University of Kentucky
UKnowledge

Law Faculty Scholarly Articles | Law Faculty Publications

12-2001

Communis Opinio and the Methods of Statutory Interpretation: Interpreting Law or Changing Law

Michael P. Healy
University of Kentucky College of Law, healym@uky.edu

Click here to let us know how access to this document benefits you.

Follow this and additional works at: https://uknowledge.uky.edu/law_facpub

 Part of the Courts Commons, and the Jurisprudence Commons

Recommended Citation
Michael P. Healy, Communis Opinio *and the Methods of Statutory Interpretation: Interpreting Law or Changing Law*, 43 Wm. & Mary L. Rev. 539 (2001).

This Article is brought to you for free and open access by the Law Faculty Publications at UKnowledge. It has been accepted for inclusion in Law Faculty Scholarly Articles by an authorized administrator of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

COMMUNIS OPINIO AND THE METHODS OF STATUTORY INTERPRETATION: INTERPRETING LAW OR CHANGING LAW

MICHAEL P. HEALY*

* Dorothy Salmon Professor of Law, University of Kentucky College of Law. J.D., University of Pennsylvania, 1984; B.A., Williams College, 1978. Preparation of this Article was supported by the University of Kentucky College of Law through a summer research grant. The author thanks Dan Farber, Kathy Moore, and John Rogers for their comments on an earlier draft of the Article and Anne Hayden, Class of 2002, for her work as research assistant.

INTRODUCTION

Interpretive methodology lies at the core of the Supreme Court's persistent modern debate about statutory interpretation.[1] Supreme Court Justices have applied two fundamentally different methods of interpretation. One is the formalist method,[2] which seeks to promote rule-of-law values and purports to constrain the discretion of judges by limiting them to the autonomous legal text.[3] The

1. *See* CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 171 (1996) ("Members of the judiciary remain uncertain or publicly undecided about some deep underlying questions about the interpretation of statutes, and they attempt, to the extent they can, to decide questions of statutory meaning without answering those questions."); Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 5 (1998) (commenting on the 1997 Supreme Court Term: "[T]he principal disagreements concerned how to read statutes. How dispositive is statutory text? Should the Court attempt to discern the intent of the Congress that enacted a statute, and if so, using what tools? Is the meaning of a statute fixed at its adoption or does it evolve?"); Daniel Farber, *The Scholarly Attorney as Lawyerly Judge: Stevens on Statutes*, 1992/1993 ANN. SURV. AM. L. xxxv, xxxvii ("In the past decade, a debate has raged about the proper methods of statutory interpretation.").

The protracted and intense debate about interpretive methodology has been the subject of significant scholarly commentary. For examples of this scholarship, see the sources cited in WILLIAM N. ESKRIDGE, JR., & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 751 n.3 (2d ed. 1995), as well as the articles and commentary presented in the symposium on Formalism and Statutory Interpretation, 66 U. CHI. L. REV. 635 (1999).

2. *See generally* Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636 (1999). Professor Sunstein's article is the leading article in the Formalism and Statutory Interpretation portion of a symposium entitled Formalism Revisited. *See* Symposium, *Formalism Revisited*, 66 U. CHI. L. REV. 527 (1999).

3. Professor Sunstein described these purposes of formalist interpretations:

> [F]ormalism is an attempt to make the law both *autonomous*, in the particular sense that it does not depend on moral or political values of particular judges, and also *deductive*, in the sense that judges decide cases mechanically on the basis of preexisting law and do not exercise discretion in individual cases. Formalism therefore entails an interpretive method that relies on the text of the relevant law and that excludes or minimizes extratextual sources of law. It tends as well to favor judicial holdings that take the form of wide rules rather than narrow settlements of particular disputes.

Sunstein, *supra* note 2, at 638-39; *see also* Michael P. Healy, *Legislative Intent and Statutory Interpretation in England and the United States: An Assessment of the Impact of* Pepper v. Hart, 35 STAN. J. INT'L L. 231, 232-33 (1999) (discussing the textualist approach). Professor Sunstein has written that:

> Because formalism downplays the role of extratextual sources, it generally denies courts four relevant powers: to make exceptions to the text when those exceptions seem sensible or even necessary; to allow meaning to change over time; to invoke "canons" of construction to push statutes in favored directions; and to invoke the purposes of the legislature to press otherwise unambiguous

second is the nonformalist or antiformalist method, which may consider the legislature's intent or purpose or other evidence as context for understanding the statutory text.[4] The debate within the current Court is commonly framed and advanced by Justices Stevens and Scalia. Justice Scalia is now famous for his rigid adherence to formalism.[5] Justice Stevens rejects the formalist method, grounded as it is solely on the abstract meaning of statutory text, and employs instead the contextual, nonformalist method that seeks to interpret statutes by reference to the legislature's intent and purpose.[6] This debate about methodology is important because different interpretive results may well follow from the interpretive method that is employed.[7]

---

words in certain directions.

Sunstein, *supra* note 2, at 639.

4. As Professor Sunstein explains:

> There is certainly no canonical form of antiformalism, and those who reject formalism can offer many different competing approaches. But the antiformalist tends to insist that interpretation requires or permits resort to sources other than the text, and the antiformalist tends as well to support judgments that take the form of narrow rather than wide holdings.

Id. (footnote omitted). Nonformalists are often divided into several categories, including intentionalists and purposivists, depending on their contextual rationale. *See* Healy, *supra* note 3, at 233-36. Professor Sunstein has written that this broad antiformalist category includes a range of interpretive approaches:

> No antiformalist thinks that judges interpreting statutes should engage in ad hoc balancing of all relevant considerations. The real division is along a continuum. One pole is represented by those who aspire to textually driven, rule-bound, rule-announcing judgments; the other is represented by those who are quite willing to reject the text when it would produce an unreasonable outcome, or when it is inconsistent with the legislative history, or when it conflicts with policy judgments of certain kinds or substantive canons of construction.

Sunstein, *supra* note 2, at 640.

5. *See infra* note 39.

6. *See infra* note 43.

7. For example, the Court's decision in *Holy Trinity Church v. United States*, 143 U.S. 457 (1892), is famous because the Court rejected the text-based, formalist approach, which had led to the imposition of a statutory penalty for violating the statutory prohibition, *see* United States v. Church of the Holy Trinity, 36 F. 303, 303-04 (C.C.S.D.N.Y. 1888), *rev'd*, 143 U.S. 457 (1892), and instead found that there had been no statutory violation based on a nonformalist method that considered the statute's purpose and legislative history. *Holy Trinity*, 143 U.S. at 462-63. *See generally* Carol Chomsky, *Unlocking the Mysteries of* Holy Trinity*: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901 (2000) (arguing the appropriateness of relying on legislative history to construe statutes properly); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold*

This Article provides a context for assessing the Court's debate about interpretive methodology through an examination of the past and contemporary place of the *communis opinio* canon in cases of statutory construction. The Article begins by describing *Brogan v. United States*,[8] a recent case in which Justices Scalia and Stevens debated the modern relevance of the ancient canon of *communis opinio*.[9] The Court, in an opinion by Justice Scalia, employed the formalist method to reject a narrow interpretation of a broad criminal prohibition on making false statements to federal officials.[10] Justice Stevens, invoking the *communis opinio* canon in his nonformalist dissent, relied on a long-standing practice that had developed under the statute, and was accepted by the Department of Justice and several courts, to impose substantial limits on the scope of the criminal prohibition.[11] Justice Scalia derided this resort to the *communis opinio* canon, contending first, that the canon simply did not apply to the interpretation of a statutory text and second, that the canon resulted in an error being adopted as law because of its wide acceptance.[12]

The second part of the Article considers the validity of Justice Scalia's claim that the *communis opinio* canon has no proper application to the interpretation of statutes. The Article addresses the source of the *communis opinio* canon and a closely related canon in Coke's *Institutes*, hypothesizes reasons for the articulation of the canons by Chancellor Coke, and considers the easy acceptance and

---

Story of Holy Trinity Church, 50 STAN. L. REV. 1833 (1998) (arguing for a new rule that avoids judicial reliance on legislative history). Similarly, in two *communis opinio* decisions, *United States v. Hill*, 120 U.S. 169 (1887) (discussed *infra* at notes 103-10 and accompanying text) and *M'Keen v. Delancy's Lessee*, 9 U.S. (5 Cranch) 22 (1809), the Court's nonformalist interpretive method led to decisions that were inconsistent with the clear and determinate meaning of the text. Another fine example of how the two interpretive methods yield contrary interpretive results is the English decision in *Pepper (Inspector of Taxes) v. Hart*, 1 All E.R. 42 (H.L. 1993). There, the House of Lords employed a formalist approach and reached one interpretive result. *See id.* at 52, 54. After being advised about legislative history contrary to the formalist meaning of the text, the House of Lords reached the contrary interpretive result when it reheard the case and employed a nonformalist interpretive method. *See id.* at 71. *See generally* Healy, *supra* note 3.

8. 522 U.S. 398 (1998).

9. *See infra* Part I.

10. *Brogan*, 522 U.S. at 399-408.

11. *See infra* notes 42-47 and accompanying text.

12. *See infra* notes 48-50 and accompanying text.

application of the hybridized canon in early American cases.[13] This section will show how the canon, whose value was ridiculed by Justice Scalia, was commonly accepted by American courts. The Article then considers the conventional requirements for the application of the canon and examines how effectively those requirements have constrained the use of the canon in statutory interpretation.[14] Finally, this part of the Article considers the varying interpretive effects that courts have given to the canon when it is applicable.[15] One of these interpretive effects, employed in two notable cases, one decided by Chief Justice Marshall[16] and the other[17] decided five years before the Court famously "endorsed countertextual interpretive techniques"[18] in *Holy Trinity Church v. United States*,[19] has been to reject the clear, determinate meaning of the statutory text and to accept instead the common practice that developed under the statute.[20] In short, far from being inapplicable to the interpretation of statutes, the *communis opinio* canon has been employed by the Supreme Court to reach countertextual interpretive results.

Given that the *communis opinio* canon has been used by the Supreme Court to present interpretations that conflict with the apparent meaning of the text, the last part of this Article considers whether a court acts properly when it accords legal significance, including a determinative effect, to *communis opinio*.[21] Particular attention is given to Justice Scalia's claim that *communis opinio*

13. *See infra* Part II.A.

14. *See infra* Part II.B.

15. *See infra* Part II.C.

16. M'Keen v. Delancy's Lessee, 9 U.S. (5 Cranch) 22 (1809).

17. United States v. Hill, 120 U.S. 169 (1887).

18. Vermeule, *supra* note 7, at 1836.

19. 143 U.S. 457 (1892).

20. *See infra* Part II.C.3.

21. In discussing the interpretive significance of *communis opinio*, this Article is focused on vertical legal coherence, except to the extent that the common practice that develops under a statute reflects the community's evolved understanding of the law. *See* ESKRIDGE & FRICKEY, *supra* note 1, at 423-24 (contrasting vertical coherence and horizontal coherence in law). The Article does not purport to address in detail whether there are circumstances under which the horizontal coherence of law ought to compel interpretations of statutes that conflict with statutory text or common practice. *Cf. infra* notes 192-93 (discussing circumstances under which modern notions of justice should trump inconsistent common practice).

yields interpretations that have the effect of changing the law by codifying common error. This analysis initially proceeds by considering the three rationales traditionally employed for employing the *communis opinio* canon—strong evidence of the meaning of text,[22] evidence of the intent of the drafters of the text,[23] and public reliance.[24] When it fails to account for *communis opinio*, a formalist court loses a valuable opportunity to place a reliable check on the autonomy of that interpretive method and undermines important reliance interests.

The Article then presents a fourth rationale for the strong use of the canon: its use reflects a proper role of the court in the process of lawmaking. The Article first assumes the significance of the rule-of-law values that formalism purports to serve. Because common practice constitutes law in important ways, the *communis opinio* canon should provide an especially important context for interpreting statutes under the formalist or antiformalist methods. Ignoring *communis opinio* may yield interpretations that are inconsistent with the rule-of-law values that formalism tries to promote.[25] The presumptive meaning that this canon should give to statutory text has strong indicia of correctness and ought to be rejected only when other textual and contextual meanings are uniform and contrary.

One historically important context in which the formalist Justices have recognized the status of practice as law was the recent presidential election cases. In deciding whether the Florida Supreme Court had changed state election law when it interpreted the election statute, the three concurring Justices in *Bush v. Gore*,[26] including Justices Scalia and Thomas, relied on two standards against which to gauge whether the decision had effected a change in law: variance from the text[27] and, importantly, variance from prior practice.[28] To be sure, the concurring opinion makes no reference to the canon of *communis opinio* in relying on prior

22. *See infra* Part III.A.
23. *See infra* Part III.B.
24. *See infra* Part III.C.
25. *See infra* Part III.D.1.
26. 531 U.S. 98, 111-12 (2000) (Rehnquist, C.J., concurring).
27. *See id.* at 112-22.
28. *See id.*

practice to discern a change in law. The opinion does, however, properly accept the significance of practice in fixing the content of law.[29] This section concludes that Justice Scalia's formalist aversion to *communis opinio* strongly undercuts the formalist method's traditional claims to legitimacy and may encourage judicial interpretations that have the effect of changing law.

The Article's final section discusses how the formalist aversion to employing the *communis opinio* canon yields erroneous decisions and undercuts the empirical value of the formalist method by increasing the costs of the legal system.[30]

I. A MODERN DEBATE ABOUT AN ANCIENT CANON: *BROGAN V. UNITED STATES* AND *COMMUNIS OPINIO*

In *Brogan v. United States*,[31] the Supreme Court decided whether a "mere denial of wrongdoing"[32] was a violation of the federal prohibition against making false statements to federal officials.[33] That statutory prohibition was written in the following broad terms:

---

29. Whether the practice relied upon by the concurring Justices to identify a change in law was sufficient to meet the traditional requirements for the application of the *communis opinio* canon is doubtful. Those requirements are discussed in part II.B. A recent book addressing the disputed 2000 election stated that

> there was simply no state law or administrative practice of significance that bore on the question of how Florida applied these disputed-election statutes to a statewide election contest. In addition, there was no evidence from the text of these state laws that, when they were designed, any legislator had a Presidential election contest in mind one way or the other.

SAMUEL ISSACHAROFF ET AL., WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000, at 19 (2001). These authors also stated:

> Because there had been no statewide election contests previously, let alone a Presidential one, neither side could point to clearly established state practices or rulings in similar situation (with the exception of one issue, the standard for what counted as a legal vote in a manual recount process, on which there was arguably prior evidence from one county, though not a prior statewide standard).

Id. at 20.

30. *See infra* Part III.D.2.

31. 522 U.S. 398 (1998).

32. *Id.* at 399.

33. 18 U.S.C. § 1001 (1988) (current version at 18 U.S.C. § 1001 (2000)).

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.[34]

Notwithstanding the breadth of this statutory text, a practice had developed over many years that an "exculpatory no"—that is a simple denial of wrongdoing—did not come within the criminal prohibition. This practice consisted of a long line of decisions by the courts of appeals accepting an "exculpatory no" defense to claimed violations of the criminal prohibition,[35] a Department of Justice policy against prosecutions for statements that are mere denials of wrongdoing,[36] and a confession of error by the Solicitor General before the Supreme Court that was approved by the Court.[37]

Writing for six members of the Court,[38] Justice Scalia employed his usual formalist method for interpreting a statute[39] and determined that "the plain language of § 1001 admits of no exception for an 'exculpatory no.'"[40] For Justice Scalia, the breadth of the statute's text foreclosed any possibility of a narrow judicial construction: "[I]t is not, and cannot be, our practice to restrict the

---

34. *Id.*

35. *See Brogan*, 522 U.S. at 401 (citing cases).

36. *Id.* at 415 (Stevens, J., dissenting) (quoting the Department of Justice's United States Attorneys' Manual).

37. *Id.* at 414-15 (Ginsburg, J., concurring) (discussing confession of error and Court action in *Nunley v. United States*, 434 U.S. 962 (1977)).

38. Justice Scalia's decision was joined fully by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas. Justice Souter, the sixth Justice, joined the Court's opinion except for the Court's response to concerns about prosecutorial abuse in the application of the prohibition against false statements. *Id.* at 408 (Souter, J., concurring).

39. *See* Farber, *supra* note 1, at xxxvii ("On the Supreme Court, Justice Scalia has emerged as the champion of textualism."); Michael P. Healy, *The Attraction and Limits of Textualism: The Supreme Court Decision in* PUD No. 1 of Jefferson County v. Washington Department of Ecology, 5 N.Y.U. ENVTL. L.J. 382, 433 n.210 (1996) (discussing Justice Scalia's approach toward textualism); Sunstein, *supra* note 2, at 639 ("[O]n the current Supreme Court, Justice Scalia is [formalism's] most enthusiastic proponent.") (footnote omitted).

40. *Brogan*, 522 U.S. at 408.

unqualified language of a statute to the particular evil that Congress was trying to remedy—even assuming that it is possible to identify that evil from something other than the text of the statute itself."[41]

Justice Stevens dissented.[42] Employing his usual eclectic, non-formalist approach to statutory interpretation,[43] Justice Stevens concluded that Congress intended to proscribe a narrower range of conduct than the statutory text indicated, and that the "exculpatory no" exception should be recognized by the Court.[44] In defending this conclusion, Justice Stevens relied on the ancient canon of *communis opinio* to establish that, because a narrow understanding of the scope of the statutory prohibition was well and long accepted by the legal community, the statute should be interpreted narrowly by the Court.[45] Justice Stevens contended that "the Court should show

41. *Id.* at 403.

42. Justice Stevens was joined by Justice Breyer. *Id.* at 418 (Stevens, J., dissenting).

43. *See* Farber, *supra* note 1, at xxxvii ("Justice Stevens has argued vigorously against the new textualism, pointing out time and again that a wooden reading of statutory language serves only to muddle public policy and obstruct Congressional goals.") (footnote omitted); *id.* at xliii ("The current leading scholars in statutory interpretation identify Justice Stevens an exemplar of practical reason in statutory interpretation.") (footnote omitted); *see also* William D. Popkin, *A Common Law Lawyer on the Supreme Court: The Opinions of Justice Stevens*, 1989 DUKE L.J. 1087, 1149 (1989) ("A preference for legislative intent over plain meaning is often noted by Justice Stevens."). Professor Sunstein describes Justice Breyer, who joined Justice Stevens's dissent in *Brogan*, as "an outspoken critic of formalism." Sunstein, *supra* note 2, at 640.

44. *Brogan*, 522 U.S. at 419-20 (Stevens, J., dissenting).

45. Justice Stevens has argued for the application of the *communis opinio* canon in decisions other than *Brogan*. *Id.* at 420 (Stevens, J., dissenting) (citing cases). Justice Scalia's opinion in *Brogan* chides Justice Stevens for his unwillingness to apply the canon on a consistent basis, contending that the canon "becomes yet another user-friendly judicial rule to be invoked *ad libitum*." *Id.* at 408. *Communis opinio* would, however, hardly be the first canon, or even principle of statutory construction, to be relied upon inconsistently by an interpreter of statutory text. *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) (describing thrust-and-parry characteristics of opposing canons of construction). In fact, Justice Stevens leveled a similar charge in *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 723 (1994) (Stevens, J., concurring), chiding Justices Scalia and Thomas, who dissented in the case, for being inconsistent by failing to apply and accept the consequences of their formalist method:

> For judges who find it unnecessary to go behind the statutory text to discern the intent of Congress, this is (or should be) an easy case. Not a single sentence, phrase, or word in the Clean Water Act purports to place any constraint on a State's power to regulate the quality of its own waters more stringently than federal law might require. In fact, the Act explicitly recognizes

greater respect for the virtually uniform understanding of the bench and the bar that persisted for decades with ... the approval of this Court as well as the Department of Justice."[46] Justice Stevens indicated that such respect was proper and warranted because "as Sir Edward Coke phrased it, 'it is the common opinion, and *communis opinio* is of good authoritie in law.'"[47]

Justice Stevens's reliance on Coke received a two-part response from Justice Scalia. First, Justice Scalia stated that Justice Stevens had "wrenched [the principle] out of its context"[48] by applying a principle that Chancellor Coke had applied to the common law, or "lex communis," to the interpretation of a statute.[49] Second, Justice Scalia suggested that the principle is unsound because, "[w]hile *communis error facit jus* [common error makes law] may be a sadly accurate description of reality, it is not the normative basis of this Court's jurisprudence. Courts may not create their own limitations on legislation, ... no matter how widely the blame may be spread."[50]

In sum, the Court's decision in *Brogan* showed the contrasting reactions of formalist and nonformalist interpretive methods to the *communis opinio* canon. This Article now turns to a consideration of Justice Scalia's two-part attack on the canon: that it has no applicability to the interpretation of statutes, and that it is, in any event, a fundamentally flawed basis for understanding the meaning of a statutory text.

States' ability to impose stricter standards.

46. *Brogan*, 522 U.S. at 420 (Stevens, J., dissenting).

47. *Id.* at 420-21 (Stevens, J., dissenting) (footnote and citation omitted).

48. *Id.* at 407.

49. *Id.* at 407 n.3. Justice Scalia stated further that: "As applied to [*lex communis*], of course, the statement is not only true but almost an iteration; it amounts to saying that the common law is the common law." *Id.*

50. *Id.* at 408. Justice Stevens gave this response to Justice Scalia's invocation of the *communis error* precept:

> The majority's invocation of the maxim *communis error facit jus* adds little weight to their argument. As Lord Ellenborough stated in *Isherwood v. Oldknow*, 3 Maule & Selwyn 382, 396-97 (K. B. 1815):
>
> "It has been sometimes said, *communis error facit jus*; but I say *communis opinio* is evidence of what the law is; not where it is an opinion merely speculative and theoretical floating in the minds of persons, but where it has been made the ground-work and substratum of practice."

Id. at 421 n.4 (Stevens, J., dissenting).

