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Intangible Fish and the Gulf of Understanding: *Yates v. United States* and the Court's Approach to Statutory Interpretation

JOHN M. GARVIN[*]

INTRODUCTION

Is a fish a tangible object? The answer in most cases is obviously "yes." But in *Yates v. United States*,[1] one of the stranger cases of the 2014 term, the Supreme Court held that a fish is *not* a tangible object.[2] Or, more precisely, it held that fish are outside the meaning of the phrase "tangible object" as it is used in the Sarbanes–Oxley Act of 2002.[3]

Most of the attention that the *Yates* case has received thus far relates to what it says about prosecutorial discretion and overcriminalization.[4] These are important topics, to be sure, and this facet of the case deserves all the attention it has received. But the *Yates* decision has interesting, and arguably further-reaching, implications about how the Court interprets statutes in general. Because overcriminalization as a political issue does not have a strong left- or right-leaning political valance,[5] the *Yates* case provides an excellent lens with which to examine the Court's contemporary methods of statutory interpretation. Part I of this Note provides an overview of the *Yates* opinions, and then offers a more thorough argument for its relevance to understanding the Court's current approach to statutory interpretation.

Part II begins with some critiques of the traditional textualist approach before turning to a discussion of where the Court's approach to statutory interpretation may be headed. The Court, for better or for worse, has adopted the vocabulary of the textualist approach most famously associated with the late Justice Scalia, emphasizing linguistic canons of construction and largely eschewing legislative history. But even though, and in some senses because, the Justices have committed to speaking the same language, fundamental differences between the Justices remain.[6] This exposes the inherent flexibility of the textualist approach and its capacity to accommodate ideological, normative choices in deciding cases.

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1. 135 S. Ct. 1074 (2015).
2. *Id.* at 1079.
3. 18 U.S.C. § 1519 (2012).
4. *See infra* note 93.
5. *See, e.g.*, Adam Liptak, *Right and Left Join Forces on Criminal Justice*, N.Y. TIMES (Nov. 23, 2009), http://www.nytimes.com/2009/11/24/us/24crime.html?_r=0 [https://perma.cc/6U25-SSTS] (arguing that both liberal and conservative groups have lent legal support to challenge perceived overcriminalization, signaling a conservative break from Nixon-era tough-on-crime policies).
6. *See infra* Part I.A.2.

I. THE INTANGIBLE QUALITIES OF LANGUAGE (AND OF FISH?)

Part I.A provides a brief overview of the factual background of the *Yates* case, followed by a close reading of the Supreme Court's decision. Part I.B then argues the importance of the *Yates* decision as a barometer of the Court's attitude towards different approaches to statutory interpretation, due to its relatively neutral political valence compared to other statutory interpretation cases.

A. Purpose and Ordinary Language at Odds

1. Factual Background

John Yates's arrest and conviction stemmed from an August 2007 incident when the commercial fishing boat he captained, the *Miss Katie*, was boarded by Florida Fish and Wildlife Conservation Commission officer John Jones.[7] Onboard, Jones noticed several red grouper that appeared to be smaller than the minimum length allowable under federal conservation regulations.[8] Jones inspected the rest of the ship's catch, measuring fish he believed to be undersized, and found that seventy-two grouper were below the minimum twenty inches; all but three were between nineteen and twenty inches.[9] He separated the undersized fish in wooden crates away from the rest of the catch, told Yates to leave the fish separated until the boat returned to port, and issued him a citation for possession of the undersized fish.[10]

When the *Miss Katie* returned to port, Jones remeasured the fish in the crates and found that the measurements—still under the twenty-inch requirement—did not correspond to the measurements he had taken while previously on the vessel.[11] He questioned a crew member, who admitted that he had, at Yates's request, thrown overboard the fish Jones had measured, and that he and Yates replaced those fish with others from the catch.[12]

While Yates was only subject to civil penalties for possessing the undersized fish,[13] the attempted cover-up resulted in two criminal convictions for him. Under

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7. *Yates*, 135 S. Ct. at 1079. The *Miss Katie* was in exclusively federal waters when Jones boarded it; nevertheless, it was within Jones's jurisdiction to do so—he had been deputized as a federal agent by the National Marine Fisheries Service and had the authority to enforce federal (as well as state) fishing laws. *Id.*

8. *Id.* (citing 50 C.F.R. § 622.37(d)(2)(ii) (2007)).

9. *Id.*

10. *Id.*

11. *Id.* at 1080.

