conference report passed the House:

The second major House initiative that was accepted [by the Conference] involved permits for the taking of endangered species when no other Federal action is involved. We found that, in many instances, the development of long range conservation plans that allowed some taking of a species could be more beneficial to that species than simply leaving it alone. A prime illustration of this involves a planned development in San Mateo County that could affect two species of butterflies. The developer and the Fish and Wildlife Service have developed a long range plan, to be funded by the developer, that will provide for management of the *habitat* of the butterflies. Without the plan, exotic species of plants would crowd out the plants essential to the butterflies and they would be severely threatened. Our legislation would encourage the

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69. *Id.* at 31–32 (emphasis added).

70. 128 CONG. REC. 26,187–89.

71. *Id.* at 26,187.

72. *Id.* at 26,189.

development of similar conservation and allow the long-range planning necessary to provide both species protection and investment security.<sup>73</sup>

We are now up to a massive five pages of legislative history. Earlier debates and earlier reports could be cited, as Justice Stevens did, but the conference report and statements by the House drafters are the best legislative history about the decisions made in 1982 about a House-authored provision. This analysis confirms Congress's bipartisan choice to read the text to cover harms that were not intentionally inflicted but "incidental" to a taking such as habitat modification.

Certainly, reasonable minds may reject this policy judgment. The policy may even look unconstitutional,<sup>74</sup> but it is difficult to say that this was not Congress's decision. As far as one can tell, Congress was quite happy to leave the problems of potential over-enforcement to the agency, even if that meant granting it power wide indeed. The incidental "taking" provision of the 1982 Act simply makes no sense if it is impossible to take endangered species without intention. The legislative history is a "second opinion" confirming that reading.

### III. CANDOR OR SELF-FULFILLING PROPHECY: THE PROBLEM WITH NORMS AND PURPOSES

What then of the proposition asserted by Professor Eskridge that it is more candid to invoke a statute's purpose because this will "flush out" hidden norms? In fact, as Professor Eskridge's own exposition suggests, whether open or closeted, normative positions are quite evident in both *Sweet Home* opinions. The question remains whether purposivism is more virtuous because it allows the *open* play of norms. To the extent that this is a relative claim—that relative to textualism, purposivism is more likely to reveal normative preferences, this may be true: hiding norms in judgments of "plain meaning" does seem to hide the ball. But it does not follow that there are no risks to opening the field to find a statute's "purpose." We must consider the risk that modern purposivists have invited the very phenomenon they fear: decisions based on idiosyncratic, or what I have called "selfish," norms.

Consider Justice Stevens's praise of the 1973 Act's single-minded pursuit of environmentalism. Professor Eskridge argues that Justice Stevens is affirming the "green revolution." Professor Eskridge writes that the majority opinion reflected "the 'green property' norm, the modern regulatory notion that landowners have, since 1970, been on notice that they cannot impose costs on

73. *Id.* at 26,188.

74. Robert F. Blomquist, *Witches' Brew: Some Synoptical Reflections on the Supreme Court's Dangerous Substance Discourse, 1790–1998*, 43 ST. LOUIS U. L.J. 297, 322 (1999) (suggesting the scope of laws like the one at issue do not allow for such an encompassing reading).



the environment without expecting regulatory pushback.”<sup>75</sup> The problem is that this norm may seriously misjudge what happened ten years later in 1982. In 1982, as the House and Senate debate on the conference report reveals, Congress was well apprised of the need to balance the needs of industry and environmental groups, the costs of environmental extremism, and the protection of animals (and genetic material) threatened with extinction.

Precisely because of the norms invoked by Justice Scalia, and the modern property rights revolution endorsed by President Reagan, it was difficult to reauthorize the 1973 law.<sup>76</sup> Cost and industry concerns were all over the 1982 debate.<sup>77</sup> The Congress that decided to grant permits for incidental takings was virtually terrified of the snail darter and cautioned the Secretary that there were potentially extreme applications of the Act which should be avoided in private and public land cases.<sup>78</sup> The 1982 statute itself provided that the Secretary “shall designate critical habitat . . . after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat.”<sup>79</sup>