II. THE SOURCE AND APPLICATION OF THE *COMMUNIS OPINIO* CANON

A. Coke's Articulation of the Principle and Early Applications

In the first part of *Institutes*, Sir Edward Coke discusses the content of the English common law and presents this material in the form of a commentary upon the previous work of Littleton.[51] On two occasions in *Institutes*, when describing the law of joint tenancy[52] and the law of warranty,[53] Chancellor Coke states the principle of *communis opinio* in defining the content of the common law. As Justice Scalia argued in his opinion in *Brogan*,[54] Chancellor Coke's high regard for common opinion is understandable in the context of defining the common law. Indeed, William Blackstone, in describing the common law or *leges non scripta*, stated that "their original institution and authority were not set down in writing, as acts of parliament are, but they receive their binding power and the force of laws by long and immemorial usage, and by their universal reception through the kingdom."[55] Moreover, there is the sense that the doctrine of *communis opinio* would have appealed to the conservatism of Chancellor Coke, who, on occasion in his *Institutes*,

---

51. DAVID M. WALKER, THE OXFORD COMPANION TO LAW 625 (1980).

52. See 1 EDWARD COKE, INSTITUTES § 288, at 186 (Garland Publishing 1979) (1628) (footnotes omitted), where he wrote:

> Also, it is commonly said, that every jointenant is seised of the land which he holdeth jointly *per my et per tout*; and this is as much to say as he is seised by every parcel and by the whole, etc., and this is true, for in every parcell, and by every parcell [sic] and by all the lands and tenements he is joyntly seised with his companion.
>
> That is, it is the common opinion, and *communis opinio* is of good authority in law. A *communi observantia non est recedendum*, which appeareth here by *Littleton*.

53. See *id.* § 697, at 364-65, where he wrote:

> *Il est communement dit.* ["It is commonly said."] Here by the opinion of *Littleton*, *communis opinio* is of authority, and stands with the rule of law, A *communi observantia not est recedendum:* and again, *Minime mutanda sunt quae certam habuerunt interpretationem.*

54. *Brogan*, 522 U.S. at 407 & n.3.

55. 1 WILLIAM BLACKSTONE, COMMENTARIES *111. Interestingly, Justice Scalia has disputed the role of common practice in defining common law. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 4 (1997) ("[T]he common law is not really common law, except insofar as judges can be regarded as common. That is to say, it is not 'customary law,' or a reflection of the people's practices, but is rather law developed by the judges.").

extols the virtues of attention to accepted practices or customs for those entering the practice of law.[56]

Justice Scalia's attempt to demean the application of *communis opinio* by maintaining that the maxim is applicable in determining the content of the common law, but not the meaning of statutes, would thus appear to derive support from the first part of *Institutes*. Chancellor Coke did not recognize such a limitation himself, however, as his writings in the second part of *Institutes* make clear. The second part of *Institutes* considers the written, rather than the common, law, including the Magna Carta. There, in the context of commenting on the meaning of written law, Coke states the rule that "*Contemporanea expositio est fortissima in lege*,"[57] that is, contemporary exposition is the strongest in the law. Coke applies this canon to demonstrate the "true intendment of these words," notwithstanding that "[s]ome have thought that these words are to be understood" to have a different meaning.[58]

Justice Stevens's tracing of the *communis opinio* maxim in interpreting statutes back to Chancellor Coke is accordingly reasonable because Coke himself identified and employed the analogous *contemporanea expositio* canon to interpret written law.[59] The label may be somewhat misleading when applied to statutes, but the principle fits. Moreover, the whole understanding of English

---

56. For an example of this advice, see 1 COKE, *supra* note 52, § 371, at 229, where he wrote that "[h]ere it appeareth that which is most commonly used in conveyances is the surest way. *A communi observantia non est recedendum, & minime mutanda sunt quae certam habuerunt interpretationem. Magister rerum usus.*" He included similar advice in the next section of *Institutes*:

> Here *Littleton* sets down three formes of deeds indented in the first person, *brevis via per exempla, longa per precepta.* It is requisite for every student to get precedents and approved formes not only of deeds according to the example of *Littleton*, but of fines, and other conveyances, and assurances, and especially of good and perfect pleading, and of the right entries, and formes of judgements, which will stand him in great stead: both while he studies, and after when he shall give counsel. It is a safe thing to follow approved precedents, for *nihil simul inventum est perfectum.*

Id. § 372, at 230.

57. 2 EDWARD COKE, INSTITUTES 10 (London, E. & R. Brooke 1797).

58. *Id.*

59. One of the cases that Justice Stevens relied upon in support of *communis opinio* in *Brogan* was *United States v. The Reindeer*, 27 F. Cas. 758 (C.C.D.R.I. 1861) (No. 16,145). *Brogan*, 522 U.S. at 421 (Stevens, J., dissenting). *The Reindeer* relied on the *contemporanea expositio* form of the canon. *The Reindeer*, 27 F. Cas. at 761-62.

common lawyers was grounded in history and "there were special incentives for an English lawyer to consider the law in an historical fashion."[60] Thus, the public understanding of written law would have appeared to a lawyer such as Coke as a proper basis upon which to fix legal meaning. The canon of construction is also conservative in its acceptance of the received meaning of statutes and thus conforms to the essential conservatism of the English legal system.[61]

A final reason why Scalia fails in his effort to fault Stevens for relying on the *communis opinio* maxim as a canon of statutory construction can be found in Chancellor Coke's general attitude toward statutes. Statutes were understood by Coke,[62] and later by

---

60. DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN 41 (1989) (footnote omitted). Professor Lieberman has written:

> Just as English lawyers interpreted their civil liberties as an ancient body of historic rights, so their attitude to constitutional norms and political authority turned on their reading of the past. Hence, there were special incentives for an English lawyer to consider the law in an historical fashion, and Blackstone responded fully to them, recognizing both the legal and political importance of treating English law as an historical entity.

Id.

61. The conservative character of the English system is captured by the following anecdote:

> The discretionary powers of the equity judge seemed contrary to the objectives and character of English law from another standpoint. This was in terms of the more general concern to preserve legal "certainty" against possible judicial disruption. As Bacon claimed, "[c]ertainty is so essential to law that law cannot even be just without it ... It is well said also, 'That that is the best law which leaves least to the discretion of the judge'; and this comes from the certainty of it." Increasingly in the eighteenth century, this position was taken up by utilitarian moralists to develop an understanding of precedent close to the modern doctrine of *stare decisis*.

Id. at 79 (footnote omitted). Indeed, these conservative characteristics are closely associated with the formalist interpretive method. *See infra* notes 267-71 and accompanying text.

62. See Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388, 389-90 (1942), who describes this attitude toward statutes as follows:

> The statute issues from a sovereign who in feudal times was conceived of not as a depositary of supreme power, but as the capstan of the feudal edifice, whose duty to maintain ancient and reasonable customs was as definite a part of his complex of functions as his diverse and miscellaneous powers of privileges, his *regalia*, which were later fused with the concept of the prerogative. ...
>
> The oath the feudal king took was to maintain the ancient customs of the realm, and to Coke the ancient customs were identical with the common law.

Blackstone,[63] as intrusions on the common law. As one of the pioneers in seeking to define the rules for construing statutes,[64]

63. *See* LIEBERMAN, *supra* note 60, at 71 ("[T]he practice of the courts both reflected and lent crucial support to those who construed the relationship in such a way so as to restrict the scope of parliamentary action. Thus the emphasis remains the Blackstonean one of placing the claims of common law somehow *against* the statute book."); *id.* at 72 ("In the long view of English legal history, the manner by which common law controlled legislation was to render it superfluous. The remarkable durability and adaptability of the common law system was what secured its primacy within the legal system."). *See generally* Harry Willmer Jones, *Statutory Doubts and Legislative Intention*, 40 COLUM. L. REV. 957, 958 (1940). Professor Jones made the following comments about traditional English attitudes toward statutes:

> [T]he evolution of the statute law to a position, at least, of parity with the judge-made law demands the reexamination of judicial methods developed during periods in which the chief concern of the judges was to build up an interpretative technique by which occasional, *ad hoc* legislative directions might be fitted, neatly and without disturbance, into the general fabric of common law. The general judicial attitude at the time of the original pronouncement of the traditional rules of statutory interpretation is indicated by the charge of a great common lawyer, the late Sir Frederick Pollock, that many of those rules-of-thumb known as canon of construction "... cannot well be accounted for except upon the theory that Parliament generally changes the law for the worse, and that the business of the judge is to keep the mischief of its interference within the narrowest possible bounds."

Id. (quoting FREDERICK POLLOCK, ESSAYS IN JURISPRUDENCE AND ETHICS 85 (1882)) (footnote omitted).

64. Chancellor Coke has been recognized as one of the first important Anglo-American lawyers to seek to identify rules for construing statutes. *See* A. Arthur Schiller, *Roman Interpretatio and Anglo-American Interpretation and Construction*, 27 VA. L. REV. 733, 764 (1941). Professor Schiller wrote:

> Canons or rules of construction play an infinitely larger part in Anglo-American interpretation than in modern European law. The standard treatises on interpretation of statutes use these canons to group the cases that have dealt with the subject, and the extensive studies dealing with the construction of the various types of private instruments present much of the same picture. If the Anglo-American law has any theoretical side to interpretation it is to be found in the series of canons of construction for statutes, wills, contracts and the like. Yet in its beginnings English law paid little attention to this aspect of interpretation, for each case was decided on its own merits. With Plowden and Coke, however, the development of canons is well under way, reaching its height some centuries later in works such as Rutherforth and Dwarris. Kent and Story, likewise, emphasize canons as a basis of discussion and Lieber's general and special rules of interpretation had some effect on 19th century American jurisprudence. In the latter half of that century voices were raised against the excessive importance given rules of construction, and hardly a writer today does not deplore the blind adherence to "barbaric rules of interpretation."

Id. (footnotes omitted).

Chancellor Coke naturally embraced a rule requiring a narrow interpretation of a statute in a case in which the affected public accepted and understood that the statute displaced the common law to only a limited degree. Indeed, for a jurist who is recognized for having articulated the doctrine that courts may find acts of parliament void when contrary to reason,[65] the principle that statutes should be interpreted according to how they are understood to fit within the customs of the people seems a principle of judicial restraint. In sum, the *communis opinio* maxim is one that had a natural appeal to the English common law tradition, both in the context of defining the common law and in determining the meaning of statutes.

It should not be surprising, then, that the maxim was readily accepted as a doctrine of American law in the first years of the Supreme Court. The initial application of the doctrine by the Supreme Court occurred in a case that challenged the constitutionality of the practice of employing Supreme Court Justices as circuit judges.[66] In a unanimous opinion by Justice Paterson, affirming the judgment of Chief Justice Marshall, who had sat below as a circuit judge, the Court rejected the claim of unconstitutionality by relying on the common understanding of Article III of the Constitution:

> Another reason for reversal is, that the judges of the Supreme Court have no right to sit as circuit judges, not being appointed as such, or in other words, that they ought to have distinct commissions for that purpose. To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing

---

65. As Professor Lieberman wrote:

> The doctrine [that acts of Parliament "contrary to reason" were void in themselves] received its most famous airing in Coke's decision in Bonham's case, where the oracle of law declared that "in many cases the common law will control acts of parliament . . . sometimes it will judge them completely void." It remains unclear precisely what Coke intended by this, particularly with regard to the extent of the judiciary's power. But despite these difficulties, it was possible to take the statement at face value. In a case of 1710, Chief Justice Holt described Coke's claim in Bonham's case as "a very reasonable and true saying," and then utilized it to counter a statute.

LIEBERMAN, *supra* note 60, at 53 (footnotes omitted).

66. Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803).

> with the organization of the judicial system, afford an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed.[67]

The Court was accordingly quite comfortable "fix[ing] the construction" of the written Constitution on the basis of "practice and acquiescence under it for a period of several years."[68]

Chief Justice Marshall did not have to wait many years to employ the doctrine himself, this time to give a meaning to statutory text that had a different literal meaning. In *M'Keen v. Delancy's Lessee*,[69] the Court had to determine whether a deed had been properly recorded. The state statute at issue there provided that, before a deed could be recorded, the deed had to be acknowledged or proved "'before one of the justices of the peace of the proper county or city where the lands lie.'"[70] The deed that was the subject of the dispute before the Court had been "acknowledged before John Lawrence, one of the justices of the supreme court of Pennsylvania; and was recorded in the office for the city and county of Philadelphia, in which a part of the lands lie."[71] The Court summarized the following evidence of the common practice regarding recording in Pennsylvania:

> [T]he courts of Pennsylvania consider a justice of the supreme court as within the description of the act.
>
> ... [T]his deed was acknowledged by the chief justice, who certainly must have been acquainted with the construction given to the act, and ... the acknowledgment was taken before another judge of the supreme court. It is also recollected that the gentlemen of the bar, who supported the conveyance, spoke positively as to the universal understanding of the state, on this point, and that those who controverted the usage on other points, did not controvert it on this. But what is decisive with

67. *Id.* at 309.
68. *Id.*
69. 9 U.S. (5 Cranch) 22 (1809).
70. *Id.* at 32 (quoting the Pennsylvania Act of May 28, 1715).
71. *Id.*

> the court is, that the judge who presides in the circuit court for the district of Pennsylvania, reports to us that this construction was universally received.[72]

In deciding that the deed had been properly recorded and proved, Chief Justice Marshall wrote:

> Were this act of 1715 now, for the first time, to be construed, the opinion of this court would certainly be, that the deed was not regularly proved. A justice of the supreme court would not be deemed a justice of the county, and the decision would be, that the deed was not properly proved, and therefore not legally recorded.
>
> But, in construing the statutes of a state on which land titles depend, infinite mischief would ensue, should this court observe a different rule from that which has been long established in the state; and in this case, the court cannot doubt that the courts of Pennsylvania consider a justice of the supreme court as within the description of the act.[73]

Although Justice Scalia would no doubt view the case as an example of *communis error facit jus*, Chief Justice Marshall felt constrained to give the statute its commonly accepted meaning despite the written text.

About twenty years later, Justice Story, one of America's greatest nineteenth-century legal thinkers, had occasion to consider the application of Coke's maxim. In *United States v. Bank of North Carolina*,[74] the Court had to decide how to construe statutory text that fixed the priority of the United States to the assets of a debtor. In urging his construction of the language, Attorney General Roger Taney relied upon the *communis opinio* doctrine.[75] Justice Story

---

72. *Id.* at 32-33.

73. *Id.* at 32.

74. 31 U.S. (6 Pet.) 29 (1832).

75. Taney argued:

> The construction of the law of the United States now claimed, has been that of universal practice since it was enacted. From 1797 down to the present period, it has been applied in favor of the United States to bonds not due, as well as to others to become due; and the estates of insolvents and intestates have been adjusted and settled on this principle, in every section of the Union. This received construction will induce the court to hesitate before it will adopt

resolved the matter in favor of the United States, relying in part on the *communis opinio* doctrine:

> It is not unimportant, to state, that the construction, which we have given to the terms of the act, is that which is understood to have been practically acted upon by the government, as well as by individuals, ever since its enactment. Many estates, as well of deceased persons, as of persons insolvent, who have made general assignments, have been settled upon the footing of its correctness. A practice so long and so general would, of itself, furnish strong grounds for a liberal construction; and could not now be disturbed, without introducing a train of serious mischiefs. We think, the practice was founded in the true exposition of the terms and intent of the act; but if it were susceptible of some doubt, so long an acquiescence in it, would justify us in yielding to it as a safe and reasonable exposition.[76]

Indeed, by the early twentieth century, the Supreme Court was comfortable in declaring that "[n]othing is more convincing in interpretation of a doubtful or ambiguous statute" than "the uniform practice of [an executive agency] for nearly thirty years."[77] In sum, notwithstanding Justice Scalia's suggestion that there is no basis for applying the *communis opinio* canon to the construction of statutes, just such a use of the principle was articulated by Chancellor Coke, fits comfortably within the English common

---

> another; as it would open those long-established settlements, and would be productive of great difficulty and confusion.

Id. at 31.

76. *Id.* at 39-40. The *communis opinio* maxim was employed by federal courts in other cases prior to 1850. For example, in *United States v. Macdaniel*, 32 U.S. (7 Pet.) 1 (1833), the Court stated that "[u]sage cannot alter the law, but it is evidence of the construction given to it; and must be considered binding on past transactions." *Id.* at 15. The Court then held that "[f]or more than fifteen years, the claim has been paid for similar services, and it is now too late to withhold it for services actually rendered." *Id.* at 16; *see also* United States v. The Reindeer, 27 F. Cas. 758 (C.C.D.R.I. 1861) (No. 16,145) (cited by Justice Stevens in his dissenting opinion in Brogan v. United States, 422 U.S. 398, 421 n.4 (1998)).

77. Wisconsin v. Illinois, 278 U.S. 367, 413 (1929) ("This construction of Section 10 is sustained by the uniform practice of the War Department for nearly thirty years. Nothing is more convincing in interpretation of a doubtful or ambiguous statute.") (citations omitted); *see also* Briscoe v. Buzbee, 143 So. 887, 887 (Miss. 1932) ("Contemporary construction as a rule of construing statutes is as old as the common law, and has, throughout the history of the state, been recognized as the proper course in doubtful cases.") (citations omitted).

lawyers' suspicion of statute law, and was immediately embraced by eminent jurists in the newly independent United States.

B. Traditional Application of the Canon in Statutory Cases

The foregoing survey of the historical roots of the *communis opinio* canon sets the stage for the following description of how the canon has traditionally been applied in statutory cases. As will be seen, courts established two requirements for the application of the canon: an ambiguous statute and a showing of well-settled contemporary usage, which could be defined by either common practice or common inaction. The last part of this section will discuss the effect that courts have given to the canon when it has been used in interpreting a statute.

1. Statutory Ambiguity

The first long-standing requirement for the application of the *communis opinio* canon is that the meaning of the statute be ambiguous. There are numerous examples of this textual-ambiguity requirement in the application of the *communis opinio* canon. For example, in *McPherson v. Blacker*,[78] the Supreme Court held that the canon had no applicability when the text of the constitutional provision at issue was unambiguous:

> The framers of the Constitution employed words in their natural sense; and where they are plain and clear, resort to collateral aids to interpretation is unnecessary and cannot be indulged in to narrow or enlarge the text; but where there is ambiguity or doubt, or where two views may well be entertained, contemporaneous and subsequent practical construction are entitled to the greatest weight.[79]

Because the text of the Constitution addressing the method by which presidential electors are selected by the states was ambiguous, common understanding and practice determined the

78. 146 U.S. 1 (1892).
79. *Id.* at 27.

meaning of the text.[80] Similarly, the Court has rejected the application of *communis opinio* in the face of a clear text.[81]

That an ambiguous text was seen as necessary before a court could properly employ the canon is understandable in view of the traditional English source of the canon.[82] Given Justice

---

80. The Court stated:

> [P]laintiffs in error cannot reasonably assert that the clause of the Constitution under consideration so plainly sustains their position as to entitle them to object that contemporaneous history and practical construction are not to be allowed their legitimate force, and, conceding that their argument inspires a doubt sufficient to justify resort to the aids of interpretation thus afforded, we are of opinion that such doubt is thereby resolved against them, the contemporaneous practical exposition of the Constitution being too strong and obstinate to be shaken or controlled.

Id. (citation omitted).

81. See *United States v. Graham*, 110 U.S. 219, 221 (1884), in which the Court stated:

> [I]t matters not what the practice of the departmen smay [sic] have been or how long continued, for it can only be resorted to in aid of interpretation, and "it is not allowable to interpret what has no need of interpretation." If there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling in its effect. But with language clear and precise, and with its meaning evident there is no room for construction, and consequently no need of anything to give it aid.

See also McLaren v. Fleischer, 256 U.S. 477, 480-81 (1921) (common practice may determine meaning of statute when the statute is "fairly susceptible of different constructions"); Swift & Co. v. United States, 105 U.S. 691, 695 (1881) ("The rule which gives determining weight to contemporaneous construction, put upon a statute, by those charged with its execution, applies only in cases of ambiguity and doubt.") (citations omitted); United States v. Temple, 105 U.S. 97, 99 (1881) ("When the language is plain, we have no right to insert words and phrases, so as to incorporate in the statute a new and distinct provision," and contemporary practice accordingly does not provide a basis for interpretation); Edwards' Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827) ("In the construction of a doubtful and ambiguous law, the cotemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.").

82. See D.J. Llewelyn Davies, *The Interpretation of Statutes in the Light of Their Policy by the English Courts*, 35 COLUM. L. REV. 519 (1935), in which Professor Davies makes the following comments about early rules of statutory interpretation:

> A very marked feature of the common law rules for the construction of written instruments has been the rigidity with which they excluded all extrinsic evidence, and their insistence that the meaning of documents must be ascertained from its words as they stood. This attitude may well have originated in what Pollock and Maitland call the "mystical awe" with which the early Common Law regarded the written instrument, and there can be no doubt but that the particular solemnity attributed to the instrument under seal has exercised a great influence on the attitude of the courts towards the written law.

Id. at 522; *see also* LIEBERMAN, *supra* note 60, at 85. As Professor Lieberman indicated

> [t]he relevant distinction between authentic positive law and the common law

Scalia's commitment to formalism, whereby a court is limited to statutory text when interpreting statutes,[83] Justice Scalia's strategy in responding to Justice Stevens's use of the *communis opinio* canon in *Brogan* is surprising. One would anticipate that Justice Scalia would have rejected the use of this canon to discern the statute's meaning because the text of section 1001 is altogether clear. Instead, though, Justice Scalia asserted that the canon has no relevance to the interpretation of statutes.

This belief of both classical English legal theorists and Justice Scalia that a clear statutory text ought to foreclose any resort to sources of meaning outside the text is suspect for three principal reasons. First, courts and scholars have recognized that, when applying written law, blind adherence to text may be inconsistent with the spirit or purpose of that law.[84] Indeed, concerns about this inconsistency between the meaning and the spirit of a writing have been voiced since the heyday of Roman law.[85] Second, modern

---

was carefully delineated by James Sedgwick in his *Remarks on the Commentaries*. Sedgwick observed that "in the administration of statutory law" the magistrate "has only to apply that law to the affair under trial." "In common litigations," however, "those general principles which are the essence of justice itself are to be resorted to, and the adjudged cases consulted, with a view to their application, so far as they are accordant with the spirit of equity, and not for the mere *dictatum* of the adjudged case itself."

Id. (quoting JAMES SEDGWICK, REMARKS CRITICAL AND MISCELLANEOUS ON THE COMMENTARIES OF SIR WILLIAM BLACKSTONE 69-70 (London, 1800)). The opposition of many modern judges and commentators to the formalist method is grounded in large part on the view that formalism is too wooden and leads to unjust results in particular cases. *See* Healy, *supra* note 3, at 235 n.20.

83. *See supra* note 39 and accompanying text.

84. *See* Frederick J. De Sloovère, *Extrinsic Aids in the Interpretation of Statutes*, 88 U. PA. L. REV. 527, 553 (1940). Professor Sloovère notes that

> one of the simplest forms of ambiguity is inconsistency between meaning and purpose. Thus the theory of all satisfactory construction—that all interpretation must further so far as possible the objectives of the legislation—is curtailed, if a thoroughgoing, factual search for objectives in extrinsic aids is prevented. A check-up, on the basis of extrinsic aids, may well show the purpose of the legislature to be somewhat different from what the text indicates; and when this occurs, the obvious meaning is no longer plain, as it is now inconsistent with actual legislative objectives. In short, extrinsic aids may not only show that what appears to be plain is really ambiguous, but that another meaning more consonant with the immediate ends of the legislation is more sound and satisfactory.