12. *Id.*

13. *Id.* at 1079. "Violation of [these federal conservation] regulations is a civil offense punishable by a fine or fishing license suspension." *Id.* (citing 16 U.S.C. §§ 1857(1)(A), (G), 1858(a), (g) (2012)). However, "[b]y the time of the indictment, the minimum legal length for Gulf red grouper had been lowered from 20 inches to 18 inches. . . . No measured fish in Yates's catch fell below that limit. The record does not reveal what civil penalty, if any, Yates received for his possession of fish undersized under the 2007 regulation." *Id.* at 1080 (citing 16 U.S.C. § 1858(a) (2012); 50 C.F.R. § 622.37(d)(2)(iv) (2009)).

18 U.S.C. § 2232(a),[14] Yates was convicted of destroying property to prevent a federal seizure.[15] More controversially, Yates was convicted under 18 U.S.C. § 1519, which provides:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.[16]

At trial, Yates moved for acquittal on the § 1519 charge, arguing that the statute's origin as a provision of the Sarbanes–Oxley Act limits it to document-related offenses.[17] The court rejected this argument,[18] as did the Eleventh Circuit on appeal.[19] Only the § 1519 charge, and not the § 2232(a) conviction, was at issue when Yates's case made its way to the Supreme Court.[20]

Yates's argument is an essentially purposivist one: § 1519, as part of the Sarbanes–Oxley Act, was simply never meant to cover fish. Rather, the type of tangible objects included in the phrase "record, document, or tangible object"[21] is limited to "devices designed to preserve information."[22] What is interesting about the *Yates* case is how little focus the Court places on true legislative history. The plurality's narrow reading of § 1519 in support of Yates's argument is based primarily on the application of traditional linguistic canons of construction. Part I.A.2 examines the countervailing issues at play in this decision.

2. The *Yates* Decision

Yates v. United States comprises three opinions: Justice Ginsberg wrote the plurality opinion, joined by Chief Justice Roberts, Justice Breyer, and Justice

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14. 18 U.S.C. § 2232(a) (2012) ("Destruction or removal of property to prevent seizure.—Whoever, before, during, or after any search for or seizure of property by any person authorized to make such search or seizure, knowingly destroys, damages, wastes, disposes of, transfers, or otherwise takes any action, or knowingly attempts to destroy, damage, waste, dispose of, transfer, or otherwise take any action, for the purpose of preventing or impairing the Government's lawful authority to take such property into its custody or control or to continue holding such property under its lawful custody and control, shall be fined under this title or imprisoned not more than 5 years, or both.").

15. *Yates*, 135 S. Ct. at 1080.

16. 18 U.S.C. § 1519 (2012).

17. *Yates*, 135 S. Ct. at 1080.

18. United States v. Yates, No. 2:10–cr–66–FtM–29SPC, 2011 WL 3444093, at *1–2 (M.D. Fla. Aug. 8, 2011).

19. United States v. Yates, 733 F.3d 1059, 1061 (11th Cir. 2013).

20. *Yates*, 135 S. Ct. at 1079.

21. 18 U.S.C. § 1519.

22. Transcript of Oral Argument at 3, Yates v. United States, 135 S. Ct. 1074 (2015) (No. 13-7451).

Sotomayor; Justice Alito wrote an opinion concurring in the judgment; and Justice Kagan wrote a dissent, which was joined by Justices Scalia, Kennedy, and Thomas. Although Justices Scalia, Kennedy, and Thomas often join in the same opinion, *Yates* marked only the third time in Justice Kagan's tenure that these four had aligned in a 5–4 decision.[23] Justice Kagan's dissent hews closely to the textualist approach more typically associated with the other dissenting Justices—Justice Scalia in particular.[24] The dissent had, perhaps, an easier case to make in *Yates*—a fish *is* a tangible object, after all—and so Kagan's dissent is mostly focused on calling into question the arguments of the plurality and concurring opinions.[25] Before analyzing how these voting blocs may have formed, the logic by which fish were deemed not tangible objects warrants further explanation.

i. Ginsburg's Plurality

Justice Ginsburg's opinion begins by acknowledging that fish do indeed fall within the literal meaning of the phrase "tangible object."[26] But she then makes a somewhat more contentious claim: "Whether a statutory term is unambiguous, however, does not turn solely on dictionary definitions of its component words."[27] Quoting *Robinson v. Shell Oil Co.*, she explains that whether certain statutory language is ambiguous depends on the context in which the language itself is used and on the broader context of the statute as a whole.[28]