Surely, Justice Stevens would have sounded a more conciliatory tone, and one more based in actual congressional decisionmaking, had he relied not on the “green revolution” alone, but also on Congress’s attempt to “balance” the green revolution with industrial costs. This was all the more important, of course, because of Justice Scalia’s insistence on the potential “financial ruin” of the Act.<sup>80</sup> Certainly, this was a powerful argument against Justice Scalia’s

75. Eskridge, *supra* note 2, at 882; see PHILIP SHABECOFF, *A FIERCE GREEN FIRE: THE AMERICAN ENVIRONMENTAL MOVEMENT* 134–35 (1993); J. Peter Byrne, *Green Property*, 7 CONST. COMMENT. 239, 242 (1990); Terry W. Frazier, *The Green Alternative to Classical Liberal Property Theory*, 20 VT. L. REV. 299, 347–71 (1995); David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public’s Interest in Environmentally Critical Resources*, 12 HARV. ENVTL. L. REV. 311, 311–13 (1988).

76. 128 CONG. REC. 26,189 (statement of Rep. Walter Jones) (“Earlier efforts to reauthorize this act caused heated debates in Congress . . . and between business and environmental interests.”). Representative John Breaux was the manager of the bill in the House and one of its principal authors. *Id.* at 26,187–88 (statement of Rep. Gene Snyder) (the ranking minority member concurred that the bill was “fair and rational” to “both industry and the environmental community.”).

77. See, e.g., *id.* at 26,188 (statement of Rep. John B. Breaux) (pointing to the span of interest groups with a hand in the legislation’s outcome, including “organizations as diverse as Greenpeace, the Audubon Society, the National Wildlife Federation, the Western Regional Council, the Edison Institute, and the American Mining Congress . . .”); *id.* at 26,189 (statement of Rep. Thomas Evans) (highlighting the occasional “irreconcilable conflict” between environmental and economic interests).

78. See *infra* text accompanying note 71; see also 128 CONG. REC. 26,188–89.

79. Endangered Species Act Amendments of 1982, Pub. L. No. 97–304, § 2(b)(2), 96 Stat. 1411, 1412 (1982).

80. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 714–15 (Scalia, J., dissenting).

claim that the statute included no coverage of private habitat degradation because in 1973, the *legislative history* relegated that to government purchase of land to preserve habitat.<sup>81</sup> By 1982, it was clear that Congress not only had a different idea of the statute, but so did lots of groups and interests that cared about property rights, and Congress was attempting to accommodate them.<sup>82</sup>

If Justice Stevens's normative vision is insufficiently attentive to Congress's decisions, so too is Justice Scalia's. Professor Eskridge argues,

The baseline for Justice Scalia's dissent is the political and moral philosophy of Sir William Blackstone, updated to understand the sagebrush rebellion of the 1990s, namely, the reaction by western ranchers and farmers to what they considered excessive federal interference with their control over their own property. A natural law thinker who viewed the law in moral, liberty-loving terms, Blackstone also provided a synthesis of the common law of the eighteenth century, which assured well-nigh absolute protection for landowners to do anything with their property that did not tangibly harm other landowners. In the last generation, the sagebrush/property rights social movement objected that environmental regulations violated this Blackstonian norm. President Ronald Reagan (1981–89), who appointed Justice Scalia to the Court and elevated Justice Rehnquist (a second *Sweet Home* dissenter) to Chief Justice, endorsed the property rights social movement during his term in office and, consistent with the views of its leaders, supported the movement's notion that excessive environmental regulation was not only inefficient and anti-libertarian, but amounted to a "taking" of private property.<sup>83</sup>

There are all sorts of reasons to suggest that Blackstonian norms, if that is what Justice Scalia was invoking, are not the kind of norms that "faithful agents" of a twentieth century Congress would or should employ. There is no reason to believe that legislators still legislate with the common law in mind, as they might have in the eighteenth century. To impose common law norms on a modern Congress is far more radical a notion than is generally thought. Blackstone affirmed all sorts of ancient common law practices, like beating one's wife,<sup>84</sup> practices that no modern legislature would tolerate precisely because norms have changed, and changed noncontroversially. As Judge Posner has expressed it: textualism is the "lineal descendant of the canon that

81. *Id.* at 726–29.