Id.

85. Schiller, *supra* note 64, at 748 ("As Phipson has pointed out, this is nothing more

judges, including Justice Stevens,[86] have taken the position that, when interpreting statutes, a court should give effect to the intent of the legislature.[87] In pursuing this intentionalist approach to interpretation, courts have occasionally determined from a review of extrinsic evidence that the apparent meaning of the statutory text is not what the legislature intended.[88] Although this intentionalist approach has been long accepted in the United States,[89] English courts have only recently permitted the use of this approach to interpretation in special cases.[90] Finally, even if one were to accept the traditional rule that the statutory text must be ambiguous before common practice can be used as a source of statutory meaning, modern theorists have challenged the position that a text can actually have only a single clear meaning and have posited that all texts are ambiguous to some degree.[91]

---

than the old conflict between *verba* and *voluntas*, between the letter and the spirit, or whatever form expressed, that first takes a prominent place in legal thought in the classical age of the Roman law.") (footnote omitted); *see also* Radin, *supra* note 62, at 402 (explaining that, according to Aristotle, "in specific instances the written law might be disregarded in order to effect 'equity,' and that 'equity' soon came only to mean the withdrawal of the specific case from the application of the law. ... That is what insistence on the spirit as opposed to the letter usually implied in practice ....") (footnote omitted).

86. *See* Popkin, *supra* note 43, at 1149 ("A preference for legislative intent over plain meaning is often noted by Justice Stevens.").

87. *See* Schiller, *supra* note 64, at 747. Professor Schiller states:

> The specific object of interpretation is, according to Lieber, to find out the true sense of any form of words, i.e., the sense which their author intended to convey. [Justice Joseph] Story declares that the fundamental rule of the interpretation of all instruments is to construe them according to the sense of the terms and the intention of the parties. So, generally, do the writers and the courts lay emphasis on the sense of the words in the intention of their utterer. It is at once to be observed that there are two elements herein, the meaning of the words, and the intention of the writer.

Id. (footnotes omitted).

88. *See* Healy, *supra* note 3, at 240-41 (discussing *Train v. Colorado Public Interest Research Group*, 426 U.S. 1 (1976)).

89. An early statement of this intentionalist approach is included by the Court in *Atkins v. The Disintegrating Co.*, 85 U.S. (18 Wall.) 272, 301 (1873) ("The intention of the lawmaker constitutes the law. A thing may be within the letter of a statute and not within its meaning, or within its meaning though not within its letter.") (footnotes omitted). Moreover, the Court had relied on legislative history to determine congressional intent more than ten years before *Atkins*. *See* Healy, *supra* note 3, at 233 n.10.

90. *See generally id.* at note 3.

91. *See* Schiller, *supra* note 64, at 746 ("It is now a well-established principle that interpretation is required for the understanding of all words, not only for those difficult or obscure.... This is an entirely different conception from that of older times, for it was

It is unsurprising, therefore, that the Supreme Court has employed the *communis opinio* canon in cases in which the Court has looked beyond the text alone to decide whether an ambiguity was present. In *Brewster v. Gage*,[92] the Court decided to adhere to the executive's common practice under a statute, because that practice "[did] no violence to the letter or spirit of the provisions

---

assumed that writings properly framed needed no interpretation.") (footnotes omitted); Frederick J. De Sloovère, *Contextual Interpretation of Statutes*, 5 FORDHAM L. REV. 219, 219 (1936) ("The first canon of interpretation—that if a statute is plain and explicit it needs no interpretation—is meaningless, for one can hardly ever say that a statute is plain and explicit until it has been subjected to the tradition techniques and processes of interpretation."); *cf.* Johnson v. United States, 529 U.S. 694, 705 n.7 (2000) ("English is rich enough to give even textualists room for creative readings."); Muscarello v. United States, 524 U.S. 125, 138 (1998) ("[M]ost statutes are ambiguous to some degree"). In another article, I have presented the view that the English requirement that a statutory text must be either ambiguous, absurd, or obscure before a court may pursue the intentionalist approach to interpretation has not successfully limited judicial use of intentionalism, because the requirement can so easily be met. *See generally* Healy, *supra* note 3, at 247-50.

This question of the clarity or ambiguity of a text somewhat obscures the underlying issue of the context in which the text is understood:

> To claim, then, as I do, that the phrase *the text itself* is oxymoronic is to argue not that formalism is undesirable and that we should stop being formalists but that formalism is impossible and that no one ever has been a formalist. To read is always already to have invoked the category of the extrinsic, an invocation that is denied, as I suggested earlier, not only by avowedly formalist critics but by all those who think of textual meaning as in any sense intrinsic. Many contemporary legal and literary theorists, for example, are accustomed to thinking of language as inherently "ambiguous" or "undecidable," a position that at least appears to be more responsive to the complexities of contracts and poems than any doctrine of plain meanings. But the trouble with this account is that it simply replaces clarity and precision as properties of language with ambiguity and undecidability. In fact, although some texts are ambiguous, no texts are inherently ambiguous, and although some texts are precise, no texts are inherently precise either. ... [N]o text is inherently anything. The properties we attribute to texts are in fact functions of situations, of the contexts in which texts are read.

Walter Benn Michaels, *Against Formalism: Chickens and Rocks in* THE STATE OF THE LANGUAGE 418-19 (Leonard Michaels & Christopher Ricks eds., 1980); *cf.* John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. 685, 694 n.42 (1999) ("Sometimes texts are precise and clear when considered in their linguistic and cultural environments.") (citations omitted).

92. 280 U.S. 327, 336 (1930).

construed."[93] In *United States v. Pugh*,[94] the Court considered an interpretive "question [that] is one by no means free from doubt,"[95] and decided to give "great respect" to the administrative practice that had developed in the implementation of the statute.[96] The Court stated that it was "not inclined to interfere, at this late day, with a rule which has been acted upon by the Court of Claims and the executive for so long a time,"[97] and responded to the concern that the practice conflicted with the statutory text with the following nontext-based assertion: "If this practice is not supported by the exact letter of the law, it is by the spirit, and it is certainly just. We are not disposed to change it."[98]

The willingness of the Supreme Court to consider more than the statutory text to determine statutory meaning, including whether the statute is ambiguous, does not necessarily mean that the canon will be applied with greater frequency. Because extrinsic evidence of intent or meaning may eliminate statutory ambiguity as well as create it, a court that is willing to look to more than a facially ambiguous statutory text may decide that the *communis opinio* canon has no application because other evidence shows that the statute has a clear meaning. For example, in *Jacobs v. Prichard*,[99] the Court considered the "immediate and continued construction of the act of Congress by the Interior Department,"[100] and stated that "such construction would determine against ambiguity in the act even if we should admit ambiguity existed."[101] The Court concluded, however, that "we find no ambiguity in the act when we consider its

93. *Id.* The Court also indicated:

> These regulations were prepared by the department charged with the duty of enforcing the Acts. The rule so established is reasonable and does no violence to the letter or spirit of the provisions construed. A reversal of that construction would be likely to produce inconvenience and result in inequality. It is the settled rule that the practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons.

Id. (citations omitted).

94. 99 U.S. 265 (1878).

95. *Id.* at 269.

96. *Id.*

97. *Id.*

98. *Id.*

99. 223 U.S. 200 (1912).

100. *Id.* at 213-14.

101. *Id.*

purpose," and accordingly had no need to employ the *communis opinio* canon.[102]

In sum, the first requirement for the application of the *communis opinio* canon is quite simple to define: The canon may be used only when the statute at issue is ambiguous. The application of this requirement is more controversial. Traditionally, and under Justice Scalia's formalist interpretative method, courts consider only the statutory text to determine whether it is ambiguous. Nonformalist judges like Justice Stevens, however, would consider the text and extrinsic evidence of statutory meaning to determine whether an ambiguity exists.

2. Contemporary Usage (Including Inaction)

The second requirement for the application of the *communis opinio* canon is the existence of a common practice in response to a statutory provision. Most often, the common practice is defined by the conduct of the executive or judiciary. Also, the practice of private parties may be the source of common practice. Less commonly, well-accepted inaction by groups that are the subject of a statutory provision may be relied upon by courts to conclude that a statute does not permit conduct that a group contends is permitted by the statute.

A striking example of common practice by the government determining the meaning of a statute occurred in *United States v. Hill*.[103] There, the United States had brought an action against the clerk of the United States District Court for the District of Massachusetts, asserting a statutory right to recover money from the clerk. The applicable statutory provision stated that each district court clerk must

> on the first days of January and July in each year, or within thirty days thereafter, make to the attorney general, in such form as he may prescribe, a written return for the half year ending on said days, respectively, of all the fees and emoluments of his office of every name and character, and of all the necessary expenses of his office, including necessary clerk hire,

102. *Id.*
103. 120 U.S. 169, 182 (1887).

> together with the vouchers for the payment of the same for such last half year. He shall state separately in such return the fees and emoluments payable under the bankrupt act. . . . Said returns shall be verified by the oath of the officer making them.[104]

Despite the breadth of this requirement to report to the Attorney General "all the fees and emoluments of his office of every name and character,"[105] the clerk conceded that he had not reported the receipt of certain naturalization fees.[106] The parties' agreed statement of facts presented the clerk's position that the reporting was lawful because it conformed to the long-standing practice in the District of Massachusetts:

> As clerk, he has made half-yearly returns of fees and emoluments received by him, but he has not included in the same the amounts received by him for the naturalization of aliens in the District Court.
>
> It has been the custom in the United States Courts in the District of Massachusetts, for a long time, not less than forty-five years before the date of the writ in the present action, and known and approved by the judges, for the clerk to charge one dollar as a fee for a declaration of intention to become a citizen, and two dollars as a fee for a final naturalization and certificate thereof; and the clerk of the District Court has never included these in the fees and emoluments returned by him, and this has been known to the judges to whom the accounts have been semi-annually exhibited, and by whom they were passed without objection in this particular.[107]

The circuit court, which first reviewed the claim, held in favor of the clerk. In its decision, quoted at length by the Supreme Court, the circuit court virtually ignored the broad statutory text that gave rise to the government's claim and relied instead on the long- and well-established practice of the Massachusetts court and the fact that the executive departments never objected to the legality of the

104. *Id.* (quoting MASS. REV. STAT. § 833 (1853)).
105. *Id.*
106. *Id.* at 171.
107. *Id.*

practice.[108] The circuit court concluded that "[t]his construction of the statute in practice, concurred in by all the Departments of the government, and continued for so many years, must be regarded as absolutely conclusive in its effect."[109]

In its own analysis of the case, the Supreme Court also resisted any detailed review of the statutory text, and instead asserted that the text was "doubtful" and therefore the statute's meaning was determined by the practice of those the statute regulated:

> With this long practice, amounting to a contemporaneous and continuous construction of the statute, in a case where it is doubtful whether the statute requires a return of the disputed fees, judges of eminence, heads of departments, and accounting officers of the Treasury having concurred in an interpretation in which those concerned have confided, the surety in the present bond, as well as his principal, had a right to rely on that interpretation in giving the bond; and the semiannual accounts of the principal having been actually examined and adjusted at the Treasury, with the naturalization fees excluded, down to and including the one last rendered five months before this suit was brought, a court seeking to administer justice would long hesitate before permitting the United States to go back, and not only as against the clerk, but as against the surety on his bond, reopen what had been settled with such abundant and formal

---

108. *See id.* at 180. The circuit court is quoted as stating:

> No complaint of these [naturalization] fees has ever come to the ear of the court from any quarter. On the contrary, this service performed by the clerks has been of great advantage to those seeking to be admitted as citizens. It has had the effect, as originally intended, to simplify the process of becoming a citizen, and to make it more expeditious and inexpensive. It saves the parties the expense of employing an attorney, and the fee charged therefor is much less than would be allowed by the fee-bill, if the application is to be treated and entered on the docket of the court as an ordinary suit. In rejected cases no fee has been charged. This practice has prevailed for more than forty years, ever since the act of 1842, which first required returns, and has been perfectly well known to everybody conversant with the courts. It was begun by Judge Story and Judge Sprague, and has had the approval of all the judges of this district since their day. It has also had the sanction successively of the Department of the Treasury, the Department of the Interior, and the Department of Justice. Until this suit was brought, it has never been called in question by any accounting officer of the government; nor has Congress seen fit to put a stop to it by legislation.

Id. (quoting United States v. Hill, 25 F. 375, 379 (C.C. Mass. 1885)).

109. *Id.* (citations omitted).

> sanction. This principle has been applied, as a wholesome one, for the establishment and enforcement of justice, in many cases in this court, not only between man and man, but between the government and those who deal with it, and put faith in the action of its constituted authorities, judicial, executive, and administrative.[110]

In sum, common practice is often determined by government practice and may be defined by the actions of the executive,[111] the judiciary,[112] or the legislature.[113]

---

110. *Id.* at 182.

111. For an additional example of the Court's reliance on the common practice within the executive branch, see *Surgett v. Lapice*, 49 U.S. (8 How.) 48, 68 (1850), where the Court concluded:

> The foregoing construction being the one adopted by the departments of public lands soon after the act of 1832 went into operation, we should feel ourselves restrained, unless the error of construction was plainly manifest, from disturbing the practice prescribed by the Commissioner of the General Land Office, acting in accordance with the opinion of the Attorney-General, and which had the sanction of the Secretary of the Treasury and of the President of the United States.

See also Schell v. Fauche, 138 U.S. 562, 572 (1891) ("In all cases of ambiguity, the contemporaneous construction, not only of the courts but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling.") (citations omitted); United States v. Burlington & Mo. River R.R. Co., 98 U.S. 334, 341 (1879) ("Such has been the uniform construction given to the acts by all departments of the government. ... This uniform action is as potential, and as conclusive of the soundness of the construction, as if it had been declared by judicial decision. It cannot at this day be called in question.").

112. For a case relying on the common practice of courts, see *Hill v. Tohill*, 80 N.E. 253 (Ill. 1907). The court stated:

> To sustain the appellee's contention now would be to unsettle that which has for well-nigh 50 years been tacitly held by the courts of the state to be the law, and would be to destroy property rights which have grown up and been established on the theory that this statute was enforceable. This law having been regarded as valid and enforced without question as to its constitutionality by this court and other courts of the state since 1857, we would not now be justified in holding it to be unconstitutional unless its invalidity was clear, certain, and beyond question. ... While the question under discussion might in the first instance have presented some difficulty, the statute here challenged must now be regarded as a proper exercise of the police power.

Id. at 256 (citations omitted); *see also* United States v. Pugh, 99 U.S. 265, 269 (1878); *cf.* HENRY M. HART, JR., & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1379 (William N. Eskridge, Jr., & Philip P. Frickey eds., 1994), where the authors state:

> The court's own prior interpretations of a statute in related applications should be accepted, on the principle of *stare decisis*, unless they are manifestly out of

The application of the *communis opinio* canon may, however, be based on a practice that does not involve any of the three branches of government, but rather looks toward how private, affected parties understand the statutory provision. Moreover, although evidence of the common practice will usually be based on affirmative actions taken under the statute, a court may also look to inaction in defining the *communis opinio*. In *Atkins v. The Disintegrating Co.*,[114] the Supreme Court had to construe the scope of the grant of admiralty jurisdiction in section 11 of the Judiciary Act, which provided that "*no civil suit shall be brought before either of said courts, against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.*"[115] In this admiralty action, the defendant argued that the district court lacked jurisdiction because the action was a "civil suit" and the action was not brought in a district where the defendant was an inhabitant.[116] In addition to considering the meaning of the statutory text, the Court found significance in the fact that in earlier admiralty cases "the [jurisdictional] point here

---

> accord with other indications of purpose. Once these applications are treated as fixed, they serve as points of reference for juristic thinking in the same fashion as verbally clear applications in the case of a new statute.

Judicial practice need not be in the form of judicial opinions to constitute *communis opinio*. In *F.T.C. v. Mandel Bros., Inc.*, 359 U.S. 385, 391 (1959) (citations omitted), the Supreme Court stated that "[t]his contemporaneous construction is entitled to great weight even though it was applied in cases settled by consent rather than in litigation." *Accord* E.I. du Pont De Nemours & Co. v. Collins, 432 U.S. 46 (1977).

113. For an example of reliance on legislative practice to discern the meaning of a text, see *Fairbank v. United States*, 181 U.S. 283, 322 (1901), where Justice Harlan, dissenting for four Members of the Court, concluded that a long practice of statutory enactments showed the meaning of the Constitution's text:

> Many cases have been cited which hold that the uniform, contemporaneous construction by *executive* officers charged with the enforcement of a *doubtful* or *ambiguous* law is entitled to great weight and should not be overturned unless it be plainly or obviously erroneous. If such respect be accorded to the action of mere executive officers, how much greater respect is due to the legislative department when it has at different periods in the history of the country exercised a power as belonging to it under the Constitution, and no one in the course of a century questioned the existence of the power so exercised.

114. 85 U.S. (18 Wall.) 272 (1873).

115. *Id.* at 300-01.

116. *Id.* at 274.

under consideration was not adverted to either by the court or the counsel."[117] The Court stated, moreover, that

> [n]either in the rules of this court nor in either of the cases referred to is there any reference, express or implied, to the eleventh section of the act of 1789. It does not seem to have occurred to any one that the limitations in that section could have any application to proceedings in admiralty.[118]

The Court then stated its conclusion that "[t]hese facts are full of significance. They are hardly less effectual than an express authoritative negation upon the subject."[119] In sum, the Court found the practices of the admiralty bar as forming a solid basis for understanding the meaning of the Judiciary Act.

The Court also relied on broad and accepted inaction to hold that the federal circuit courts do not "exercise a common law jurisdiction in criminal cases."[120] The first argument offered by the Court to support this conclusion was the following:

> Although this question is brought up now for the first time to be decided by this Court, we consider it as having been long since settled in public opinion. In no other case for many years has this jurisdiction been asserted; and the general acquiescence of legal men shews the prevalence of opinion in favor of the negative of the proposition.[121]

An English court applied the canon in a similar manner when it considered that there had been no attempt over a long period of years to apply written law in a particular manner and therefore found a basis for concluding that the law foreclosed the novel application when it was finally proposed.[122] Likewise, in *Fairbank*

---

117. *Id.* at 305.

118. *Id.* at 305-06.

119. *Id.* at 306 (footnote omitted).

120. United States v. Hudson, 11 U.S. (7 Cranch) 32, 32 (1812).

121. *Id.*

122. In *Rex v. St. Edmundsbury & Ipswich Diocese*, 2 All E.R. 604, 604-05 (K.B. 1946) (citation and footnote omitted), the court held that the writ of certiorari sought by the claimant was not available for the following reason:

> It would be sufficient for this court to say, when they find that from the earliest days of the King's courts no writ of *certiorari* has ever been shown to have been

v. United States,[123] Justice Harlan, dissenting on behalf of four Members of the Court, relied on the fact that, for many years, no objection had been registered to an application of written law, as he argued that the Court should hold that the commonly accepted application is proper.[124]

To be sure, though, situations in which those affected by a statute or the Constitution have done nothing, rather than identifying through decisions or actions their understanding of the law, are likely to be viewed by courts as providing a far more tenuous basis for defining common practice. Indeed, one English court rejected a party's contention that the court should decline to adopt a proposed interpretation of a statute because it had not previously been advocated for the more than two hundred years the statute had been in effect.[125] Instead, like the Supreme Court majority in

---

issued by this court to an ecclesiastical court, that it is far too late now to come and ask this court to make a precedent and order a *certiorari* to issue. True, as I shall show later, prohibition has lain to the ecclesiastical courts since the 12th century, and probably earlier, but no trace can be found of a *certiorari* ever having been granted or even moved. As I said in the course of the argument, Lord Ellenborough in *Isherwood* v. *Oldknow*, said that *communis opinio* is evidence of what the law is, and it seems abundantly clear that there has been a *communis opinio* among lawyers that *certiorari* does not lie, because in the hundreds of cases which have come before the King's courts in the old days and afterwards in this court in which an excess of jurisdiction has been alleged against a spiritual court, there is no trace that counsel has ever attempted to obtain more than a prohibition or suggested that *certiorari* has been granted.

123. 181 U.S. 283 (1901).

124. In his dissent in *Fairbank*, Justice Harlan raised the following objection:

> Practically no weight has been given in the opinion just filed to the fact that the power now denied to Congress has been exercised since the organization of the Government without any suggestion or even intimation by a single jurist or statesman during all that period that the Constitution forbade its exercise. It is said that the question of power never was presented for judicial determination prior to the present case, and therefore this court is at liberty to determine the matter as if now for the first time presented. But the answer to that suggestion is that, in view of the frequent legislation by Congress and its enforcement for nearly a century, the question must have arisen if it had been supposed by any one that such legislation infringed the constitutional rights of the citizen. Within the rule announced in *Stuart v. Laird*, and in other cases, the questions should be considered at rest.

Id. at 323 (Harlan, J., dissenting).

125. See *Hickman v. Potts*, 3 All E.R. 794, 802 (C.A. 1939). The court presented the following discussion:

> It remains for us to deal with what was the main strength of the argument of counsel for the respondent, that this point has never been taken in the 230

Fairbank, the English Court of Appeal viewed the case as "one in which we have to decide for the first time a question which might well have arisen before, but never has done so."[126]

In sum, the practice, and in certain circumstances the inaction, of the executive, the judiciary, and the legislature, as well as affected private parties, may identify *communis opinio* to a court and thereby fix the meaning of statutory or constitutional text.

C. Interpretive Effect of the Canon's Application

Once a court has determined that the *communis opinio* canon applies to the resolution of the interpretive issue, it must define the interpretive effect of applying the canon. A leading casebook on the subject of statutory construction posits that courts may give a range of legal effects to substantive canons when interpreting legislation.[127] Under this view, a canon's impact may vary from

---

> years during which the Act has been in force. Now, this is not a case in which an appellate court is asked to reverse a decision of long standing on the faith of which persons have acquired rights and ordered their affairs. It is one in which we have to decide for the first time a question which might well have arisen before, but never has done so. It is fruitless to attempt an inquiry as to the reason for this silence, not only of decided cases, but of text writers. Certainly one would have thought that *Hutchins v. Chambers* would have encouraged landlords to raise it, or text writers to discuss it. Even if we assume that those whose business it is to levy distress for rates have been long of opinion that the Act does not apply, this affords no ground for perpetuating the error. "*Communis error facit jus*" is a maxim of very limited application; it is truer to say—as was said by Lord Ellenborough, C.J., in *Isherwood v. Oldknow*—"*communis opinio* is evidence of what the law is," but here there is no trace of a *communis opinio* among lawyers. And if there has been prevalent an erroneous view of the Act, it is clear that no one has acquired rights in consequence; the most that can be said is that landlords have perhaps been induced to refrain from exercising the right given them by the Act in the particular case of distress for rates. Whether it is desirable in modern conditions that the landlord should have a preference over the rating authority is a matter for the legislature, and not for the courts. We are bound to decide the case according to what we believe to be the true view of the law.