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23. Justice Kagan joined the Court for the beginning of the 2010 term. The first example of this bloc in a 5–4 case occurred in *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012), in which the four Justices joined a majority opinion authored by Justice Sotomayor. In the 2014 term, prior to the *Yates* decision, the four dissented in *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014) (Scalia, J., dissenting). For a display of each voting alignment in 5–4 decisions for the respective Supreme Court terms 2010–2014, see *Stat Pack for October Term 2010*, SCOTUSBLOG, 52–53 (June 28, 2011), http://sblog.s3.amazonaws.com/wp-content/uploads/2011/06/SB_OT10_stat_pack_final.pdf [https://perma.cc/9J9N-BLXQ]; *Stat Pack for October Term 2011*, SCOTUSBLOG, 56–57 (June 30, 2012), http://sblog.s3.amazonaws.com/wp-content/uploads/2014/07/SCOTUSblog_Stat_Pack_OT11_final.pdf [https://perma.cc/M2BK-L65V]; *Stat Pack for October Term 2012*, SCOTUSBLOG, 52–54 (June 27, 2013), http://sblog.s3.amazonaws.com/wp-content/uploads/2013/09/SCOTUSblog_StatPack_OT121.pdf [https://perma.cc/5HDJ-HNHN]; *Stat Pack for October Term 2013*, SCOTUSBLOG, 62–63 (July 3, 2014), http://sblog.s3.amazonaws.com/wp-content/uploads/2014/07/SCOTUSblog_Stat_Pack_for_OT13.pdf [https://perma.cc/RZW3-S23E]; *Stat Pack for October Term 2014*, SCOTUSBLOG, 50–52 (June 30, 2015), http://sblog.s3.amazonaws.com/wp-content/uploads/2015/07/SB_Stat_Pack_OT14.pdf [https://perma.cc/45EM-UKYX].

24. *See, e.g.*, William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 532 (2013) (reviewing READING LAW, ANTONIN SCALIA & BRYAN A. GARNER (2012) ("Justice Antonin Scalia is the leading theorist as well as practitioner of what has been dubbed *the new textualism*." (emphasis in original)).

25. *See Yates*, 135 S. Ct. at 1090–1101 (Kagan, J., dissenting).

26. *Id.* at 1081.

27. *Id.*

28. *Id.* at 1081–82 (quoting 519 U.S. 337, 341 (1997)).

This claim, that the context surrounding an otherwise unambiguous phrase can render the phrase ambiguous, is central to the disagreement between the plurality and dissent. Even Justice Scalia, the archetypal textualist, would have agreed that context and purpose are appropriate tools for resolving ambiguity or vagueness surrounding the meaning of a word or phrase.[29] The dissent ultimately argues, however, that the phrase "tangible object" is unambiguous and that its plain meaning should thus prevail.[30]

From an ahistorical perspective, it seems dubious that any canon of construction should lead to the conclusion that a fish is not a tangible object. But § 1519 was enacted as part of the Sarbanes–Oxley Act,[31] so it would be an equally surprising result to hold a fisherman criminally liable under a statute that was meant to punish financial fraud.[32] In any case, the Justices deciding *Yates* found little use for an extensive consideration of § 1519's legislative history, and this Note will follow their lead. Ginsburg writes:

> The Sarbanes–Oxley Act, all agree, was prompted by the exposure of Enron's massive accounting fraud and revelations that the company's outside auditor, Arthur Andersen LLP, had systematically destroyed potentially incriminating documents. The Government acknowledges that § 1519 was intended to prohibit, in particular, corporate document-shredding to hide evidence of financial wrongdoing.[33]

In the plurality's view, the phrase "tangible object" in § 1519 refers only to objects used to record or preserve information, such as servers and hard drives.[34] To support this narrow reading, Justice Ginsburg points to what she calls "familiar interpretive guides."[35]

First, she points to § 1519's caption: "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy."[36] The caption specifically refers to records, and not to "objects" or some other word that would indicate that the provision is meant to apply broadly to the spoliation of all physical evidence.[37]

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29. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 33 (2012) ("[The 'fair reading' approach to interpretation endorsed by the authors] requires an ability to comprehend the *purpose* of the text, which is a vital part of its context. But the purpose is to be gathered only from the text itself, consistently with the other aspects of its context. This critical word *context* embraces not just textual purpose but also (1) a word's historical associations acquired from recurrent patterns of past usage, and (2) a word's immediate syntactic setting—that is, the words that surround it in a specific utterance." (emphases in original)).