82. See *Endangered Species Act Amendments of 1982: Hearings Before the Subcomm. on Envtl. Pollution of the S. Comm. on Env't and Pub. Works on S. 2309*, 97th Cong. 10 (1982) (statement of Sen. G. Ray Arnett); *Endangered Species Act: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Env't of the H. Comm. on Merch. Marine and Fisheries*, 97th Cong. 2 (1982) (statement of Rep. John B. Breaux); *Endangered Species Act Oversight: Hearings Before the Subcomm. on Envtl. Pollution of the S. Comm. on Env't and Pub. Works*, 97th Cong. 3–4 (1981) (statement of Sen. Robert A. Jantzen).

83. Eskridge, *supra* note 2, at 880.

84. 1 WILLIAM BLACKSTONE, COMMENTARIES \*444–45.

statutes in derogation of the common law are to be strictly construed, and, like that canon, was used in nineteenth-century England to emasculate” Parliament’s modernizing legislation.<sup>85</sup>

The historical truth is that the norms expressed by Professor Eskridge and attributed to Justice Scalia are in fact modern ones, a 1980s vision of property rights, spurred on by Richard Epstein’s book *Takings*, not a vision of property rights that can be found in the constitutional law of 1890 or 1910 or 1920.<sup>86</sup> If Justice Scalia believes that he is invoking the Blackstonian vision of takings and property, this was not the vision of takings prevalent in the Supreme Court throughout the late nineteenth and twentieth century, considered the hey-day of property rights. By 1930, the Supreme Court had upheld all sorts of property regulations, including zoning, on the theory that the regulation was based on a harm to other property.<sup>87</sup> So, for example, in 1928, if your cedar trees were diseased, they could be “taken” without compensation if they posed a danger to other cedar *trees*.<sup>88</sup> If in 1928 Congress was entitled to believe that the Supreme Court would not see such an action as a constitutional violation of property rights, they were entitled to see this in the same way, over fifty years later.

If both of these points are correct, then on the scale of proper judicial normativity, Justice Scalia’s opinion is far more “legislative,” I would suggest, than Justice Stevens’s opinion (to be clear, elsewhere I have criticized Justice Stevens for his opinions).<sup>89</sup> Frankly, Justice Scalia would have been far more candid if he were to have suggested that the statute was unconstitutional under Professor Epstein’s “modern” theory of property rights,<sup>90</sup> than embedding that assumption within his reading of the text of the statute (and the legislative history). I agree, for example, that the lost history of those rights has created a paradox: property rights are far less protected than they should be because liberals do not think they exist at all,<sup>91</sup> and conservatives on the bench do not

85. Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 821 (1983).

86. Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751, 761–67 (2009).

87. *Id.* at 764; *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 392–95 (1926) (rationalizing the upholding of zoning laws for a variety of safety and harm prevention purposes).

88. *Miller v. Schoene*, 276 U.S. 272, 277–79 (1928).

89. Nourse, *Decision Theory*, *supra* note 3, at 100.

90. RICHARD A. EPSTEIN, *SUPREME NEGLECT: HOW TO REVIVE CONSTITUTIONAL PROTECTION FOR PRIVATE PROPERTY* 8–11 (2008); RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 306 (1985).

91. *Kelo v. City of New London*, 545 U.S. 469, 470–89 (2005) (Justices Stevens, Souter, Ginsburg, and Breyer—all notoriously left-leaning justices—as well as Justice Kennedy, were in the majority in finding that a government taking was not in violation of the Fifth Amendment takings clause); *see also* Steven Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30

know the history of property regulation detailed above.<sup>92</sup> The question remains whether being candid about these norms is enough. As we can see from this critique, candor does not necessarily entail historical accuracy.

One might go so far as to say that, in a world where normativism (Professor Eskridge's term) is normal, where gaps are considered fair play for judicial norms, then it seems quite clear that one will arrive at opinions like that of Justice Scalia, which openly brandish norms. Although seemingly an "odd couple," upon reflection there is in fact nothing terribly surprising about the fact that Justice Scalia's opinions may have a tendency to "morph" in academic eyes into those of Ronald Dworkin's Hercules.<sup>93</sup> This is not only because the legal process school, by emphasizing norms, has invited judges to engage in such behavior. It is also because the legal process school was a legal process of courts, not Congress.<sup>94</sup> If judges and lawyers are taught little about congressional decisionmaking, they will of course ignore it, filling gaps and choosing texts within the context of meanings that are decidedly judicial and entirely unwilling to address Congress's meanings. It is no surprise that in such a world, Justice Scalia would hold tight to the term "taking" as if it had all sorts of meanings with which constitutionalists associate it, when the far more likely explanation is that congressional drafters, particularly those in the Senate, took it from modern state law.