Id. (citations omitted).

126. *Id.*

127. ESKRIDGE & FRICKEY, *supra* note 1, at 655. See also Sunstein, *supra* note 2, at 650, where Professor Sunstein makes the following statements about the different effects of rules of construction:

> [S]ome interpretive rules are *based on public policy and inalienable*; they are, in that sense, far more than mere default rules. Constitutional law amounts to

providing a tiebreaker when the meaning is uncertain in the absence of the canon, to determining a presumptive meaning of the statute that may be overcome by other, stronger evidence of statutory meaning, to compelling the statutory meaning in the absence of an alternative clear or even super-clear statement.[128]

Courts employing the *communis opinio* canon have given the canon each of these various effects, regardless of whether they actually defined the legal effect of applying the canon or expressly analyzed whether one effect or another of the canon was proper.[129] A limitation on the application of the canon that likely would be generally accepted as a matter of theory is that common practice cannot change what a statute otherwise requires; that *communis error* does not *facit jus*.[130] This limit, however, is most uncertain,

---

the equivalent of inalienable default rules for statutory interpretation; of course Congress is not permitted to contract around constitutional requirements. These points are pretty obvious, but a less obvious point is in the background: There is a continuum from "other things being equal" default rules to "superstrong" default rules, which require an especially clear statement from the parties or from Congress, to genuinely inalienable default rules.

128. ESKRIDGE & FRICKEY, *supra* note 1, at 655; *see also* SUNSTEIN, *supra* note 1, at 189 ("Some of these principles [of statutory construction] tell courts what to do when the interpretive enterprise otherwise leaves judges in equipoise. Some of them are not just tiebreakers, but impose a presumption, one that can be overcome only through a 'clear statement' from the legislature.").

129. Such debates about the legal effect of the application of a canon are relatively rare. Professors Eskridge and Frickey discuss one example of such a debate in a recent article. William N. Eskridge & Phillip P. Frickey, *The Supreme Court 1993 Term: Law as Equilibrium*, 108 HARV. L. REV. 26, 85-87 (1994). In the case they discuss, *Hagen v. Utah*, 510 U.S. 399 (1994), the Court majority concluded that the canon calling for a strict construction of statutes diminishing the size of Indian reservations was a tiebreaker canon, and rejected the contention that the canon established a clear statement requirement. *Id.* at 411-12; *see also* Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108-10 (1991) (contrasting a canon defining a "presumption . . . properly accorded sway only upon legislative default" with a canon "that entails a requirement of clear statement, to the effect that Congress must state precisely any intention to overcome the presumption's application"); *cf.* Shalala v. Illinois Council on Long Term Care, Inc., 529 U.S. 1, 32 (2000) (Scalia, J., dissenting) (distinguishing between a "presumption," which "suggests that some unusually clear statement is required by way of negation," and a "background rule, which can be displaced by any reasonable implication . . . from the statute").

130. *See* United States v. The Reindeer, 27 F. Cas. 758, (C.C.D.R.I. 1861) (No. 16,145) ("[A] usage or custom which violates an express law, created by statute or perhaps any other way, may not protect one who breaks the law.") (citations omitted); Rogan v. Baltimore & O. R. Co., 52 A.2d 261, 268 (Md. 1947) ("No custom, however venerable, can nullify the plain meaning and purpose of a statute.").

because different courts may reach different conclusions about what the statute understood in context otherwise requires.

1. Communis Opinio *as Tiebreaker*

Employing a canon as a tiebreaker to resolve any statutory ambiguity would appear to be a well-accepted and long-standing use of a rule of construction. To the extent that the canon is well-known, a court may defend this application of the canon because the legislature could have avoided its application by providing a statute that was not ambiguous.[131]

In *Brown v. United States*,[132] the parties disagreed about whether a statutory provision "applie[d] only to commissioned officers, and not to warrant officers, to which latter class Brown belonged."[133] The Court "conceded that were the question a new one the true construction of the section would be open to doubt."[134] The practice of the President and the Navy Department following enactment of the statute was to apply the provision to both groups of servicemembers. The Court held that "[t]his contemporaneous and uniform interpretation is entitled to weight in the construction of the law, and in a case of doubt ought to turn the scale."[135] Many applications of the *communis opinio* canon discussed in earlier sections of this Article indicate that the courts often have taken this tiebreaker approach to the legal effect of the canon.

Despite the fact that this approach to the application of canons is well accepted, the tiebreaker approach still may result in controversy. If the court disagrees about whether the statute is ambiguous, then the court will disagree about allowing the canon to determine the statute's meaning. For example, the majority in *McNally v. United States*[136] applied the rule of lenity in explaining its narrow interpretation of a criminal prohibition.[137] The dissenters argued that the majority discerned an ambiguity where none was

131. *Cf.* Sunstein, *supra* note 2, at 645-50 (analogizing rules of statutory construction to default rules against the background of which Congress legislates).

132. 113 U.S. 568 (1885).

133. *Id.* at 570.

134. *Id.*

135. *Id.* at 571.

136. 483 U.S. 350 (1987).

137. *Id.* at 356-57, 360-61.

present and the rule of lenity did not apply because the statute had a broad and determinate meaning.[138] Another potential criticism of giving this effect to this or any other canon is that Congress may have had no reason to know of the canon as a default rule and accordingly could not have been expected to direct a specific reading of the statute with particular clarity.[139] There are two reasons why this criticism lacks real force regarding the *communis opinio* canon. First, unlike other substantive canons, the *communis opinio* rule is not based on a court's view of the default rules for substantive legislation, for which the court assumes the legislature has accounted in its statutory text.[140] The effect of the *communis opinio* canon turns on how the legislation is understood by affected parties, rather than a court's potentially shifting views of the background norms of legislation. Second, this canon is based on common practice in response to the statutory scheme. In other words, the default rule is based on an accepted practice, one which Congress would know and could change by a statutory amendment if it considered the practice to be inconsistent with the statute.[141]

In sum, the use of *communis opinio* to break the tie inhering in an ambiguous statutory text is well-established and noncontroversial.

2. Communis Opinio *as Presumptive Meaning*

In several decisions, the Supreme Court has stated that the legal effect of *communis opinio* is to identify the presumptive meaning of the statutory text, one that may be overcome only by a showing of an "error of construction" that is "plainly manifest."[142] Because the

---

138. *Id.* at 375-76.

139. *See* Eskridge & Frickey, *supra* note 129, at 85. The dissenters in *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765 (2000), objected for this reason to the majority's application of a clear statement requirement when interpreting the federal *qui tam* statute. *Id.* at 789-96 (Stevens, J., dissenting).

140. *See* ESKRIDGE & FRICKEY, *supra* note 1, at 654.

141. *But see infra* notes 233-34 and accompanying text (discussing the view that congressional inaction is not good evidence of congressional intent).

142. In *Surgett v. Lapice*, 49 U.S. (8 How.) 48 (1850), the Court's analysis of the effect of *communis opinio* was the following:

> The manifest object of Congress was to disembarras [sic] public sales by barring preference rights that would be a cloud on the title of lands thus offered.

Courts that characterized the canon's effect in this way also decided that the common practice reflected a reasonable reading of the statutory texts, the Courts had no occasion to define the circumstances under which a party would be able to overcome the presumptive meaning fixed by the *communis opinio*.[143] Moreover, the difference in the legal effects of tiebreaker and presumptive meaning may be no more than rhetorical.[144]

3. Communis Opinio *as Clear Statement Rule*

In special circumstances, *communis opinio* has had an effect more significant than tiebreaker or presumptive meaning. In these cases, the Supreme Court has given *communis opinio* the effect of determining a statute's meaning, notwithstanding conflicting statutory text. When Chief Justice Marshall applied the canon in *M'Keen*,[145] he construed the statute in accordance with *communis opinio*, despite the fact that the custom was contrary to the plain meaning of the statute's text. The Court interpreted the statute to conform to *communis opinio* because it did not wish to jeopardize

---

> The foregoing construction being the one adopted by the departments of public lands soon after the act of 1832 went into operation, we should feel ourselves restrained, unless the error of construction was plainly manifest, from disturbing the practice prescribed by the Commissioner of the General Land Office, acting in accordance with the opinion of the Attorney-General, and which had the sanction of the Secretary of the Treasury and of the President of the United States.

Id. at 68; *see also* Universal Battery Co. v. United States, 281 U.S. 580, 583 (1929) ("This construction of those [statutory] terms has been adhered to in the Internal Revenue Bureau for about ten years and it ought not to be disturbed now unless it be plainly wrong. We think it is not so, but is an admissible construction."); United States v. State Bank of N.C., 31 U.S. (6 Pet.) 29, 30 (1832) ("The construction of the law of the United States now claimed, had been that of universal practice since it was enacted.... This received construction will induce the court to hesitate before it will adopt another...."); *id.* at 39-40 (stating that a long held practice lent strong support "for a liberal construction; and could not now be disturbed without introducing a train of serious mischiefs" and that "the practice was founded in the true exposition of the terms and intent of the act; but if it were susceptible of some doubt, so long an acquiescence in it would justify us in yielding to it as a safe and reasonable exposition").

143. *See* cases cited *supra* note 142.

144. *See* Eskridge & Frickey, *supra* note 129, at 68 ("Virtually all of the textual and referential canons are 'presumptions' of meaning; they are merely a factor to be considered, or a tiebreaker in close cases.").

145. M'Keen v. Delancy's Lessee, 9 U.S. (5 Cranch) 22 (1809).

the security of property interests established in reliance on *communis opinio*.[146] Similarly, the Court's decision in *United States v. Hill*[147] relied on the long-standing practice of district court clerks not reporting the receipt of fees in immigration cases to limit the scope of a statute requiring the reporting of "all the fees and emoluments"[148] of the clerk's office.[149] To be sure, the *Hill* Court protested that the meaning of the statute's text was "doubtful."[150] Nevertheless, the only fair conclusion is that the Court relied on the canon in a manner that conflicted with the statutory text. Justice Stevens's application of the *communis opinio* canon in *Brogan* would have given similar preclusive effect to custom, notwithstanding the broadly stated prohibition in the False Statements Act.

Application of the canon in *Hill* and *Brogan* had the effect of limiting the scope of a statute's broad and general language. In giving this effect to the canon, the Justices relying on the canon engaged in a use of canons that is increasingly important in the Rehnquist Court's jurisprudence. Commentators on the Supreme Court's recent statutory interpretation decisions have described the Court's tendency to fashion some rules of construction as requiring that the legislature provide a clear textual statement before the Court will reach certain interpretive results.[151]

---

146. See *id.* at 32, where the Court presents the following discussion:

> Were this act of 1715 now, for the first time, to be construed, the opinion of this court would certainly be, that the deed was not regularly proved. A justice of the supreme court would not be deemed a justice of the county, and the decision would be, that the deed was not properly proved, and therefore not legally recorded.
>
> But, in construing the statutes of a state on which land titles depend, infinite mischief would ensue, should this court observe a different rule from that which has been long established in the state; and in this case, the court cannot doubt that the courts of Pennsylvania consider a justice of the supreme court as within the description of the act.

147. 120 U.S. 169 (1887).

148. *Id.* at 172 (quoting MASS. REV. STAT. § 833 (1853)).

149. *See id.* at 180 ("This construction of the statute in practice, concurred in by all the Departments of the government, and continued for so many years, must be regarded as absolutely conclusive in its effect.") (citations omitted).

150. *Id.* at 182.

151. For example, Professors Eskridge and Frickey wrote:

> Some of the substantive canons, however, have now been developed as more powerful "clear statement rules," which are presumptions that can only be rebutted by clear statements in the statutory text. The Court's choice to

This transformation in the treatment that certain canons of construction receive can be observed in the Court's changing attitude toward the canon that statutes are to be interpreted to avoid a constitutional question. The traditional application of this canon requires a court to apply a tiebreaking rule in favor of an interpretation of the statute that does not raise a question of constitutional infirmity, provided that the interpretation is "fairly possible."[152] In *National Labor Relations Board v. Catholic Bishop of Chicago*,[153] Chief Justice Burger redefined the legal effect of this canon to require that there be a "clear expression of an affirmative intention of Congress"[154] before the Court will construe a statute "in a manner that could in turn call upon the Court to resolve difficult and sensitive" constitutional questions.[155] The Court's interpretive method in *Catholic Bishop* indicated that Congress could express its clear intent in statutory text or in the legislative history.[156]

The Rehnquist Court has further modified the effect of at least some canons grounded in constitutional values. In *Gregory v. Ashcroft*,[157] the Court held that, before it will construe a statute in a way that raises a question of constitutionality, "it must be plain to anyone reading the Act" that it has a constitutionally

---

> articulate a canon as a clear statement rule rather than as a presumption not only imposes a higher burden on those seeking to trump the canon, but signals the intensity of the Court's preferences.

Eskridge & Frickey, *supra* note 129, at 68-69 (footnote omitted).

Professor Popkin has written that Justice Stevens has fashioned clear statement rules when particular interpretive questions are at issue as well:

> These tests for piercing the veil of statutory language are versions of the "clear statement" doctrine, which posits that certain substantive results will be inferred only when the statutory language clearly impels it. Justice Stevens applies this doctrine when he rejects the apparent meaning of the statutory language because it produces results that he "cannot believe" the legislature intended without a clear statement to that effect, especially if Congress seems unaware of what it is doing.

Popkin, *supra* note 43, at 1152 (footnotes omitted).

152. *See, e.g.*, International Ass'n of Machinists v. Street, 367 U.S. 740, 749-50 (1961); Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804).

153. 440 U.S. 490 (1979).

154. *Id.* at 504.

155. *Id.* at 507.

156. *See id.* at 504-07 (examining statutory text and legislative history for evidence of any affirmative intention of Congress).

157. 501 U.S. 452 (1991).

questionable meaning.[158] Although this last change may reflect only the fact that the Court has become more formalist in its approach to interpretation, the change does mean that the clear statement must be in the text, rather than in the legislative history.[159] This requirement of clear text goes beyond the rationale of *Catholic Bishop*, which sought to ensure congressional deliberation on the question of constitutional import, and runs a serious risk of disingenuous interpretive results when the question of constitutional doubt is one that the Court identified after the statute was enacted.[160] By using these rules, the Court may improperly present an interpretive result as consistent with principles of legislative supremacy, when the Court itself is actually imposing the legal rule.[161]

---

158. *Id.* at 467.

159. A more cynical view of the use of these clear statement rules by formalists would be that the Court's formalists have found that they need to have rules of construction available to them that will trump the plain, though not explicit, meaning of broadly written statutory text when the formalists view the interpretive result directed by the text as objectionable.

160. This general point was made fifty years ago with regard to the aggressive use of canons:

> Rules of interpretation in the nature of presumptions are the hardest with which to deal. They are fictional rules of interpretation and frequently lead to results exactly opposite those which legislatures intend. At best they are judicial standards requiring a particular form of legislative expression. As such, they are within limits defensible. Every system of government depends upon the ability of society to require of its people certain formalities as prerequisite to legal consequence. It is not too much to require this of the agencies of government as well. Formalities, however, become intolerable when they no longer reflect the normal expectations of the society for which they were constructed. To test thus the rules of presumed intention discloses that they are altogether unsatisfactory.

Frank E. Horack, Jr., *The Disintegration of Statutory Construction*, 24 IND. L.J. 335, 342-43 (1949).

161. Hart and Sacks make a similar point:

> [The principle of institutional settlement], obviously forbids a court to substitute its own ideas for what the legislature has duly enacted. What the legislature *has* thus enacted should not be frustrated or defeated. What it *has not* thus enacted should be declared to be law, if at all, only upon the court's independent responsibility and not upon a pretense of legislative responsibility.

HART & SACKS, *supra* note 112, at 1194-95; *see* Horack, *supra* note 160, at 345 ("Numerous other rules of presumption [in statutory construction] serve the function of shifting policy determination from the legislature to the court."); *cf.* De Sloovère, *supra* note 91, at 236. De Sloovère notes:

> Presumptions and maxims must be relegated to the secondary position of justifying ... the conclusions reached. Indeed, this ... has been going on in

As applied by the Court in *M'Keen* and *Hill* and by Justice Stevens in *Brogan*, *communis opinio* has an effect that is quite similar to a clear statement rule for the Rehnquist Court. When employed in this way, *communis opinio* seems appropriate because it would tend to foreclose major changes in the law that may not have been intended by the legislature and were not, given the common practice that developed under the statute, generally understood to result from the legislative enactment.[162] This

---

> statutory interpretation for centuries, with the result that the writers of digests and texts have been erroneously elaborating the maxims rather than dealing directly with actual problems of interpretation as found in the case law.

Id.

This concern should not be read so broadly as to condemn the whole enterprise of fashioning rules for construing statutes. Professors Eskridge and Frickey, for example, describe the value of establishing an "interpretive regime":

> An interpretive regime is a system of background norms and conventions against which the Court will read statutes. An interpretive regime tells lower court judges, agencies, and citizens how strings of words in statutes will be read, what presumptions will be entertained as to statutes's [sic] scope and meaning, and what auxiliary materials might be consulted to resolve ambiguities. Interpretive regimes serve both rule-of-law and coordination purposes. The integrity of an interpretive regime provides some degree of insulation against judicial arbitrariness; by rendering statutory interpretation more predictable, regular, and coherent, interpretive regimes can contribute to the rule of law.

Eskridge & Frickey, *supra* note 129, at 66; *see also id.* at 66-67 (describing the "institutional coordination functions" served by defining an interpretive regime: "The Court can perform a valuable coordinating function by generating 'off-the-rack,' gap-filling rules that are accessible ex ante to the drafters. Knowing the interpretive regime into which statutes will be developed over time, the players in the legislative bargaining process will be better able to predict what effects different statutory language will have."). Professor Sunstein has also argued that courts may limit the costs of uncertainty of statutory interpretation by prescribing well-defined rules of construction. *See* Sunstein, *supra* note 2, at 650.

As I argue in the text, the objection that a clear statement rule will result in courts interpreting statutes in ways unintended by the legislature does not have much force in the context of the use of *communis opinio* as a clear statement rule.

162. For this reason, a court's application of the *communis opinio* canon as a clear statement rule does not raise the concerns about judicial activism voiced by Dean Pound in the early twentieth century:

> There are two ways in which the courts impede or thwart social legislation demanded by the industrial conditions of today. The first is narrow and illiberal construction of constitutional provisions, state and federal.... The second is a narrow and illiberal attitude toward legislation conceded to be constitutional, regarding it as out of place in the legal system, as an alien element to be held down to the strictest limits and not to be applied beyond the requirements of its express language. The second is by no means so conspicuous as the first, but is not on that account the less unfortunate or the less dangerous.

constraining, conservative use of *communis opinio* seems quite consistent with the historical roots of the ancient canon.[163] This clear statement application of *communis opinio* also is consistent with the rule of clear statement that the Supreme Court, and Justice Stevens in particular, occasionally has applied when the interpretive issue is whether a legislative enactment has changed a settled and clear pre-existing legal rule. On those occasions, the Court has declined to give a broad, unsettling effect to the text in the absence of either a clear statement in the text or clear deliberation and expression of intent in the legislative history.[164]

Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 385 (1908).

163. *See supra* notes 57-61 and accompanying text.

164. *See* Chisom v. Roemer, 501 U.S. 380, 396 (1991) ("We reject that construction because we are convinced that if Congress had such an intent, Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history of the 1982 amendment.") (footnote omitted); American Hosp. Ass'n v. NLRB, 499 U.S. 606, 613-14 (1991) ("If this amendment had been intended to place the important limitation on the scope of the Board's rulemaking powers that petitioner suggests, we would expect to find some expression of that intent in the legislative history.") (citation omitted); Williams v. United States, 458 U.S. 279 (1982) (explaining that if Congress intended for a statute to be a national bad check law, "it did so with a peculiar choice of language and in an unusually backhanded manner.... Absent support in the legislative history for the proposition that [the statute] was 'designed to have general application to the passing of worthless checks;' we are not prepared to hold petitioner's conduct proscribed by that particular statute.") (citation and footnote omitted). This approach is often recognized by the allusion to Sherlock Holmes's use of the evidence of the dog that did not bark. *See* Griffin v. Oceanic Contractors Inc., 458 U.S. 564, 588-89 & n.20 (1982) (Stevens, J., dissenting) (citing A. CONAN DOYLE, *Silver Blaze*, *in* THE COMPLETE SHERLOCK HOLMES 383 (1938)); Harrison v. PPG Industries, Inc., 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting) ("In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night."). As these citations indicate, Justice Stevens has been particularly supportive of this approach. *See* Popkin, *supra* note 43, at 1152 ("Justice Stevens applies this [clear statement] doctrine when he rejects the apparent meaning of the statutory language because it produces results that he 'cannot believe' the legislature intended without a clear statement to that effect, especially if Congress seems unaware of what it is doing.") (footnote omitted). This clear statement approach has distinguished scholarly support from Professors Wellington and Albert, who wrote:

> [T]he invocation of the clear statement rule would seem appropriate ... where one interpretation of a statute would work vast and far-reaching changes in an established body of jurisprudence, either statutory or common law. Such changes in a body of existing doctrine is not a factor Congress is likely to have considered in passing a statute, and the disruption worked by such a statute is a consideration worthy of legislative attention.

Harry H. Wellington & Lee A. Albert, *Statutory Interpretation and the Political Process: A*

Actual practice that is sufficient to establish *communis opinio* and that has arisen pursuant to the statutory text at issue in the case should, in fact, provide a surer foundation for a presumptive statutory meaning than in the context where the legislature has acted after the practice has developed.

The use of *communis opinio* to define a clear statement rule, however, contrasts sharply with the use to which formalists put clear statement rules when they are viewed as needed to overcome an otherwise clear statutory meaning—in those cases, the Court's new clear statement rules yield interpretations unlikely to have been intended by Congress, in circumstances in which Congress had no reason to anticipate a need to be any more specific in defining its intent.[165]

Comment on Sinclair v. Atkinson, 72 YALE L.J. 1547, 1563 n.50 (1963).