30. *Yates*, 135 S. Ct. at 1091 (Kagan, J., dissenting).

31. H.R. 3763, 107th Cong. (2002).

32. *See, e.g.*, *The Enron Collapse: Implications to Investors and the Capital Markets: Hearing Before the Subcomm. on Capital Mkts., Ins., & Gov't Sponsored Enters. of the H. Comm. on Fin. Servs.*, 107th Cong. (2002).

33. *Yates*, 135 S. Ct. at 1081.

34. *Id.* at 1077.

35. *Id.* at 1083.

36. *Id.* (quoting 18 U.S.C. § 1519 (2002)).

37. *Id.*

Additionally, § 1519 is located within § 802 of the Sarbanes–Oxley Act, entitled "Criminal penalties for altering *documents*"[38]—this is the aforementioned "broader context of the statute as a whole."[39] The plurality also cites the specificity of the other sections within Chapter 73 of Title 18 as evidence that "tangible object" does not mean all physical evidence.[40] Other Sarbanes–Oxley provisions, however, were placed near more general sections of the U.S. Code; the plurality argues that Congress could have placed § 1519 among these more general sections if it intended § 1519 to be broadly applicable.[41]

The simultaneous passage of another Sarbanes–Oxley provision, 18 U.S.C. § 1512(c)(1), also implicates the long-held surplusage canon. Section 1512(c)(1) provides:

> (c) Whoever corruptly
> (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; . . .
> . . . .
> shall be fined under this title or imprisoned not more than 20 years, or both.[42]

Yates, the plurality notes, does not dispute that the phrase "other object" in this provision does in fact refer to all physical objects.[43] Here the plurality does reference legislative history, but only to reinforce the primary textual argument: § 1512(c)(1) was drafted after § 1519; the expansive definition of "tangible object" proffered by

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38. 15 U.S.C. § 802 (2012) (emphasis added).

39. *Yates*, 135 S. Ct. at 1082 (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)).

40. *Id.* at 1083–84 ("Section 1519's position within Chapter 73 of Title 18 further signals that § 1519 was not intended to serve as a cross-the-board ban on the destruction of physical evidence of every kind. Congress placed § 1519 (and its companion provision § 1520) at the end of the chapter, following immediately after the pre-existing § 1516, § 1517, and § 1518, each of them prohibiting obstructive acts in specific contexts. See § 1516 (audits of recipients of federal funds); § 1517 (federal examinations of financial institutions); § 1518 (criminal investigations of federal health care offenses).").

41. *Id.* at 1084 ("Congress did not direct codification of the Sarbanes–Oxley Act's other additions to Chapter 73 adjacent to these specialized provisions. Instead, Congress directed placement of those additions within or alongside retained provisions that address obstructive acts relating broadly to official proceedings and criminal trials: Section 806, 'Civil Action to protect against retaliation in fraud cases,' was codified as § 1514A and inserted between the pre-existing § 1514, which addresses civil actions to restrain harassment of victims and witnesses in criminal cases, and § 1515, which defines terms used in § 1512 and § 1513. Section 1102, 'Tampering with a record or otherwise impeding an official proceeding,' was codified as § 1512(c) and inserted within the pre-existing § 1512, which addresses tampering with a victim, witness, or informant to impede any official proceeding. Section 1107, 'Retaliation against informants,' was codified as § 1513(e) and inserted within the pre-existing § 1513, which addresses retaliation against a victim, witness, or informant in any official proceeding.").

42. 18 U.S.C. § 1512(c)(1) (2002), *quoted in Yates*, 135 S. Ct. at 1084.

43. *Yates*, 135 S. Ct. at 1084.

the government would make § 1512(c)(1) wholly superfluous, as "any matter within [federal] jurisdiction" includes "an official proceeding"; thus Congress would have had no reason to draft § 1512(c)(1).[44]

The plurality then turns to the language of § 1519 itself, employing the well-known canons of statutory interpretation *noscitur a sociis* and *ejusdem generis* to argue for a narrow reading.