The deeper problem here is not textualism's embedded normativity (its tendency to embed norms in textual choice), but that it is based on jurisprudential foundations that amount to a radical invitation to ignore Congress entirely. It is no accident that Justice Scalia has based his version of textualism on the jurisprudential foundations of Max Radin, arch-realist and radical of the 1930s. Invoking Radin, Justice Scalia has argued that there is no such thing as congressional "intent," and therefore it is proper to look only at text.<sup>95</sup> This decontextualizing move invites the play of norms, for it means that in cases of ambiguity (every case, by definition, which reaches the Supreme Court), the judge will choose a particular chunk of the text, with no check on whether that is the right chunk of text, and then will proceed to ignore Congress's context and procedure. This is why Judge Posner has taken to

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UCLA L. REV. 1103, 1162 (1983) (discussing the rejection of the property rights freedom model by most ethical liberals based on the overriding concern for a common good).

92. *But see* DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 13 (2011) (an example of a scholar who does know the history of property regulation in the United States).

93. Eskridge, *supra* note 2, at 889.

94. *See generally* Nourse, *Decision Theory*, *supra* note 3.

95. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 31–32 (1997).

calling textualism an “autistic” theory of statutory interpretation—because it tends to decontextualize text from any form of human communication.<sup>96</sup>

I would simply add that there is not only a risk that it is autistic, but that it is autocratic, for it refuses to engage with the legislative context in which decisions are made. There is no “check” on the autistic, decontextualizing move which fixates on a particular text and then proceeds to use that text to make a normative point that may or may not be embedded in that text. As I have shown elsewhere, the decontextualizing move is itself subject to choice—why one piece of text rather than another?<sup>97</sup> Why “take” rather than “incidentally take,” “take” rather than “harrass,” “take” rather than “endanger,” “take” rather than “critical habitat,” et cetera? Without context, there is no possibility for restraining the possible choices among texts except by reference to other information about Congress’s decisionmaking process. As most linguists would explain, decontextualized language may in fact be subject to a vast range of meanings. If I say, “go there,” do I mean go by plane or car or train; do I mean go to China or New Jersey or France?<sup>98</sup>

If there is a shocking conclusion here is it not that the dissenting opinion uses norms, but that it is the opinion of a legal realist, where by legal realism I mean that, like Judge Posner (with whom he wars about statutory interpretation), at the end of the day, Justice Scalia appears willing to accept that it is fine to act as a legislator. It is fine to ignore Congress and embrace the common law, the place where judges are most powerful,<sup>99</sup> even if this amounts to a “selfish norm,” one which refuses to check that judgment against Congress’s decisionmaking process. The only difference is that Judge Posner is candid about his “legislative” duties and Justice Scalia wraps them in positivist garb.

### CONCLUSION

In conclusion, let me briefly set forth what I think may be some questions that need to be asked about jurisprudence and statutory interpretation. First, is it possible to define a form of legal normativity that is different and identifiable from political normativity? In my view, normativity itself needs to be a subject of jurisprudential inquiry. Second, is it possible that purposivism invites judges to make easier cases harder precisely by emphasizing that there are gaps in the law? In my view, this possibility cannot be ruled out if there are cases, such as

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96. RICHARD A. POSNER, *HOW JUDGES THINK* 194 (2008).

97. Nourse, *Decision Theory*, *supra* note 3, at 137 (showing that judges may “pick and choose” text).

98. ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK LIKE A LAWYER”* 45–49 (2007).

99. POSNER, *supra* note 96, at 153 (“Common law systems give judges the power to make law. This makes them more powerful than civil law judges, and power augments independence.”).

*Sweet Home*, that might have been made easier in ways I have discussed. Third, and finally, if I am right about decision theory, is it possible that there is an alternative to textualism and purposivism, which is both a challenge to standard legal process theory, and yet adds to it by emphasizing not the legal process of courts, but the legal process of Congress?