Other decisions, however, have rejected this interpretive approach. *See Chisom*, 501 U.S. at 406 (Scalia, J., dissenting) ("[W]e have forcefully and explicitly rejected the Conan Doyle approach to statutory construction in the past. We are here to apply the statute, not legislative history, and certainly not the absence of legislative history. Statutes are the law though sleeping dogs lie.") (citations omitted); *PPG Industries*, 446 U.S. at 592 ("[I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, . . . pursue the theory of the dog that did not bark.") (footnote omitted).

165. Professors Eskridge and Frickey have criticized the Court's use of clear statement rules in some recent cases as evidencing a "bait and switch" approach to statutory interpretation:

> [Two recent] decisions surely came as a surprise to Congress. Indeed, there is a "bait and switch" feature to [these] cases ... when Congress enacted the statutes in question, the constitutionality of the state-infringing provisions was clear and Congress could not have anticipated the *Gregory* rule; nor could a reasonable observer have predicted the expansion of *Gregory* in [the second case]. When the Court's practice induces Congress to behave in a certain way and the Court then switches the rules, Congress justifiably feels taken.

Eskridge and Frickey, *supra* note 129, at 85 (footnote omitted). These authors also made the following telling criticism of the formalists' recent use of clear statement rules:

> When candidly set forth and applied, clear statement rules are among the many ways the Court can signal to Congress its concerns about the constitutionality of government actions. But when the Court transparently manipulates the canons to fit its own substantive agenda, the Court places its credibility and legitimacy at risk. Like the Court's erratic textualist performance in statutory cases, its application of quasi-constitutional clear statement rules has been tactically clever in the short-term but institutionally risky in the longer-term. The Court's adventurism has been most apparent, and most normatively questionable, in the super-strong clear statement rules protecting states' rights at the expense of individual rights and national policies.

In sum, the Court, in different cases, has given the *communis opinio* canon all of the various effects that may result from a canon's application. When given the strongest possible canonical effect—the effect of foreclosing an interpretive result unless that result is directly compelled by the specific, rather than general terms of the statute—*communis opinio* does not raise the serious concerns of judicial limitation on legislative supremacy that are associated with the Supreme Court's application of super-clear statement rules in some of its recent statutory cases.

III. THE REASON OF *COMMUNIS OPINIO* AND ITS RELATION TO INTERPRETIVE METHODS

The previous part, by describing the source of the canon and the requirements for and effect of its application, presented strong reasons to reject Justice Scalia's claim that the *communis opinio* canon has no application to the interpretation of statutes. The Article now responds to Justice Scalia's view that *communis opinio* is simply an unsound basis for interpreting a statute and will lead to erroneous judicial decisions.[166] Justice Scalia's attack is considered in light of the rationale for the canon and the strength of that rationale. Use of this canon may be supported by the following four factors: *communis opinio* is telling evidence of the contextual meaning of a statute; *communis opinio* indicates the intent of the drafters of the statute; *communis opinio* establishes a strong reliance interest that ought to be recognized; and *communis opinio* has a significant place in the development of law and that place should be recognized by courts when they play their interpretive role in the development of statutory law. The strength of three of the four reasons for the canon—contextual meaning, reliance, and development of law—seem so strong that they show a flaw in the formalist approach advocated by Justice Scalia, which categorically rejects any application of *communis opinio* in cases of statutory construction.

Id. at 81-82 (footnote omitted).

166. *See* Brogan v. United States, 522 U.S. 398, 406-07 (1998).

A. Contextual Meaning

In their classic work, *The Legal Process*, Professors Hart and Sacks provide a forceful rationale for the use of *communis opinio* as a valuable aid in the interpretation of a statute:

> [An administrative or popular construction] affords weighty evidence that the words *may* bear the meaning involved. In the absence of reasons of self-interest or the like for discounting the construction, it is persuasive evidence that the meaning is a natural one. Considerations of the stability of transactions and of existing understandings counsel in favor of its acceptance, if possible. In cases where the construction has been widely accepted and consistently adhered, it may be said to fix the meaning—to *be* the meaning which experience has demonstrated the words to bear.[167]

Stating this rationale in somewhat different terms, Hart and Sacks also contend that the common practice that emerges out of a common understanding of a statute indicates not only that a meaning conforming to the practice is possible, but that such an interpretation is right, regardless of what the legislature might have intended:

> [A]ction [taken by those regulated by a statute], manifestly, is especially cogent evidence that the words of the statute would bear the meaning which the action necessarily attributed to them. Was it not also evidence that the meaning was not merely possible but right—and this on a principle independent of any assumed awareness of the popular understanding on the part of the legislature? In the social institution of language, is not the true meaning of words disclosed by the meaning which in fact they have communicated?

---

167. HART & SACKS, *supra* note 112, at 1379-80. These authors provide a different rationale in support of a court's reliance on previous judicial understanding of a statute:

> The court's own prior interpretations of a statute in related applications should be accepted, on the principle of *stare decisis*, unless they are manifestly out of accord with other indications of purpose. Once these applications are treated as fixed, they serve as points of reference for juristic thinking in the same fashion as verbally clear applications in the case of a new statute.

Id. at 1379.

> An illustration of the point is afforded by the experience which law professors, and no doubt other professors, almost invariably have in drafting examination questions. The question is written as carefully as the instructor knows how in order to raise for discussion certain problems and those problems only. Again and again, in reading answers the instructor will discover that a problem which he did not see was actually posed in the words he used, and that one or more problems which he thought were posed, were not, or at least not successfully posed. He will then alter his understanding of the question, for the purpose of grading the answers, so as to make it correspond with the meaning actually communicated rather than with the meaning which originally he had subjectively "intended."[168]

A court's decision to credit the meaning of a statute as determined by *communis opinio* also serves rule-of-law values.[169] "The rule of law requires that statutes ... be applied in an objective, consistent, and transparent way to citizens and others subject to the state's authority."[170] Such values are disserved by a judicial decision rejecting a common practice that arguably fixes statutory meaning.

A series of decisions interpreting various tariff acts in the second half of the nineteenth century reflects the approach to identifying statutory meaning advocated by Hart and Sacks,[171] and illustrates

---

168. *Id.* at 1270. As the quoted passage indicates, Hart and Sacks viewed common practice as so important to discerning the meaning of a statute because:

> Language is a social institution. Its successful functioning depends upon commonly accepted responses to particular verbal symbols used in particular kinds of contexts. These responses are social facts. A particular user of the language may play tricks with it, and assign his own private meanings to particular symbols in it. But he cannot unilaterally alter the social facts of other people's responses. He can affect those responses, if at all, only as people generally come to understand and accept his own originally private meanings.

Id. at 1188; *cf.* William Safire, *What Language in the Year 3000?*, N.Y. TIMES, Dec. 5, 1999, § 6 (Magazine), at 29 ("Language has no life independent of its speakers and does not change according to laws of its own.").

169. The importance of employing the *communis opinio* canon to furthering rule-of-law values is discussed in greater detail *infra* in Part III.D.1.

170. William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 678 (1999).

171. *See* HART & SACKS, *supra* note 112, at 1268-69, where the authors stated:

> Evidence of the common understanding of [statutory] terms ... might be thought to be relevant for two reasons: first, as showing, at the least, that the

how the Supreme Court has traditionally viewed common practice as strong evidence of the meaning of statutory text. In *Maillard v. Lawrence*,[172] the Court considered a claim that worsted shawls should not have been subjected to the tariff applicable to "'clothing ready-made, and wearing apparel of every description, of whatever material composed, made up, or manufactured, wholly or in part by the tailor, sempstress, or manufacturer.'"[173] The claimant tried to show that the term "shawl" had a specialized meaning within the commercial community that brought it outside the statutory description. Responding to this contention, Attorney General Cushing relied principally on common practice to support the applicability of the tariff:

> The witnesses for the plaintiffs ... endeavor to confuse the plain meaning of the statute by introducing a sophistical sense, called by them "a commercial sense;" and even in that they put away the established significations of words, contradict standard writers on commerce, and repudiate common sense and common usage.
>
> Wearing apparel is a general description or genus comprehending many species, and shawls are undoubtedly a species of wearing apparel. Common use, the definitions and explanations of learned writers of commercial dictionaries, and of other lexicons, the daily experience of our own eyesight, all concur to convince our understandings, beyond a doubt, that shawls are a species of apparel worn by females.[174]

The Supreme Court rejected the appeal to special meaning, concluding that "[t]he popular or received import of words furnishes the general rule for the interpretation of public laws as well as of private and social transactions."[175] The Court's reasoning foreshadowed substantially the idea of the "social institution of language" elaborated by Hart and Sacks, as well as

---

words would bear the meaning reflected in the understanding; and, second, as showing, on the basis of the assumption that the legislature used the words in their ordinary signification to the people affected, that this meaning was the correct one.

172. 57 U.S. (16 How.) 251 (1853).

173. *Id.* at 257 (quoting schedule C of the Tariff Act of 1846).

174. *Id.* at 255-56.

175. *Id.* at 261.

the transparency concerns, implicit in its reference to the "safety" of giving words their common meaning, that motivate the rule-of-law rationale:

> The effort has been to substitute for the literal and lexicographical and popular meaning of the phrase "wearing apparel," some supposed mercantile or commercial signification of these words, and to render subservient to that signification what was clearly accordant with the etymology of the language of the statute, with the essential purposes and action of the government, and with the wide-spread, if not the universal understanding, of all who may not happen to fall within the range of a limited and interested class. In instances in which words or phrases are novel or obscure, as in terms of art, where they are peculiar or exclusive in their signification, it may be proper to explain or elucidate them by reference to the art or science to which they are appropriate; but if language which is familiar to all classes and grades and occupations—language, the meaning of which is impressed upon all by the daily habits and necessities of all, may be wrested from its established and popular import in reference to the common concerns of life, there can be little stability or safety in the regulations of society. Perhaps within the compass of the English language, and certainly within the popular comprehension of the inhabitants of this country, there can scarcely be found terms the import of which is better understood than is that of the words "shawl" and "wearing apparel," or of "shawl" as a familiar, every day and indispensable part of wearing apparel. And it would seem to be a most extravagant supposition which could hold that, in the enactment of a law affecting the interests of the nation at large, the legislature should select for that purpose language by which the nation or the mass of the people must necessarily be misled. The popular or received import of words furnishes the general rule for the interpretation of public laws as well as of private and social transactions; and wherever the legislature adopts such language in order to define and promulgate their action or their will, the just conclusion from such a course must be, that they not only themselves comprehended the meaning of the language they have selected, but have chosen it with reference to the known apprehension of those to whom the legislative language is addressed, and for whom it is designed to constitute a rule of conduct, namely, the community at large. If therefore

> the strange concession were admissible that, in the opinion of a portion of the mercantile men, shawls were not considered wearing apparel, it would still remain to be proved that this opinion was sustained by the judgment of the community generally, or that the legislature designed a departure from the natural and popular acceptation of language.[176]

The Court pursued the same interpretive approach in the more famous tariff act case of *Nix v. Hedden*.[177] There, the Court concluded that tomatoes are "vegetables" and not "fruit" in determining the applicable duty. The Court relied on the "[c]ommon language of the people, whether sellers or consumers of provisions," regardless of the category that might apply "[b]otanically speaking."[178] Similarly, in *Robertson v. Salomon*,[179] the Court rejected a claim that white beans should be free of duty because they are seeds "not otherwise provided for," rather than subject to a duty of ten percent as "vegetables."[180] The Court specifically held that evidence of common understanding of a product is admissible in determining the statute's applicability:

> The [trial] court, however, did not allow the [Customs Service] to prove the common designation of beans as an article of food. It was shown by the evidence that beans are generally sold and dealt in, under the simple designation of "beans;" but that does not solve the question as between the rival designations of "seeds" and "vegetables." The common designation as used in every-day life, when beans are used as food, (which is the great purpose of their production,) would have been very proper to be shown in the absence of further light from commercial usage. We think that the evidence on this point ought to have been admitted.[181]

The Court also rejected giving a classification to beans that, while technically accurate, was inconsistent with common practice: "We do not see why [white beans] should be classified as seeds any more

176. *Id.*
177. 149 U.S. 304 (1893).
178. *Id.* at 307.
179. 130 U.S. 412 (1889).
180. *Id.* at 413.
181. *Id.* at 414-15.

than walnuts should be so classified. Both are seeds in the language of botany or natural history, but not in commerce nor in common parlance."[182] In all three cases, the Court viewed it as wholly proper to discern statutory meaning on the basis of common practice.

In another of this series of cases, the Supreme Court identified common practice as critical to defining when a term used in a tariff statute will receive a specialized meaning. In *De Forest v. Lawrence*,[183] the claimant had imported dried sheepskins with the wool remaining on them and, because the trade designation for the import was "skins," sought to have the five percent duty for "raw hides and skins" applied to the import.[184] The Supreme Court held instead that the common practice within customs and within the course of tariff legislation determined the applicable tariff designation for the import, notwithstanding the terms that might be used in commercial dealing:

> The article [of import] has never been classed in any of the tariff acts under the designation of skins; but has been charged always, since it came under the notice of these [tariff] acts, with a specific duty. It has been thus charged, since the act of 1828, down to the present act, a period of some eighteen years. And, although it has been invoiced, and is known in trade and commerce, by the designation of sheepskin raw, and dried, and may, generally speaking, be properly ranged under the donomination [sic] of skins, as a class; yet, having a known designation in the revenue acts, distinct from the general class to which it might otherwise be assigned, we must regard the article in the light in which it is viewed by these acts, rather than in trade and commerce. For, when Congress, in legislating on the subject of duties, has described an article so as to identify it by a given designation for revenue purposes, and this has been so long continued as to impress on it a particular designation as an article of import, then it must be treated as a distinct article, whether there be evidence that it is so known in commerce or not. It must be taken as thus known in the sense of the revenue laws, by reason of the legal designation given to

182. *Id.* at 414.
183. 54 U.S. (13 How.) 274 (1851).
184. *Id.* at 280.

> it, and by which it has been known and practised on at the custom-house.[185]

In sum, these tariff act cases demonstrate that the meaning of statutory terms as set by the common practice may effectively determine statutory meaning, notwithstanding dictionary meaning.[186] Moreover, the relevant practice may be defined by a special group or groups especially affected by a statute's provisions.[187]

We consider now how the two principal modern approaches to statutory interpretation would evaluate this evidence of meaning. At some point, even nonformalists must recognize the significance of statutory text and accept that clear text may determine statutory meaning.[188] A nonformalist judge may wish to employ *communis opinio* as an especially effective check to decide whether the statutory text is determinative. When the common practice shows that the expected meaning of the words in the text has in fact been accepted and acted upon by those affected by positive law, nonformalists are almost certain to adhere to that interpretive result. The rule of law in such cases is plain.[189] When, however,

---

185. *Id.* at 281-82.

186. *See* G. A. ENDLICH, A COMMENTARY ON THE INTERPRETATION OF STATUTES § 357 (1888) ("[T]he meaning publicly given by contemporary, or long professional usage, is presumed to be the true one, even when the language has etymologically or popularly a different meaning.").

187. Professor Popkin has written that Justice Stevens has a special interest in assessing how legislative directives are understood by particular groups:

> Justice Stevens also worries more than most judges about the problems raised by deference to the plain meaning of language. He self-consciously focuses on the common historical understanding of the words at the time the statute was adopted. He worries about an often-neglected question arising from reliance on the plain meaning: to what audience is the meaning plain.

Popkin, *supra* note 43, at 1148 (footnote omitted).

188. *See, e.g.*, Frederick J. De Sloovère, *Textual Interpretation of Statutes*, 11 N.Y.U. L.Q. REV. 538, 543 (1934) ("Thus a limited sphere of direct influence of the doctrine of literalness is this: A sensible literal meaning of a statute must always be followed if there is no other meaning that the words can reasonably bear.").

189. Compare Michaels, *supra* note 91, at 418, who writes:

> The process of adjudication thus depends not on words which have plain meanings and can be used as touchstones against which to measure words whose meanings are not so plain. It depends instead on what Corbin calls "undisputed contexts," agreement on the meaning of one piece of language which can then compel agreement on the meaning of another. No text by itself can enforce such an agreement, because a "text by itself" is no text at all.

there is a *communis opinio* that is inconsistent with an arguably clear meaning of the statutory text, a nonformalist may conclude that the common practice has signaled that the text's meaning is not plain and that a contextual meaning is warranted.[190]

Indeed, *Brogan* itself is a case in which two nonformalists found the text so determinate in its meaning that they rejected Justice Stevens's *communis opinio* argument and rejected the "exculpatory no" doctrine, notwithstanding their stated public policy concerns about the broad scope of the False Statements Act as construed in *Brogan*.[191] These nonformalist Justices failed to find that the practice under the statute was a sufficient signal that the interpretive result should not be dictated by the determinate meaning of the text.

In other contexts, nonformalists may decide that a legal text must be interpreted contrary to a common practice, despite the fact that the common practice arguably conforms to the text, because other interpretive rules compel the contrary interpretation. For example, the practice of separate but equal may have been common following the adoption of the Fourteenth Amendment and that common practice may have been consistent with a meaning of the legal text.[192] There can be no doubt, however, that the Court properly rejected that practice based on its understanding of the

190. *Cf. id.* at 420 ("[P]lain meanings are functions not of texts, but of the situations in which we read them.").

191. *See* Brogan v. United States, 522 U.S. 398, 408-18 (1998) (Ginsburg, J., concurring). Justice Souter joined Justice Ginsburg's opinion.

192. See *Plessy v. Ferguson*, 163 U.S. 537, 550-51 (1896), in which the Court defended its acceptance of the legality of separate but equal by describing its wide spread applicability:

> So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

equality principle established by the Fourteenth Amendment.[193] In short, *communis opinio* should be an important, but not determinative, canon for nonformalists.

Communis opinio should be no less important to a formalist's interpretation of statutory text. Formalists would no doubt accept that, when the arguably clear meaning of statutory text is confirmed by a consistent common practice, the statute's meaning is fixed. It is, however, when *communis opinio* conflicts with the court's view of plain meaning that a formalist ought to employ the canon as a critical check on the autonomy of their interpretive method.[194] Putting aside constitutional issues of presentment and bicameralism,[195] formalists place such high value on the legal text because they value an autonomous interpretive regime that limits extratextual sources and opportunities for judges to impose their own ideological views through the interpretation of statutes.[196]

---

193. In *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), the Court framed the issue as follows: "We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does." Although the Court had received substantial evidence about the history of racial segregation around the time of the adoption of the Fourteenth Amendment, *id.* at 489, the Court abjured reliance on such evidence:

> In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Id. at 492-93.

194. Compare SUNSTEIN, *supra* note 1, at 187, who has written that:

> Dictionary definitions can be too numerous or too crude to capture contextual meaning. (Consider the words "bat," "equal," and "motor vehicle.") But courts should use the ordinary understandings of speakers of the relevant language. This approach promotes planning and imposes good incentives on legislators, by encouraging them to write in the way that people read. It also serves an important coordinating function, by allowing judges, who are not specialists, to start from common ground.

195. *See generally* Manning, *supra* note 91 (analyzing the extent to which the Constitution requires a formalist interpretive method).

196. *See* Sunstein, *supra* note 2, at 638-39; *see also* Michaels, *supra* note 91, at 411 ("[Formalism in contract interpretation was] an attempt to guarantee the objectivity of the contract by ensuring that both parties would be bound to what the words themselves said and not to anyone's 'subjective' or 'private' interpretation of what the words meant.").

A characteristic typically associated with the autonomy of formalism is inflexibility—a resistance to change.[197] One important context in which the inflexibility of formalism is apparent is that method's rejection of equity.[198] A classic statement of this formalist rejection of equity was presented by Blackstone, who praised the autonomy of law.[199]

---

197. *See* Guido Calabresi, *Two Functions of Formalism: In Memory of Guido Tedeschi*, 67 U. CHI. L. REV. 479, 482 (2000) ("[A] formal, self-contained, uncriticizable system of law is conservative. It can't be changed.").

198. *See* Sunstein, *supra* note 2, at 639 ("[F]ormalism stands opposed to 'equity,' in the form of a willingness to extend or limit the reach of the applicable text . . . ."). To illustrate the inflexibility of formalism, Judge Calabresi contrasted that approach with a functional interpretation, which was quite rare in the Middle Ages:

> For instance, in the Middle Ages in Italy, in Bologna, someone passed a law against shedding blood in the streets. The object of the law, I guess, was dueling, roughhousing, that kind of thing. It happened one day that a man was walking down the streets of Bologna and collapsed. He was sick; a doctor came along and, according to accepted medical practice, bled him, thus shedding blood in the streets. A policeman, seeing that the law as written was broken, arrested the doctor and brought him before a judge. The judge said what seems perfectly normal to us today, "that wasn't what the law was about. He did shed blood in the streets, but it had nothing to do with why the law was passed." And he let the doctor go. That is a typical example of a functional approach to law. The court looked not at the language of the law, but only to what the law was supposed to do. At that time in most other countries, such an approach would not have been thought of.

Calabresi, *supra* note 197, at 481.

199. See 1 WILLIAM BLACKSTONE, COMMENTARIES *62, where Blackstone wrote:

> Equity thus depending, essentially, upon the particular circumstances of each individual case, there can be no established rules and fixed precepts of equity laid down, without destroying its very essence, and reducing it to a positive law. And, on the other hand, the liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge. And law without equity, though hard and disagreeable, is much more desirable for the public good, than equity without law; which would make every judge a legislator, and introduce most infinite confusion; as there would then be almost as many different rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind.

Judge Calabresi has written about the attraction of formalism in similar terms:

> [T]he fear that any law that responded to social ends, even if now the social ends were democratic, might in the future be corruptible to bad social ends, continued to have an influence. In a way, these people said, it is better to have a legal system that cannot change, than to put it in the hands of human beings who are fallible.

Calabresi, *supra* note 197, at 483.

Given this commitment to autonomy, Justice Scalia's complete rejection of the *communis opinio* canon in *Brogan* can be understood as a means of limiting a court's ability to look outside the statutory text and to assign an unacceptable meaning to its words. Such a view of the canon is, however, deeply flawed. Unlike other canons or interpretive methods that a formalist may reject because they allow judges to impose their own substantive values under the guise of interpretation,[200] *communis opinio* must be defined independently of the substantive views of the interpreting judge and, accordingly, would not be easily subject to substantive distortion.[201] Indeed, *communis opinio* reinforces common practice by holding that a court may overrule such practice only for the strongest of reasons, which should exclude formalist interpretations that unpredictably make words bear the weight of too specific a meaning.[202]

---

200. See Sunstein, *supra* note 2, at 653 who indicates:

> In their modern incarnation, formalist approaches to interpretation tend to share a number of positive and negative features: ... [including] attention to canons of construction that help in limiting judicial discretion and in uncovering meaning, and also to canons that reflect a distinct constitutional commitment or otherwise give clear signals to Congress, but not to canons of interpretation that are not time-honored or that embody controversial judgments about public policy.

201. I say "easily" because a formalist might reply that judges may employ *communis opinio* in support of their own policy views by determining that a supportive common practice is present when there is no such common practice. *Compare* Bush v. Gore, 531 U.S. 98, 120 (2000) (Rehnquist, C.J., concurring) (finding an "established practice" in Florida elections law), *with supra* note 29 (strongly disputing existence of any reliable practice in Florida elections law).

202. As Professor Eskridge asserts:

> An independent judiciary may make it more likely that a statute will be applied in the same way tomorrow as today, and to the powerful and influential as well as to the miserable and the obscure, but an independent judiciary also poses a risk that judges will bend statutes to reflect their own political preferences. The latter would undermine our ability to predict how a statute will be applied, and the cynical among us expect that judicial bending would be slanted in favor of persons or groups the judge identifies with or likes.

Eskridge, *supra* note 170, at 678.

Compare this view, however, with that of an earlier commentator:

> Where courts were once considered purely as common law tribunals, the enormous increase in statutory material has changed the actual function of courts of law to approximate more closely the civil law ideal of courts as agencies for the application and administration of the legislative precept. Law is no longer the sacred precept of the court but the common property of the masses. It is the expression of what they believe to be their will and it is not for

The formalism of Justice Scalia, and Justice Thomas as well, however, gives words a meaning grounded in dictionary meaning[203] and etymology,[204] rather than usage,[205] and yields an interpretive approach that appears curiously inattentive to and unconcerned with the real world actions of those affected by legislation. *Holder v. Hall*[206] provides a striking example of how Justice Scalia's formalism ignores grounded contextual meaning. In that case, Justice Scalia joined a concurring opinion written by Justice Thomas that interpreted the words, "standard, practice, or procedure," included in section 2 of the Voting Rights Act[207] as "refer[ing] only to practices that affect minority citizens' access to the ballot."[208] These Justices supported their interpretation by a consideration of the entire text of section 2,[209] an application of the *ejusdem generis* canon,[210] and a clear statement rule[211]—the last refuge of the formalist faced with a broad text.[212] Three dissenting Justices rejected this formalist interpretation, partly because it conflicted with common practice: a "consistent and expansive interpretation of the Act by this Court, Congress, and the Attorney General."[213] In his dissent, Justice Stevens characterized Justice Thomas's formalist interpretation as a "radical reinterpretation of the Voting Rights Act."[214] Indeed, the proposed reinterpretation was

---

> the courts to frustrate it because of too nice legalistic conceptions of law and government.

Frank E. Horack, Jr., *In the Name of Legislative Intention*, 38 W. VA. L.Q. 119, 124 (1932) (footnote omitted).

203. *See* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 719 (1995) (Scalia, J., dissenting) (relying on dictionary meaning of "harm"); *see also* Johnson v. United States, 529 U.S. 694, 705 n.7 (2000) (characterizing Justice Scalia's formalist reading of text as "virtuoso lexicography, but it shows only that English is rich enough to give even textualists room for creative readings").

204. *See* MCI Telecomms. Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 225-28 (1994) (relying on the etymology of the word "modify" to hold a regulation of the Federal Communications Commission unlawful).

205. *But cf. infra* note 215.

206. 512 U.S. 874 (1994).

207. 42 U.S.C. § 1973 (1988 & Supp. V 1993).

208. *Holder*, 512 U.S. at 914 (Thomas, J., concurring).

209. *Id.* at 914-16.

210. *Id.* at 917-18.

211. *Id.* at 922.

212. *See supra* notes 157-61 and accompanying text.

213. *Holder*, 512 U.S. at 950 (Blackmun, J., dissenting).

214. *Id.* at 965 (Stevens, J., dissenting).

radical because, by taking no account of the understanding that had developed about the meaning of the statutory terms, the formalists were urging a fundamental change in the shape of federal voting rights law—inattention to *communis opinio* would have resulted in an ungrounded meaning of statutory text and a radical, unpredicted change in the law.[215]

Justice Scalia's rejection of a contextual understanding of the meaning of words in favor of an intrinsic and ideal meaning appears analogous to one side in the debate about the role of a dictionary in the English language.[216] Leading English writers and intellectuals in the eighteenth century had hoped that the first comprehensive dictionary would capture the timeless essence of the words of the English language and, similar to the French Academy, preserve and define a "national standard language."[217] The first great English dictionary, completed by Samuel Johnson in 1755, did not, however, fulfill these hopes: "The consensus now is that [Johnson] originally planned to make a fix on the tongue, but when he was halfway through his six-year task, he came to realize that it was both impossible and undesirable."[218] Moreover, the greatest of English dictionaries, the *Oxford English Dictionary*, was developed on a principle contrary to that embraced by Justice Scalia, namely that meaning is not abstract and intrinsic, but is dependent on context

215. Justice Scalia would likely object to this characterization of his formalism as abstract and unconnected to usage. In a recent decision, *Johnson v. United States*, 529 U.S. 694 (2000), the Court's debate about interpretive methodology focused on the meaning of the word "revoke" in the federal statute governing sentencing—18 U.S.C. § 3583(e)(3) (Supp. V 1993). The nonformalist majority opinion gave what the majority viewed as a "less common," though not "rare or obsolete," meaning to that word, because "the ordinary meaning fails to fit the text and . . . the realization of clear congressional policy . . . is in tension with the result that customary interpretive rules would deliver." *Johnson*, 529 U.S. at 706 n.9. Justice Scalia's formalist dissent relied on the ordinary meaning of the term revealed by dictionaries, subjected to "the acid test of whether a word can reasonably bear a particular meaning[, that is,] whether you could use the word in that sense at a cocktail party without having people look at you funny." *Id.* at 718 (Scalia, J., dissenting). He concluded that "[t]he Court's assigned meaning would surely fail that test, even late in the evening." *Id.* To the extent, however, that a common practice arose pursuant to particular statutory text, giving the text the meaning assigned by the practice would presumably pass the cocktail party test.

216. See SIMON WINCHESTER, THE PROFESSOR AND THE MADMAN: A TALE OF MURDER, INSANITY, AND THE MAKING OF THE OXFORD ENGLISH DICTIONARY 89-99 (1998), in which the author presents a brief history of Samuel Johnson's *A Dictionary of the English Language*, which was published in 1755.

217. *See id.* at 91.

218. *Id.* at 92.

and usage.[219] Freed from context and usage, the formalist method loses all claim to objectivity and instead turns on the judge's own rarefied and subjective view of the meaning of particular words.[220]

If formalists such as Justices Scalia and Thomas were, however, to employ the *communis opinio* canon, they would go a long way toward ensuring that their method's autonomy does not unsettle the legal foundation in an unpredictable manner.[221] Such a constraint on what Judge Calabresi has described as the "gold

---

219. *Id.* at 25-26:

> The *OED*'s guiding principle, the one that has set it apart from most other dictionaries, is its rigorous dependence on gathering quotations from published or otherwise recorded uses of English and using them to illustrate the use of the sense of every single word in the language. The reason behind this unusual and tremendously labor-intensive style of editing and compiling was both bold and simple: By gathering and publishing selected quotations, the dictionary could demonstrate the full range of characteristics of each and every word with a very great degree of precision. Quotations could show exactly how a word has been employed over the centuries; how it has undergone subtle changes of shades of meaning, or spelling, or pronunciation; and, perhaps most important of all, how and more exactly *when* each word slipped into the language in the first place. No other means of dictionary compilation could do such a thing: Only by finding and showing examples could the full range of a word's past possibilities be explored.

220. Compare *Hotchkiss v. National City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911), in which Judge Hand stated:

> A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort.

221. The unsettling impact of an unpredicted interpretation of a statute follows from its broad consequences. See Frank E. Horack Jr., *The Disintegration of Statutory Construction*, 24 IND. L.J. 335, 347 (1949), who wrote:

> Statutory construction has more than judicial consequences. Obviously, every judicial decision has effect beyond the immediate litigants involved. Lawyers advise clients on the basis of court decisions. Transactions are entered into on the assumption that former decisions in the same field will have future application. Decisions founded on statutory interpretation have wide import. Not only do they serve as a guide for future litigation and counseling, but they become guides for future statutory drafting, both in the area of the decision, and in many other fields as well.

The final part of this Article will discuss the decision and error costs that are likely if courts ignore *communis opinio* when interpreting statutes. *See infra* Part III.D.2.

standard" characteristic of legal formalism[222] should be accepted by formalists as a particularly effective means for ensuring that observers will not judge formalist interpretations as "hypertextual."[223] Moreover, by employing the *communis opinio* canon, all courts, especially those employing the formalist interpretive method, can better ensure a legal system in which courts act as participants in the effective development of law.[224] A

---

222. See Calabresi, *supra* note 197, at 483, in which Judge Calabresi stated:

> The greatest inflations and depressions in the world's history have been under the gold standard due to the rise and fall of the supply of gold, which was essentially outside human control. I suppose those who like a formalistic system of law believe that there is less danger from something that is not within human control than from something that can be made to do what human beings want. Because sometimes, what human beings want might be Fascism.

For example, a formalistic method could lead a court to apply a law intended to prevent dueling in the streets to prohibit medical treatment to an injured person, if the treatment involved loss of blood. *See supra* note 198. The problems with such a "gold standard" are obvious.

223. *See* Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 778 (1995). In addition, Professors Eskridge and Frickey have written:

> [T]he new, tougher version of textualism advocated by Justices Scalia and Thomas exacerbates the tension between democracy and the rule of law and ultimately serves as a cover for the injection of conservative values into statutes. Insisting that statutory interpretation ignore legislative history and adhering to dictionaries at the expense of common sense, the new textualism is insensitive to the expectations of elected representatives. Maintaining that clear statutory texts can trump longstanding practice and taking a dogmatic and often bizarre view of what is clear, the new textualism sacrifices the security and predictability associated with the rule of law.

Eskridge & Frickey, *supra* note 129, at 77 (footnote omitted).

224. *See* HART & SACKS, *supra* note 112, at 1309 ("[T]he most important criterion is simply consistency with all the rest of the law. . . . though Justice has higher aims, the virtue on which the Law stakes its hopes of salvation is consistency. But, as I say, this answer falls back on general jurisprudence, all the rest of the law.") (quoting Charles B. Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407, 423 (1950)); JAMES WILLARD HURST, DEALING WITH STATUTES 46 (1982) ("The statutory text is basic and central. But . . . to be a vital force in society, the text usually must be seen as part of a flow of policy-making activity that originates before the text is voted and continues after it is on the books."). Compare this with Eskridge & Frickey, *supra* note 125, at 87, who indicate:

> If the Court both creates a coherent interpretive regime . . . and then applies it with some constancy, then the Court has not only served a core function of the judiciary but has also revealed its usefulness to the political branches. In that event, the Court can enhance its credibility when it does have a well-considered constitutional objection to a course of action undertaken by the political branches.

This law-development value of *communis opinio* is addressed in the last section of the

failure to account properly for *communis opinio* greatly increases the risk that the formalist method is being used by judges, under the guise of autonomy, to unsettle the law in an apparently willful[225] and likely erroneous[226] manner.

In sum, a very strong rationale for relying on *communis opinio* in the interpretation of statutory texts is that common practice provides very persuasive evidence of the meaning of the text. To the extent that formalism as an interpretive method fails to value such evidence, formalism is more likely to yield interpretive results that reshape the law in fundamental ways and is not credible in its claim to be an objective method of interpretation.

B. Legislative Intent

A second rationale for the use of *communis opinio* when determining the meaning of written law, either statutory or constitutional, is that common practice indicates the intent of the drafters of the law. This rationale has been employed most commonly when the Court has relied upon the common practice of early Congresses to discern the meaning of constitutional

---

Article. *See infra* Part III.D.

225. *See* Holder v. Hall, 512 U.S. 874 (1994) (discussed *supra* notes 206-15).

226. Courts are likely to err when they reject common practice and impose their own view of a proper legal rule. *See* Adrian Vermeule, *Interpretation, Empiricism, and the Closure Problem*, 66 U. CHI. L. REV. 698, 707 (1999) ("Both rational choice and Burkean approaches suggest that deference to a developed consensus is often a sensible move for actors who themselves lack the information necessary for decisionmaking; moreover, consensus reduces the variance of opinions and thus dampens the effect of extreme views."). Courts should be especially wary about overruling the common practice when it is developed through agency expertise:

> [A]gencies are better informed, more efficient barometers of the political equilibrium than the Court is. Because of their place in governance, agencies are both knowledgeable about and responsive to presidential and congressional preferences. Agencies are also the first government organ to address most interpretive issues, and when they do so they are usually able to anticipate the responses of other national institutions accurately enough to avoid overrides. Knowing that an agency is likely to have much better information than the Court does, the Court will rationally defer to the agency on most issues. Not deferring carries with it an increased risk of a political rebuke.

Eskridge & Frickey, *supra* note 129, at 71-72 (footnote omitted). *Cf.* Christensen v. Harris County, 529 U.S. 576, 597 (2000) (Breyer, J., dissenting) ("If statutes are to serve the human purposes that called them into being, courts will have to continue to pay particular attention in appropriate cases to the experienced-based views of expert agencies.").

provisions. Indeed, when the Court decided *Stuart v. Laird*[227] and first employed the *communis opinio* canon, the context was an interpretation of the Constitution. The Court relied on the common understanding of the Constitution, "commencing with the organization of the judicial system," to reject the claim that it was unconstitutional for members of the Supreme Court "to sit as circuit judges, not being appointed as such."[228]

Almost one hundred years after *Laird*, the Court persistently relied upon *communis opinio* in *Knowlton v. Moore*[229] to counter a series of claims that Congress had violated the Constitution when it established a progressive estate tax. The first claim of unconstitutionality:

> [R]est[ed] upon the assumption that, since the transmission of property by death is exclusively subject to the regulating authority of the several States, therefore the levy by Congress of a tax on inheritances or legacies, in any form, is beyond the power of Congress, and is an interference by the National Government with a matter which falls alone within the reach of state legislation.[230]

In rejecting this claim, the Court began with a *communis opinio* argument that carried "great weight":

> It is to be remarked that this proposition denies to Congress the right to tax a subject-matter which was conceded to be within the scope of its power very early in the history of the government. The act of 1797, which ordained legacy taxes, was adopted at a time when the founders of our government and framers of our Constitution were actively participating in public affairs, thus giving a practical construction to the Constitution which they had helped to establish. Even the then members of the Congress who had not been delegates to the convention which framed the Constitution, must have had a keen appreciation of the influences which had shaped the Constitution and the restrictions which it embodied, since all questions which

227. 5 U.S. (1 Cranch) 299 (1803).
228. *Id.* at 309.
229. 178 U.S. 41 (1900).
230. *Id.* at 56.

> related to the Constitution and its adoption must have been, at that early date, vividly impressed on their minds. It would, under these conditions, be indeed surprising if a tax should have been levied without question upon objects deemed to be beyond the grasp of Congress because exclusively within state authority. It is, moreover, worthy of remark that similar taxes have at other periods and for a considerable time been enforced; and, although their constitutionalty [sic] was assailed on other grounds held unsound by this court, the question of the want of authority of Congress to levy a tax on inheritances and legacies was never urged against the acts in question. Whilst these considerations are of great weight, let us for the moment put them aside to consider the reasoning upon which the proposition denying the power in Congress to impose death duties must rest.[231]

After comprehensively rejecting the claim that an inheritance tax was beyond the power of Congress, the Court turned to the claim that the inheritance tax was unconstitutional because it violated the Constitution's requirement that "all Duties, Imposts and Excises shall be uniform throughout the United States."[232] Again, the Court rejected the claim of unconstitutionality by relying first on *communis opinio*:

> [O]ne of the most satisfactory answers to the argument that the uniformity required by the Constitution is the same as the equal and uniform clause which has since been embodied in so many of the state constitutions, results from a review of the practice under the Constitution from the beginning. From the very first Congress down to the present date, in laying duties, imposts and excises, the rule of inherent uniformity, or, in other words, intrinsically equal and uniform taxes, has been disregarded, and the principle of geographical uniformity consistently enforced. Take, for a general example, specific import duties, by which particular specific rates are imposed on enumerated articles, without reference to their value. It is manifest that all such duties are void, if intrinsic equality and uniformity be the rule, and yet in all the great controversies which have arisen over the policy of impost duties generally, and particularly as to the

231. *Id.* at 56-57.
232. U.S. CONST. art. I, § 8.

> economic wisdom of specific duties, never has it been contended that the power to impose them did not exist because of the uniformity clause of the Constitution.[233]

In rejecting the constitutional challenge, the Court found the practice contemporaneous with the adoption of the Constitution to be most important in discerning the meaning of the text:

> Nor can it be said that these illustrations relate to legislation enacted long after the adoption of the Constitution, when by lapse of time an erroneous conception as to the meaning of the Constitution had arisen, for the examples to which we have just referred are but types of many forms of taxation by way of duties, imposts and excises which were enacted without question from the very beginning, and have continued in an unbroken line to the present time, sanctioned by the founders of our institutions and approved in practical execution by all the illustrious men who have directed the public destinies of the nation. Excise taxes were largely used during the administration of President Washington, and again during and after the war of 1812. It may properly be said of these excises that none of them were uniform according to the principles now contended for, yet no constitutional question in this regard was ever raised about them.[234]

---

233. *Knowlton*, 178 U.S. at 92-93.

234. *Id.* at 93-94. Two other cases decided near the time of *Knowlton* are notable for their reliance on common practice when interpreting the Constitution's text. In *McPherson v. Blacker*, 146 U.S. 1 (1892), the Court considered a challenge to the method by which Presidential electors were selected by states. The Court concluded:

> The question before us is not one of policy but of power, and while public opinion had gradually brought all the States as matter of fact to the pursuit of a uniform system of popular election by general ticket, that fact does not tend to weaken the force of contemporaneous and long continued previous practice when and as different views of expediency prevailed. The prescription of the written law cannot be overthrown because the States have latterly [sic] exercised in a particular way a power which they might have exercised in some other way. The construction to which we have referred has prevailed too long and been too uniform to justify us in interpreting the language of the Constitution as conveying any other meaning than that heretofore ascribed, and it must be treated as decisive.

Id. at 35-36.

Later, in *Myers v. United States*, 272 U.S. 52 (1926), the Court relied upon a detailed discussion of the treatment of Congress's removal powers immediately after the ratification of the Constitution, *see id.* at 111-26, to strike down as unconstitutional a statutory

The Supreme Court's long-standing reliance on contemporary practice to discern the meaning of constitutional text has continued into a new century in a decision by Justice Scalia holding that private parties have standing to bring *qui tam* actions.[235] To be sure, Justice Scalia did not state expressly that he was relying on either the *communis opinio* or *contemporanea expositio* canons. Nevertheless, in deciding whether private claimants have standing to raise an Article III case or controversy in a *qui tam* action, Justice Scalia looked to American practice at the time of the Constitution's framing and viewed that practice as "well nigh conclusive":

> *Qui tam* actions appear to have been as prevalent in America as in England, at least in the period immediately before and after the framing of the Constitution. Although there is no evidence that the Colonies allowed common-law *qui tam* actions (which, as we have noted, were dying out in England by that time), they did pass several informer statutes expressly authorizing *qui tam* suits. ... Moreover, immediately after the framing, the First Congress enacted a considerable number of informer statutes. Like their English counterparts, some of them provided both a bounty and an express cause of action; others provided a bounty only.
>
> We think this history well nigh conclusive with respect to the question before us here: whether *qui tam* actions were cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.[236]

---

requirement that the Senate consent to the President's removal of a postmaster. *See also* Fairbank v. United States, 181 U.S. 283, 322-23 (1901) (Harlan, J., dissenting) (discussing the weight accorded to common practice).

235. Vermont Agency of Natural Res. v. United States, 529 U.S. 765 (2000).

236. *Id.* at 776-77 (citations, internal quotations, and footnotes omitted); *see also id.* at 788 (Ginsburg, J., concurring) ("[R]estriction of the judicial power to 'Cases' and 'Controversies' is properly understood to mean 'cases and controversies of the sort traditionally amenable to, ... the judicial process.' ... [H]istory's pages place the *qui tam* suit safely within the 'case' or 'controversy' category.") (citations omitted); *cf.* United States v. Morrison, 529 U.S. 598, 622 (2000) ("The force of the doctrine of stare decisis behind these decisions [interpreting the Fourteenth Amendment] stems ... from the insight attributable to the Members of the Court at that time. Every Member ... obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment.").

In all these constitutional cases, the significance of the common practice of early Congresses is that those legislators, including individuals who themselves had drafted the Constitution, best understood the intent of the drafters of the Constitution. This rationale is extended in other Supreme Court decisions to agency practices, because in cases where the agency helped draft the statute, the practices indicate what the agency intended by the statutory text it drafted for legislative action.[237]

The Court has also relied upon another form of the legislative-intent rationale in some decisions looking to common practice in discerning a statute's meaning. In these cases, the Court has concluded that Congress's acceptance of the common practice means that the statute must have been intended to permit that practice or the statute would have been amended.[238] This is of course a version

237. *See* Blanset v. Cardin, 256 U.S. 319, 326 (1921) ("[T]here can be no doubt that the act was the suggestion of the Interior Department, and its construction is an assistant, if not demonstrative criterion, of the meaning and purpose of the act.") (citations omitted); United States v. Moore, 95 U.S. 760, 763 (1877) ("The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret.") (citations omitted); *see also* Harry Willmer Jones, *Statutory Doubts and Legislative Intention*, 40 COLUM. L. REV. 957, 970 n.46 (1940) ("Perhaps the established doctrine that weight is to be given to administrative or 'practical' construction in the judicial interpretation of statutes is, in some degree, due to judicial recognition of administrative participation in the law-making process.") (citation omitted).

238. *See* United States v. Midwest Oil Co., 236 U.S. 459, 472-73 (1915) ("Both officers, lawmakers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice."); Robertson v. Downing, 127 U.S. 607, 613 (1888) ("This construction of the department has been followed for many years, without any attempt of Congress to change it .... [W]hen there has been a long acquiescence in a regulation, and by it rights of parties for many years have been determined and adjusted, it is not to be disregarded without the most cogent and persuasive reasons.") (citations omitted); United States v. The Reindeer, 27 F. Cas. 758, 762 (C.C.D.R.I. 1848) (No. 16,145) ("[A] construction so long and publicly prevailing, ... and without any dissent by the treasury department, ... operates strongly in its support.... And it is fortified even by the silence of congress [sic] itself, not legislating more specifically to prevent it, when knowing, as it must, the views which its own officers and the community had taken of the proper construction of the existing laws.") (citations omitted).

In one case, the Supreme Court relied specifically on Congress's oversight activities when it applied the rationale of congressional acquiescence in a common practice:

> We see no reason why we should not accord to the Commission's interpretation of its own regulation and governing statute that respect which is customarily given to a practical administrative construction of a disputed provision.

of the congressional acquiesence argument—an argument that has been derided as contrary to the practice of lawmaking by both commentators and members of the Court.[239] As a method of inferring congressional intent, this interpretive method also confuses the Congress whose intent is relevant to resolving the interpretive issue, because the relevant acquiescence is by Congresses subsequent to the enacting legislature.

The Court has employed the *communis opinio* canon in a related, but less controversial, context when Congress has amended a statute in some respects but has otherwise not acted to amend a known, common practice.[240] In this context, unlike the mere acquiescence situation, Congress affirmatively enacts legislation retaining the common practice and concerns about reliance on inaction are accordingly less weighty.[241]

> Particularly is this respect due when the administrative practice at stake involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new. And finally, and perhaps demanding particular weight, this construction has time and again been brought to the attention of the Joint Committee of Congress on Atomic Energy, which under § 202 of the Act, 42 U. S. C. § 2252, has a special duty during each session of Congress to conduct hearings in either open or executive session for the purpose of receiving information concerning the development, growth, and state of the atomic energy industry, and to oversee the operations of the AEC.

Power Reactor Dev. Co. v. International Union of Electricians, 367 U.S. 396, 408 (1961) (citations and internal quotations omitted).

239. Citations to scholarly and judicial criticism of the judicial practice of inferring legislative intent from legislative inaction are included in ESKRIDGE & FRICKEY, *supra* note 1, at 826-27.

240. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969). The Court stated:

> [T]he Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation. Thirty years of consistent administrative construction left undisturbed by Congress until 1959, when that construction was expressly accepted, reinforce the natural conclusion that the public interest language of the Act authorized the Commission to require licensees to use their stations for discussion of public issues . . . .

Id. at 381-82 (footnotes omitted). *Accord* Swigart v. Baker, 229 U.S. 187, 197-98 (1913); United States v. G. Falk & Brother, 204 U.S. 143, 152 (1907); United States v. Philbrick, 120 U.S. 52, 58-59 (1887).

241. Professors Eskridge and Frickey have written:

> If Congress reenacts a statute without making any material changes in its wording, the Court will often presume that Congress intends to incorporate authoritative agency and judicial interpretations of that language into the

In sum, the Supreme Court has often relied upon *communis opinio* to interpret written law, on the theory that the common practice shows the intent of the drafters of the law. Although common, this rationale for the use of *communis opinio*, at least when grounded on legislative acquiescence alone, is weak and controversial.

C. Public Reliance

Courts have consistently articulated a third rationale for applying the *communis opinio* canon: the reliance of the public on accepted practice. When Chief Justice Marshall applied the canon to adopt an interpretation of a statute that was contrary to its clear, nonabsurd meaning, he was motivated by public reliance on the accepted practice: "[I]n construing the statutes of a state on which land titles depend, infinite mischief would ensue, should this court observe a different rule from that which has been long established in the state."[242]

When Justice Story employed the canon, he too believed that its use was appropriate because of public reliance on the common practice. In *United States v. State Bank of North Carolina*,[243] Justice Story construed a statutory text that fixed the priority of the United States to the assets of a debtor and decided that the "universal practice" and "received construction will induce the Court to hesitate before it will adopt another; as it would open those long-established settlements, and would be productive of great difficulty and confusion."[244]

> reenacted statute. The leading Supreme Court statement of this rule is found in *Lorillard v. Pons* . . ., which stated: "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change."

ESKRIDGE & FRICKEY, *supra* note 1, at 814 (quoting Lorillard v. Pons, 434 U.S. 575, 580 (1978)).

242. M'Keen v. Delancy's Lessee, 9 U.S. (5 Cranch) 22, 32 (1809); *see id.* at 33 ("On this evidence the court yields the construction which would be put on the words of the act, to that which the courts of the state have put on it, and on which many titles may probably depend."); *see also* M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819) ("An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.").

243. 31 U.S. (6 Pet.) 29 (1832).

244. *Id.* at 30; *see also id.* at 39-40.

In *Schell's Executors v. Fauche*,[245] the Court considered the statutory sufficiency of a protest against the payment of duties. Considering only the terms of the statute, the Court concluded that:

> [S]o far as respects the manner, or the person upon whom protest shall be served, the statute is silent, and we can only infer that from the nature of the proceedings it must be served upon the collector or his subordinate officer, or the person who receives the entry or the payment of the duties. In this silence of the statute, and in the absence of any treasury regulation upon the subject, it would probably be competent for the collector to receive such protest personally, or delegate his authority to one of his deputies.[246]

Notwithstanding the statute's silence, the Court had to consider two other competing views of the statute's requirements for protesting duties. First, there was a previous Supreme Court decision, "generally accepted as settling the law for this court, and the practice has grown up throughout the country of paying duties under such protests,—a practice to which eminent judges have lent their sanction."[247] Second, the Treasury Department had issued a regulation—No. 384—prescribing procedures for protests different than the common practice, procedures with which the protester before the Court had failed to comply.[248] The Court applied *communis opinio*, focusing particularly on the public's reliance on the common practice, to hold that failure to comply with the Treasury regulation did not foreclose the protest:

> [W]e think it too late for us to be called upon to overrule [the common practice]. It is an acknowledged principle of law, that if rights have been acquired under a judicial interpretation of a statute which has been acquiesced in by the public, such rights ought not to be impaired or disturbed by a different construction, and if, notwithstanding Treasury Regulation Number 384, requiring protests to be special in each case, a practice has grown up in the different ports of entry of receiving prospective

245. 138 U.S. 562 (1891).
246. *Id.* at 565.
247. *Id.* at 572.
248. *See id.*

> protests, the annulment of such practice might entail serious consequences upon importers who had acted upon the faith of its validity. ... In all cases of ambiguity, the contemporaneous construction, not only of the courts but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling.[249]

Courts have relied on the public-reliance rationale in many other cases.[250] One such case illustrates that the public-reliance rationale is applicable when a court must decide the scope of criminal liability defined by statute. This was, of course, the context of the Supreme Court's recent formalist decision in *Brogan*.[251] Similarly, in *United States v. The Reindeer*,[252] the court stated that the defendants

> appeal strongly to the court in favor of a liberal construction to protect a confiding class of people, who, in this case, did the acts complained of under the sanction, if not advice of the officers of government themselves, that had the execution of this branch of the laws in their charge, and who did these acts in conformity to a custom construing these laws in that manner in those places, very uniformly from the period of their enactment. Nor do I dwell on the hardship to honest, plain men being visited by penalties for breaking laws when adhered to, as read or interpreted erroneously to them by the public officers. That, however, furnishes a strong reason, by means of contemporaneous and long construction, to show that such a construction was the true one. The fact, too, of its open existence for such a length of time, rebuts any intent of citizens, by conforming to it, to do what is wrong by such conformity, and is another powerful argument in favor of adhering to this construction. ... It becomes a very grave question, where

249. *Id.* (citations omitted).

250. *See, e.g.*, Udall v. Tallman, 380 U.S. 1, 17-18 (1965) (relying upon *McLaren v. Fleischer*, 256 U.S. 477, 480-81 (1921)); Logan v. Davis, 233 U.S. 613, 626-27 (1914); Swigart v. Baker, 229 U.S. 187, 199 (1913); Surgett v. Lapice, 49 U.S. (8 How.) 48, 71 (1850); *see also* Hill v. Tohill, 80 N.E. 253, 256 (1907) ("To sustain the appellee's contention now would be to unsettle that which has for well-nigh 50 years been tacitly held by the courts of the state to be the law, and would be to destroy property rights which have grown up and been established on the theory that this statute was enforceable.").

251. *See supra* Part I.

252. 27 F. Cas. 758 (C.C.D.R.I. 1848) (No. 16,145).

> law-makers and law-executors have long slept over conduct, as if not a departure from the law, whether the construction should suddenly be changed, and really innocent persons be insnared and prosecuted by a new construction. *Cotemporanea expositio est optima et fortissima in lege.*[253]

In short, a very common rationale for the use of common practice in the interpretation of statutes is that public reliance is not subverted.[254] To assess the strength of the reliance rationale for *communis opinio*, account must be taken of the retroactive nature of judicial decision making. Although the Supreme Court has decided, over the objection of Justice Scalia,[255] that the Constitution does not compel that judicial decisions be retroactive in all civil cases,[256] prospective judicial decisions are rare.[257] Because they decide cases retroactively, courts ought to be sensitive about unsettling the rules actually applied and accepted by the public and the government.[258] The Supreme Court has itself given express

---

253. *Id.* at 761-62 (citations and internal quotations omitted).

254. Professors Hart and Sacks add further strength to this rationale as a strong indication of the proper interpretation of the statute by showing that many engaging in the common practice are doing so contrary to their own interests:

> [Common practice] was evidence of the understanding upon which people had *acted*. Nor was the action the only circumstantial guarantee of its trustworthiness. The trustworthiness was guaranteed, in addition, by the fact that the action taken was against interest, on the part both of employees and of employers. The employees had acted against interest in failing over a long period of time to demand payment for the extra time. The employers had acted against interest in exposing themselves to the claims for back pay and double damages to which they would be liable if their understanding were mistaken, as well as in agreeing in the first place to wage rates which need not have been so high if take-home pay were to be increased by application of the rates to a larger number of working hours.

HART & SACKS, *supra* note 112, at 1269-70.

255. *See* James Beam Distilling Co. v. Georgia, 501 U.S. 529, 548-49 (1991) (Scalia, J., concurring) (stating that the Constitution does not allow the Court to apply any decision prospectively).

256. See *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), in which a majority of the Court held that a judicial decision in a civil case could not be applied in a selectively prospective manner, but did not hold that the Court could not rule in a purely prospective manner. The Court has held that decisions establishing new rules of criminal procedure must be applied retroactively. Griffith v. Kentucky, 479 U.S. 314 (1987).

257. *See* ESKRIDGE & FRICKEY, *supra* note 1, at 443 ("We are not aware of any statutory case in which the Supreme Court has, since [1961], applied its ruling prospectively.").

258. Professor Jones made this point in a slightly different context:

> The judge, when he must act as a law-maker to fill in the gaps of a statute,

consideration to the consequences of retroactive decision making by suggesting that a stronger rule of stare decisis ought to apply to constitutional decisions "where reliance interests are involved"[259] and by developing rules that provide for prospective decisions in truly exceptional cases.[260] The fact of public reliance in the circumstances of common practice is thus properly seen as a strong rationale for the use of the *communis opinio* canon. Although reliance concerns do not arise when common practice initially develops under a legislative scheme because the practice is new and reliance interests are not implicated, a long-standing, well-accepted practice[261] that has given rise to reliance should be overruled retroactively only under exceptional circumstances.[262]

> exercises not original legislative power but delegated power, comparable to that conferred upon administrative officers possessed of rule-making or subordinate legislative authority. Each has the duty of implementing the general policy of an enactment with detailed rules applying that policy to the infinite variety of unforeseeable particular situations of fact. The circumstance that judicial legislation is, in effect, retroactive, is but another reason for insisting upon the necessity of its consistency with the general legislative policy.

Jones, *supra* note 63, at 973.

259. *See* Payne v. Tennessee, 501 U.S. 808, 828 (1991) ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases such as the present one involving procedural and evidentiary rules.") (citations omitted). Professor Radin made a similar argument regarding judicial decisions interpreting statutes:

> Since they are Anglo-American courts, they will not disregard precedent, but will use it as strong courts do, namely, to avoid doing specific injustice, and not merely to satisfy the requirement of logical consistency. A statute interpreted "restrictively" for a period long enough to have induced men to adjust their affairs to this interpretation, ought not suddenly to be interpreted "liberally," and vice versa. For precisely the same reason administrative interpretation, continued long enough to cause this adjustment, should only be changed if the "mischief" caused by the change would be less than the "mischief" of maintaining the practice.

Radin, *supra* note 62, at 422.

260. *See* Chevron Oil Co. v. Hudson, 404 U.S. 97, 106-07 (1971) (defining factors for deciding when a decision overruling a prior constitutional precedent should be applied only prospectively).

261. If a practice changes over time, then there is unlikely to be any *communis opinio* and the canon has no application.

262. See HART & SACKS, *supra* note 112, at 1291, who addressed the significance of reliance when interpreting a statute with a common practice in its implementation:

> Should a court be influenced by the degree to which a regulation or ruling of the agency is likely to have received popular acceptance and induced popular reliance? Note that the FCC's lottery regulations were challenged as soon as promulgated and that the Treasury's position on jigsaw puzzles had not been

One consequence of the formalism of Justice Scalia, which rejects *communis opinio* as a canon of construction, is that his decision making method yields fundamental changes in the law that undercut reliance.[263]

D. Lawmaking Process

The final rationale for the use of *communis opinio* by courts is not one that courts have expressed clearly. The rationale, rather, is implicit in the place of judicial decisions in the lawmaking process; a place that courts and commentators have described in other contexts when considering the development of the law. This section begins by accepting the claimed rule-of-law value of formalism and then analyzes how the failure of formalism to account for *communis opinio* in interpreting statutes is inconsistent both with a rule-of-law value and with clear statement rules applied under the formalist approach. When formalists fail to account for common practice in the interpretation of statutes, they subvert the lawmaking process by the inconsistency that results. This section then considers in the context of law development the extent to which the use of the *communis opinio* canon may reduce the error costs associated with the interpretation of statutes by courts. *Communis opinio* provides strong grounds for an equitable interpretation of a statute that shows the value of incrementalism in judicial decision making.

---

consistent. But in the field of taxation, is not the settlement of disputed statutory meanings extremely important and often essential before private conduct is undertaken, not after? Perhaps for this reason, once the Bureau's ruling have developed into a "settled" administrative practice, published for public use, the courts have afforded them "great weight."

263. *See* Pierce, *supra* note 223, at 778 (noting that the Court's new textualism "allows courts to ignore the context in which language is used, reliance interests created by decades of contrary interpretations, or strong evidence that Congress intended a contrary meaning"); *cf.* HART & SACKS, *supra* note 112, at 1305 (contending that a court should "especially" defer to administrative practice when rejecting such a practice "would undoubtedly have a serious unsettling effect upon the administration" of the law).

1. Communis Opinio *and Formalism's Rule-of-Law Claims: Effecting Changes in the Law By Foreclosing Judicial Consideration of* Communis Opinio

The approach that a judge takes when interpreting a statute reflects the judge's view of the role the judiciary plays in the process of lawmaking.[264] At a general level, this is true of the interpretive methodology—either formalist or nonformalist—utilized by the judge.[265] At a more specific level, a judge also reflects her view of the role played by the judiciary in making law when she decides to employ canons of construction, or rules of presumptive meaning, to discern statutory meaning.[266]

---

264. *Cf.* SUNSTEIN, *supra* note 1, at 168-69 ("People trying to choose an interpretive method must decide how to allocate power among various groups and institutions—indeed, allocating power is what the choice of an interpretive method *does*."); *id.* at 174 ("[A] system of legal interpretation is inevitably a function of decisions that are, broadly speaking, political in character.").

265. As one commentator put it:

> Selecting an interpretive methodology thus involves inevitable choices about the institutional allocation of power. If courts give strong deference to agencies' interpretations of the statutes they administer, that arrangement shifts law elaboration authority away from judges and toward the executive. If courts reject the authority of legislative history, they shift power away from committees and bill sponsors and toward agencies and courts. If courts start from an assumption of strong legislative supremacy in statutory cases, they define themselves as subordinates of the legislature.

Manning, *supra* note 91, at 691-92 (1999) (footnotes omitted). Professor Sunstein makes the related point that different actors in the process of lawmaking may properly employ different interpretive methodologies given their varied roles:

> Formalism may be good for the judiciary but bad for the administrative state, and the judiciary would do well to recognize that possibility. Thus I have argued that the greater accountability and specialization of agencies should permit them to choose between formalist and nonformalist statutory construction, so long as both are reasonable.

Sunstein, *supra* note 2, at 669.

266. Professor Eskridge has argued that, applied consistently, the canons of construction might constitute an interpretive regime that both restrains judges and enables the citizenry to predict how those judges will apply ambiguous as well as clear statutes. Not least important, such an interpretive regime could serve democracy values ... as legislators and their staffs could predict how different proposed statutory language would be applied.

Eskridge, *supra* note 170, at 699 (footnote omitted); *see also* Eskridge & Frickey, *supra* note 129, at 86 ("[C]anons are designed, as we believe and the Court maintains they are, to create a predictable interpretive regime").

For Justice Scalia and other formalists, a critical value of that interpretive method is that it furthers the rule of law,[267] thereby ensuring that the court plays its appropriate conservative role in the process of lawmaking.[268] This conservatism is reinforced by the canons typically employed by formalist judges.[269] Generally, rule-of-law value is present in a legal system characterized by predictability and continuity in the overall legal regime,[270]

---

267. *See* WILLIAM D. POPKIN, MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS 174-75 (2d ed. 1997).

268. *See* Calabresi, *supra* note 197, at 482 ("[A] formal, self-contained, uncriticizable system of law is conservative. It can't be changed.").

269. *See* Sunstein, *supra* note 2, at 653 ("In their modern incarnation, formalist approaches to interpretation tend to share a number of positive and negative features," including "attention to canons of construction that help in limiting judicial discretion and in uncovering meaning, and also to canons that reflect a distinct constitutional commitment or otherwise give clear signals to Congress, but not to canons of interpretation that are not time-honored or that embody controversial judgments about public policy.").

270. *See id.* at 650 ("[A] central formalist goal is to reduce the burdens of on-the-spot decisions, above all by eliminating the need for the exercise of discretion in particular cases, and by making sure that law is as rule-like as possible, in a way that promotes predictability for parties and lawmakers alike.") (footnote omitted); *see also* ESKRIDGE & FRICKEY, *supra* note 1, at 515 (identifying "predictability of law" and "limiting judicial discretion" as examples of "traditional rule of law values"). Professor Eskridge also describes the rule-of-law value as follows:

> An important value also widely accepted in our polity is the desirability of the rule of law. The rule of law requires that statutes—whatever their source, be it a representative legislature, a plebescite, or a monarch—be applied in an objective, consistent, and transparent way to citizens and others subject to the state's authority. Courts are the guardians of the rule of law, but also a threat to it. An independent judiciary may make it more likely that a statute will be applied in the same way tomorrow as today, and to the powerful and influential as well as to the miserable and the obscure, but an independent judiciary also poses a risk that judges will bend statutes to reflect their own political preferences. The latter would undermine our ability to predict how a statute will be applied, and the cynical among us expect that judicial bending would be slanted in favor of persons or groups the judge identifies with or likes.

Eskridge, *supra* note 170, at 678.

When considering the rule-of-law value, it is important to recognize that the law involves more than the statutory text:

> Institutions wanting to know their legal obligations do not rely on isolated texts; they look to practice, including agency rules and advice letters, judicial decisions, congressional feedback, actions of similarly situated parties, and the reactions of the agency. If they find a stable equilibrium—private action induced by vigilant agency enforcement that has been upheld repeatedly in court—they will consider that "law," whatever its relationship to the statutory text.

Eskridge & Frickey, *supra* note 129, at 81.

characteristics that are valued by both formalists[271] and nonformalists.[272]

For example, outside of the context of interpretive methodology, Justice Scalia has also strongly advocated that courts have a particular responsibility to ensure predictability in the law.[273] The Court has also recognized that its own institutional commitment to predictability by applying rules of stare decisis is a consequence of the role played by the judiciary in the development of law, and that other legal actors may not be constrained by stare decisis because of their differing legal roles.[274]

---

271. *See supra* note 265; *infra* note 273.

272. Professor Eskridge, who is not a formalist on questions of statutory construction, has written that "[t]he most useful rule of law test of the canons, and of more general theories of statutory interpretation such as the new textualism, would be: Do they constrain judges or make interpretation more predictable?" Eskridge, *supra* note 170, at 680; *see also* William N. Eskridge & Phillip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 339 (1990) ("Citizens ought to be able to open up the statute books and have a good idea of their rights and obligations. When the statute seems plainly to say one thing, courts should be reluctant to alter that directive.").

273. See *Payne v. Tennessee*, 501 U.S. 808, 834-35 (1991) (Scalia, J., concurring), where Justice Scalia offered the following response to a claim that the Court's decision to overrule a constitutional decision was contrary to stare decisis:

> That doctrine [of stare decisis], to the extent it rests upon anything more than administrative convenience, is merely the application to judicial precedents of a more general principle that the settled practices and expectations of a democratic society should generally not be disturbed by the courts. It is hard to have a genuine regard for *stare decisis* without honoring that more general principle as well. A decision of this Court which, while not overruling a prior holding, nonetheless announces a novel rule, contrary to long and unchallenged practice, and pronounces it to be the Law of the Land—such a decision, no less than an explicit overruling, should be approached with great caution. It was, I suggest, [the earlier contrary decision], and not today's decision, that compromised the fundamental values underlying the doctrine of *stare decisis*.

274. For example, see *Neal v. United States*, in which the Court stated:

> Our reluctance to overturn precedents derives in part from institutional concerns about the relationship of the Judiciary to Congress. One reason that we give great weight to *stare decisis* in the area of statutory construction is that Congress is free to change this Court's interpretation of its legislation. ... Entrusted within its sphere to make policy judgments, the [Sentencing] Commission may abandon its old methods in favor of what it has deemed a more desirable approach to calculating LSD quantities. We, however, do not have the same latitude to forsake prior interpretations of a statute. True, there may be little in logic to defend the statute's treatment of LSD; it results in significant disparity of punishment meted out to LSD offenders relative to other narcotics traffickers. ... Even so, Congress, not this Court, has the responsibility for revising its statutes. Were we to alter our statutory

One context in which the Court's commitment to the rule-of-law value of predictability has come to be reflected in its interpretive methodology is the Court's practice of transforming a settled and clear legal framework prior to the legislative enactment into a rule that Congress must act clearly before a statute will be interpreted to unsettle that prior legal regime.[275] To be sure, Justice Scalia, in particular, has derided this methodology when it has relied on the absence of legislative history to infer that Congress did not intend to change settled law, rather than on a statutory text that Justice Scalia found to be clear in its law-changing meaning.[276] More recently, however, Justice Scalia has written an opinion and joined another that effectively employ a strong presumption in favor of incremental legislative change to reject administrative actions by the Federal Communications Commission[277] and the Food and Drug Administration.[278] In these cases, a formalist majority determined that the challenged agency actions effected a fundamental change in the law and were unlawful in the absence of express permission in the statute. The Court felt "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[279] In sum, the Court has relied in different contexts on a presumption based on rule-of-law values to hold that an arguably broad, or ambiguous, statutory text had not effected a fundamental change in the background law.[280]

> interpretations from case to case, Congress would have less reason to exercise its responsibility to correct statutes that are thought to be unwise or unfair.

516 U.S. 284, 295-96 (1996) (citations and internal quotations omitted).

275. *See supra* note 164 and accompanying text.

276. *See id.*

277. *See* MCI Telecomms. Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 231 (1994). Interestingly, Justice Scalia's opinion in this case relied heavily on the etymology and (related) dictionary meaning of the word, "modify," as referring to incremental change, *see id.* at 225-28, to strike down an FCC regulation that made a "fundamental change in the Act's tariff-filing requirement." *Id.* at 229. In the tobacco regulation case, Justice O'Connor, writing for a majority that included Justice Scalia, viewed the *MCI* case as reflecting a strong concern that settled law be unsettled by an agency only when the statutory text clearly grants that broad authority. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160-61 (2000). Of course, these cases implicate the constitutional nondelegation doctrine, as well as the Court's presumption against fundamental change in settled law.

278. *See Brown & Williamson*, 529 U.S. at 125.

279. *Id.* at 160.

280. *See* United States v. Bestfoods, 524 U.S. 51, 63 (1998). The Court noted that

The key criterion upon which a judicial opinion may be evaluated to assess whether it has conformed to rule-of-law values is whether the decision can fairly be said to have changed the law. The issue of whether a judicial opinion has changed the law, rather than merely interpreted it, is not an issue that is often litigated as an independent question.[281] In the recent Florida election cases,[282] however, the issue took on "momentous" historic significance.[283] In an opinion concurring in the judgment to halt the Florida recount,

---

> nothing in CERCLA purports to reject this bedrock principle [of corporations law], and against this venerable common-law backdrop, the congressional silence is audible. Cf. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979) ("[S]ilence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely.").

For another case holding this view, see *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 172-73 (2001) (citations omitted), in which the Court stated:

> Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. ... Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.

See generally Michael P. Healy, *Textualism's Limits on the Administrative State: Of Isolated Waters, Barkng Dogs and Chevron*, 31 ENVT'L L. REP. (forthcoming 2001).

These clear—statement canons are arguably evolved forms of Blackstone's canon that statutes in derogation of the common law should be construed narrowly and of the agency nondelegation doctrine. Compare Wellington & Albert, *supra* note 164, at 1550, in which the authors suggest that the modern trend toward nonformalism in statutory interpretation may reflect a decision that one branch of government must consider directly the issue of public policy being posed and identify the best available rule-of-law. In a case "involv[ing] questions unforeseen or unforeseeable by the legislature," the authors argued that the question is whether it is

> not unrealistic to assume that the legislature decided these questions and embodied its decision in the language of its enactment? If, under these circumstances, a court decides a case because of a statute's plain meaning, its decision will be one that rests upon abstract doctrine of statutory interpretation that bears no necessary relationship to legislative purpose. Reliance on a plain meaning rule, therefore, may result in a decision where neither court nor legislature grapples with the substantive problem at issue.

Id.

281. *But cf.* Teague v. Lane, 489 U.S. 288 (1989) (holding that, except in special circumstances, a new, i.e. changed, rule of constitutional criminal procedure will not apply to cases that have become final before the new rule is announced).

282. Bush v. Gore, 531 U.S. 98 (2000); Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000).

283. *Gore*, 531 U.S. at 145 (Breyer, J., dissenting).

Chief Justice Rehnquist, joined by the formalist Justices Scalia and Thomas, decided that the Florida Supreme Court had changed Florida's election law when that court purported to interpret the meaning of a legal vote[284] and when that court, on December 8, ordered a recount of all undervotes throughout the state.[285] In Chief Justice Rehnquist's view, the question whether the court had changed Florida election law had to be resolved because the Constitution vests the authority to select presidential electors in the state legislature[286] and because the Florida legislature had provided for the election of electors by popular vote intending to take advantage of the federal safe-harbor statute, which requires that the procedures for selecting electors be defined prior to the date of the election.[287]

Regarding the Florida court's order that undervotes throughout the state be recounted, the plurality concluded that the Florida Supreme Court had effected a change in the law because it had failed to provide for the statutorily-mandated "appropriate" remedy during the contest phase:

---

284. *Id.* at 120 (Rehnquist, C.J., concurring) (arguing that court's definition of a legal vote "depart[ed] from the legislative scheme").

285. *Id.* at 122 (Rehnquist, C.J., concurring) (arguing that court's decision "significantly departed from the statutory framework in place on November 7, and authorized open-ended further proceedings which could not be completed by December 12, thereby preventing a final determination by that date").

286. As the Chief Justice wrote:

> [T]here are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government. This is one of them. Article II, § 1, cl. 2, provides that "[e]ach State shall appoint, in such Manner as the *Legislature* thereof may direct," electors for President and Vice President. (Emphasis added.) Thus, the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance.

Id. at 112-13 (Rehnquist, C.J., concurring).

287. The Chief Justice indicated:

> As we noted in *Bush v. Palm Beach County Canvassing Bd.*.... "Since [3 U.S.C.] § 5 contains a principle of federal law that would assure finality of the State's determination if made pursuant to a state law in effect before the election, a legislative wish to take advantage of the 'safe harbor' would counsel against any construction of the Election Code that Congress might deem to be a change in the law."
>
> If we are to respect the legislature's Article II powers, therefore, we must ensure that postelection state-court actions do not frustrate the legislative desire to attain the "safe harbor" provided by § 5.

Id. at 113 (Rehnquist, C.J., concurring).

> Surely when the Florida Legislature empowered the courts of the State to grant "appropriate" relief, it must have meant relief that would have become final by the cut-off date of 3 U.S.C. § 5. In light of the inevitable legal challenges and ensuing appeals to the Supreme Court of Florida and petitions for certiorari to this Court, the entire recounting process could not possibly be completed by that date.[288]

The plurality's conclusion that the Florida Supreme Court had changed the law by changing the legal definition of a vote established by the statutory scheme is more interesting because the plurality relied principally on state-elections practice to define the law prior to the Florida Supreme Court decision.[289] The plurality discussed the actual instructions at polling places regarding the marking of ballots,[290] the interpretation of the Florida Secretary of State, who is responsible for administering the State's elections,[291] and the State Attorney General's description of previous contests under the electoral regime.[292] Based on its view that the Florida Supreme Court had rejected a consistent prior practice, the plurality concluded that the Florida court had changed the law. "For the court to step away from this established practice, prescribed by the Secretary of State, the state official charged by the legislature with 'responsibility to ... [o]btain and maintain uniformity in the application, operation, and interpretation of the election laws,' § 97.012(1), was to depart from the legislative scheme."[293] In sum, the Justices who comprised the plurality viewed it as proper to rely on common practice to determine the content of law.[294]

---

288. *Id.* at 121 (Rehnquist, C.J., concurring).

289. *Id.* at 119 (Rehnquist, C.J., concurring).

290. *Id.*

291. *Id.*

292. *Id.* at 120 (Rehnquist, C.J., concurring) ("The State's Attorney General (who was supporting the Gore challenge) confirmed in oral argument here that never before the present election had a manual recount been conducted on the basis of the contention that 'undervotes' should have been examined to determine voter intent.").

293. *Id.*

294. The plurality's view that there was an accepted elections practice against which to gauge a change in law has been strongly criticized. *See* ISSACHAROFF, *supra* note 29, at 19-20.

The principle that established practice, as well as statutory text, has to be accounted for when deciding whether law has changed is recognized in the cases—*Bouie v. City of Columbia*[295] and *NAACP v. Alabama*[296]—discussed by the plurality to support its decision in *Gore*. In *Bouie*, the Court reviewed the Supreme Court of South Carolina's decision to extend the application of its criminal trespass statute to a situation in which a person had lawfully entered onto private property and was then told to leave but did not exit the property.[297] Significant reliance interests were present because the state's courts had held that a lawful initial entry took the case outside of the statutory criminal prohibition.[298] This change in the law effected by the state supreme court decision was held to violate the Due Process Clause when the state criminal trespass statute was applied to individuals who had lawfully entered a premises prior to engaging in a civil rights sit-in.[299]

The Supreme Court reached a similar conclusion in *NAACP v. Alabama*.[300] There, the Alabama Supreme Court had decided that the review available on a writ of certiorari to that court was narrower than previous practice had indicated.[301] The Supreme Court refused to accept the Alabama court's abandonment of long-standing practice that had given rise to public reliance: "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights."[302] The Court indicated, moreover, that the nature of the conduct that constitutes practice must be known and

295. 378 U.S. 347 (1964).

296. 357 U.S. 449 (1958).

297. *Bouie*, 378 U.S. at 362-63.

298. *Id.* at 362-63. *See also id.* at 359 ("The pre-existing law gave petitioners no warning whatever that this criminal statute would be construed, despite its clear language and consistent judicial interpretation to the contrary, as incorporating a doctrine found only in civil trespass cases.") (footnote omitted).

299. *See id.* at 362 ("If South Carolina had applied to this case its new statute prohibiting the act of remaining on the premises of another after being asked to leave, the constitutional proscription of *ex post facto* laws would clearly invalidate the convictions. The Due Process Clause compels the same result here, where the State has sought to achieve precisely the same effect by judicial construction of the statute.").

300. 357 U.S. 449 (1958).

301. *Id.* at 456.

302. *Id.* at 457-58 (citation omitted).

understood by those engaging in the practice.[303] Alabama had sought to explain that the earlier court decisions had stood for a much more limited principle than the NAACP had sought to rely upon.[304] The Court responded that none of the prior state decisions

> indicate that the validity of [court] orders [giving rise to contempt] can be drawn in question by way of certiorari only in instances where a defendant had no opportunity to apply for mandamus. ... [T]he State now argues that this was in fact the situation in all of the [decided] ... certiorari cases, because there the contempt adjudications, unlike here, had followed almost immediately the disobedience to the court orders. Even if that is indeed the rationale of the Alabama Supreme Court's present decision, such a local procedural rule, although it may now appear in retrospect to form part of a consistent pattern of procedures to obtain appellate review, cannot avail the State here, because petitioner could not fairly be deemed to have been apprised of its existence.[305]

In short, the Supreme Court, including its current formalist Justices, has viewed practice as establishing law against which a change effected by a judicial decision can be measured. Indeed, the Court in rare cases has concluded that such changes are inconsistent with due process.[306] For jurists who seek to protect

---

303. *Id.* at 457.

304. *Id.*

305. *Id.*

306. A recent book on the 2000 election controversy provides two cases in the elections context in which courts held that deviations from prior practice were so significant that they violated the Constitution. ISSACHAROFF, *supra* note 29, at 18. The authors describe the factual findings in *Roe v. Mobile County Appointing Board*, 904 F. Supp. 1315, 1335 (S.D. Ala. 1995), in which the district court decided a "longstanding, unequivocal, consistent state practice" existed. *Id.* As a result, the court concluded that "the state Circuit Court's decision to include [certain absentee] ... ballots [not previously allowed] was an 'abominable' post-election change of practice that amounted to 'ballot-box stuffing' and was hence unconstitutional." *Id.*

The authors also discuss *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978), in which the First Circuit held that the Rhode Island Supreme Court violated the Constitution when it changed state elections law notwithstanding public reliance on the previous state of the law. *See* ISSACHAROFF, *supra* note 29, at 21-22. The state decisions conflicted with

> longstanding, prior state practice; with the advice the relevant state administrative officials provided before the election; with the actions of the state legislature both before the state Supreme Court decision (acquiescing in

rule-of-law values by ensuring predictability in the law, actual practice that has become sufficiently established in the implementation of a statute so that it constitutes *communis opinio* should provide a surer foundation for a presumptive statutory meaning. In this context, the Court's presumptive rule of meaning would be grounded in how the statute has actually worked, rather than on determinations about the clarity of what Congress provided regarding practices prior to the legislation. A judge who does not account for the meaning of a statute as defined by *communis opinio* risks imposing an unexpected change in the law on those who have developed the settled practice. Particularly if a judge is a formalist concerned about the rule of law, that judge should act in a consistent manner to further that value by adopting the incremental interpretation that conforms to how the law has developed as evidenced by *communis opinio*.[307]

In sum, common, accepted practice under a statutory scheme importantly identifies the content of law, along with statutory text. The failure of formalists to account for such practice in interpreting statutes risks changing law and contradicts formalism's rule-of-law rationale.

> regular use of such [absentee] ballots in primaries) and after the decision (amending the law to expressly permit such [absentee] ballots in primaries).

Id. at 22. The authors conclude that "[t]he key fact was the reliance of these [absentee] voters on longstanding state practice: evidence had been introduced that, had they known absentee balloting was not permitted, at least some of these voters would have gone to the polls and voted in person." *Id.*

307. *See* Eskridge & Frickey, *supra* note 129, at 77. The authors criticize Justice Scalia's formalism on the following grounds:

> [T]he new, tougher version of textualism advocated by Justices Scalia and Thomas exacerbates the tension between democracy and the rule of law and ultimately serves as a cover for the injection of conservative values into statutes. Insisting that statutory interpretation ignore legislative history and adhering to dictionaries at the expense of common sense, the new textualism is insensitive to the expectations of elected representatives. Maintaining that clear statutory texts can trump longstanding practice and taking a dogmatic and often bizarre view of what is clear, the new textualism sacrifices the security and predictability associated with the rule of law.

Id. (footnotes omitted); *see also id.* at 81:

> When the Supreme Court disrupts such a stable practice, ... it is not only unsettling a specific legal regime, but is also raising the possibility of general insecurity, in which neither private parties nor Congress can rely on settled law. This weakens the Court's stabilizing role in statutory interpretation, and undermines both democratic values and rule-of-law values.

2. Communis Opinio *and the Minimization of the Costs of Judicial Lawmaking*

So far in discussing this final rationale for the application of the *communis opinio* canon, we have accepted formalist values. We now consider how a failure to account for *communis opinio* undercuts the legitimacy of any interpretive methodology by increasing the costs associated with that methodology.

In a recent article, Professor Cass Sunstein assessed the claim that formalism is the preferred methodology for statutory interpretation.[308] He concluded that the legitimacy of the formalist method of interpretation cannot be established on the basis of either constitutional principle[309] or the principle of democratic self-governance.[310] Rather, in Professor Sunstein's view, the value of formalism as an interpretive method depends upon the empirical proof that the formalist method of interpretation yields better interpretive results by minimizing combined decision and error costs.[311] In Professor Sunstein's view:

---

308. Sunstein, *supra* note 2.

309. *See id.* at 662-63.

310. *Id.* at 665, where Professor Sunstein writes:

> [T]he ideal of democratic self-government does not by itself justify formalism. Many antiformalists are enthusiastic democrats too. They might invoke legislative history on the ground that judges should consult the will of the representatives of the people, rather than dictionaries or their own judgments, to determine what vague words mean. They might think that canons of construction should defeat literal language, on the ground that those canons have support within the norms and traditions of the public as revealed over time, or otherwise have a good democratic pedigree—as loose, general language from an occasionally inattentive Congress in, say, 1992, does not. This does not mean that the antiformalists are right. It means only that the ideal of democracy, or political legitimacy, cannot by itself support formalism.

311. *Id.* at 662. Professor Sunstein described these costs as follows:

> Decision costs can be understood as the costs of finding out what the law is—a cost faced by courts (attempting to discern the legal rule while deciding the case) and by ordinary citizens (having to invest resources in figuring out the content of the law). Error costs involve both the number of mistakes and the magnitude of mistakes. On some empirical assumptions, a market-mimicking default rule would minimize the relevant costs; on other assumptions, an information-eliciting rule would do so. An independent point involves the *variability* of mistakes. It is possible, for example, that a nonformalist judiciary will produce highly variable, even random errors, while a formalist judiciary will produce the same number and magnitude of mistakes, but in a way that involves no variability and a great deal of predictability.

> It seems most straightforward to defend formalism as a massive or global information-eliciting default rule. Perhaps formalism is likely to produce greater clarity from Congress, precisely because it ensures that statutory language will be understood by reference to its terms. Thus the notion that statutes will be taken in their "plain meaning" might be understood as a way of encouraging Congress to speak unambiguously.[312]

The value of employing formalism to impose such a default rule is, of course, dependent on whether Congress has the interest and ability to respond effectively to the inducement to speak clearly.[313] That broad empirical question of Congress's ability and practice in responding to formalism is well beyond the scope of this Article, although it bears mention that Professor Sunstein[314] and other scholars[315] have raised serious doubts about Congress's law-writing abilities.[316]

Putting aside that broader question of formalism's effectiveness in eliciting information, a strong rationale for the application of the *communis opinio* canon is that the resulting interpretations should result in lower decision and error costs. Relying on *communis opinio* to establish a statute's presumptive meaning should reduce decision costs because those subject to written law will be more confident that acting in accordance with common practice will be accepted as

---

Id. at 647.

312. *Id.* at 655.

313. *Id.* at 642. Professor Sunstein wrote:

> In a legal system in which the legislature is extremely careful before the fact, and highly responsive to judicial interpretations after the fact, formalism might well make sense, especially if a nonformalist judiciary would create confusion and make blunders of its own. By contrast, a nonformalist approach would make sense in a legal system with an excellent judiciary and a legislature that is both careless and inattentive.

Id.; *see also id.* at 656 ("If a formalist judiciary does not in fact elicit information from Congress—if Congress is relatively unresponsive to the formalist signals—the case for formalism, as a global information-eliciting default rule, is much weakened.").

314. *See id.* at 659 ("Congress is not in the business of responding rapidly and regularly to particular cases in which interpretations, literal or otherwise, tend to misfire.").

315. Eskridge & Frickey, *supra* note 129, at 77.

316. Resolving that empirical question also seems to depend on evaluating the effect of congressional inaction. When judges rely on congressional acquiescence or inaction as positive evidence of congressional intent, they are commonly criticized by other judges and commentators.

lawful by courts. For these actors, there will be less need to assess whether the written law can be read to mandate a practice that is inconsistent with accepted practice, and their decision costs will be thereby reduced.

Employing *communis opinio* to fix a statute's presumptive meaning should also be effective in reducing error costs. Because judicial decisions almost always have a retroactive effect,[317] when they impose error costs, such costs are likely to be high,[318] and a court's caution about damaging the broad legal fabric is well warranted.[319] The application of the *communis opinio* canon will mean that courts are less likely to unsettle established practices and impose rules based upon "a dogmatic and often bizarre view of what is clear."[320] Although courts have not used "error-cost reduction" to explain their reliance on *communis opinio*, when the Supreme Court has employed the canon its reasoning is quite compatible with this rationale.[321]

---

317. *See supra* note 257 and accompanying text.

318. Professor Radin raised similar concerns about the costs of judicial decisions:

> Since they are Anglo-American courts, they will not disregard precedent, but will use it as strong courts do, namely to avoid doing specific injustice, and not merely to satisfy the requirement of logical consistency. A statute interpreted "restrictively" for a period long enough to have induced men to adjust their affairs to this interpretation, ought not suddenly to be interpreted "liberally," and vice versa. For precisely the same reason administrative interpretation, continued long enough to cause this adjustment, should only be changed if the "mischief" caused by the change would be less than the "mischief" of maintaining the practice.

Radin, *supra* note 62, at 422; *see also supra* note 257.

319. See *United States v. Macdaniel*, 32 U.S. (7 Pet.) 1, 14-15 (1833), in which the Court stated:

> To attempt to regulate, by law, the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the government. Hence, of necessity, usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. And no change of such usages can have a retrospective effect, but must be limited to the future.

320. Eskridge & Frickey, *supra* note 129, at 77.

321. *See* United States v. Midwest Oil Co., 236 U.S. 459, 472-73 (1915). The Court had the following response to an argument that it should interpret a statute contrary to the common practice:

In sum, employing *communis opinio* as a canon of construction is likely to minimize the costs of judicial lawmaking, regardless of whether a court employs a formalist or nonformalist method of interpretation.[322]

CONCLUSION

This Article has assessed the Supreme Court's statutory interpretation debate by examining Justices Stevens's and Scalia's attitudes toward and application of the ancient canon of *communis opinio*. By considering the history of *communis opinio*, the requirements for its application, the effect of its application, and the purposes of this canon, the Article has sought to define the contours and stakes of the Court's statutory interpretation debate. This close scrutiny of interpretive method and interpretive rules has clarified several important points. The application of the *communis opinio* canon enhances the commitment to contextual meaning in a way that promotes the orderly development of the

---

> It may be argued that while these facts and rulings prove a usage, they do not establish its validity. But government is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation.

Id. The Court defended its decision in the following similar terms in *Peabody v. Stark*, 83 U.S. (16 Wall.) 240, 243-44 (1872):

> In the absence of a clear conviction on the part of the members of the court on either side of the proposition in which all can freely unite, we incline to adopt the uniform ruling of the office of the internal revenue commissioner, holding that the distiller is not liable under the eighty per cent. clause, until a copy of the survey in which the tax is assessed has been delivered to him as provided in section ten. It is made to appear to us in a very satisfactory manner that such has been the unvarying rule of that office since the act went into effect, and while we do not hold such ruling as in general obligatory upon us, we are content to adopt it in this case for the reason already mentioned, as well as for its obvious fairness to the government and to the distiller.

See also Udall v. Tallman, 380 U.S. 1, 16-18 (1965); Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 314-15 (1933); Fairbank v. United States, 181 U.S. 283, 323 (1901) (Harlan, J., dissenting).

322. *Cf.* SUNSTEIN, *supra* note 1, at 178 ("[A]ny system of constitutional interpretation must be closely attuned to the risks of judicial discretion. Rules of interpretation should be designed to minimize those risks.").

law. *Communis opinio* provides an effective check on the autonomy of formalism, which may give statutory text an abstract, ungrounded meaning. Moreover, the Article has shown how Justice Scalia, by deriding the relevance and the application of this canon in appropriate statutory cases, must surrender his claim that textualism is grounded in rule-of-law values, because ignoring the weight of *communis opinio* gives the formalist license to interpret statutes in ways that unsettle a long-standing and wide-spread understanding, and undermine the orderly development of law. Perhaps the most important value of the canon in establishing a contextual understanding of positive law is that, when properly applied, it promotes coherence in statutory interpretation and eschews ungrounded and unanticipated judicial readings of text—readings that have the effect of changing the law, notwithstanding the claimed meaning of the text.[323]

323. *Cf. id.* at 186 ("Judges are not specialists in the many subjects that call for interpretive judgments, and they have little electoral legitimacy. It follows that in general, courts should attend closely to the legislature's views, so as to recognize the law-making primacy of the legislature and simultaneously to discipline their own decisions.").