Noscitur a sociis, also called the associated words canon,[45] refers to the maxim that, "[I]f two or more words are grouped together in a statute, the meaning of a particular word may be determined by reference to the meaning of the words surrounding it."[46] In the plurality's application, *noscitur a sociis* indicates that the meaning of the phrase "tangible object" is informed by the verbs "alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in," and the nouns "record" and "document."[47] Thus "tangible object" refers not to *any* tangible object, but rather to tangible objects that share some essential similarity to records and documents.[48] The prohibited actions in § 1519 similarly influence the meaning of "tangible object": Although "alters, destroys, mutilates, conceals, [and] covers up" can each refer to most physical evidence, "falsifies, or makes a false entry in" pertain to objects that relate to record-keeping.[49]

The related canon of *ejusdem generis* denotes, "[W]hen, as part of an enumeration in a statute, general words follow specific words, the general words are presumed to be and are construed as restricted by the particular designations; thus, the general words include only things of the same kind, character, and nature as those specifically enumerated."[50] In this case, the plurality reasons, if "tangible object" truly meant any tangible object, why would Congress bother to include the words "record" and "document"?

Justice Ginsburg next addresses the government's claim, supported in the dissenting opinion, that the phrase "record, document, or tangible object" was drawn from a 1962 Model Penal Code (MPC) provision (and subsequent reform proposals based on that opinion) that employ the language broadly.[51] The plurality admits that the 1962 MPC provision "prohibited tampering with any kind of physical evidence,"[52] but it presents two arguments why "tangible object" should nevertheless be interpreted more narrowly. First, the MPC provision did not prohibit actions specifically related to record keeping—it imposed liability on one who "alters, destroys, mutilates, conceals, or removes a record, document or thing."[53] This lacks the same relationship to record keeping as § 1519's "falsifies, or makes a false entry

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44. *Id.* at 1084–85.

45. *See* 82 C.J.S. *Statutes* § 439 (2016); SCALIA & GARNER, *supra* note 29, at 195–98.

46. 82 C.J.S. *Statutes* § 439 (2016).

47. *Yates*, 135 S. Ct. at 1085–86.

48. *Id.*

49. *Id.* at 1086.

50. 82 C.J.S. *Statutes* § 438 (2016); *see also* 73 AM. JUR. 2D *Statutes* § 127 (2016); 2A SUTHERLAND STATUTORY CONSTRUCTION § 47:17 (7th ed. 2015).

51. *Yates*, 135 S. Ct. at 1087 (citing MODEL PENAL CODE § 241.7(1) (Proposed Official Draft 1962)).

52. *Id.*

53. *Id.* (citing MODEL PENAL CODE § 241.7(1) (Proposed Official Draft 1962)).

in" language. Second, the 1962 MPC provision was proposed as a misdemeanor, while § 1519 is a felony punishable by up to twenty years in prison.[54] The more severe punishment associated with § 1519, the plurality argues, indicates that the statute was intended to have a narrower application than the proposed MPC provision.[55]

Finally, the plurality invokes the rule of lenity to buttress its argument.[56] The rule of lenity insists that, "In interpreting criminal statutes, any ambiguities must be construed most favorably to the defendant."[57] The rule, Justice Ginsburg writes, "is relevant here, where the Government urges a reading of § 1519 that exposes individuals to 20-year prison sentences for tampering with *any* physical object that *might* have evidentiary value in *any* federal investigation into *any* offense, no matter whether the investigation is pending or merely contemplated, or whether the offense subject to investigation is criminal or civil."[58] Although the government in Yates's case did not seek to impose anywhere close to the twenty-year statutory maximum, the plurality here expressed concern that prosecutors would be able to impose huge, and hugely disproportionate, punishments under such an expansive reading of § 1519.

ii. Alito's Concurrence

Justice Alito's concurrence is essentially a slimmed-down version of the plurality opinion. He eschews the plurality's discussion of the broader statutory context of § 1519 within the Sarbanes–Oxley Act, the relevance (or lack thereof) of the 1962 MPC provision, and the rule of lenity. Instead, he opines that *Yates* "can and should be resolved on narrow grounds"[59]—namely, "the statute's list of nouns, its list of verbs, and its title."[60] Justice Alito acknowledges that none of these factors is in itself dispositive, but reasons that as a whole they tip the balance of the case in favor of Yates.[61]

The concurring opinion's discussion of § 1519's nouns and verbs follows the plurality's discussion of *noscitur a sociis* and *ejusdem generis*, and then anticipates the dissent's critiques.[62] Beginning with an analysis of § 1519's nouns, Justice Alito agrees with the plurality that the Latinate canons suggest that "tangible objects" should be of a type similar to records and documents.[63] A hard drive containing e-mail and other electronic media, he suggests, is likely the kind of thing intended by the phrase, insofar as it would be sufficiently similar to records and documents without itself being a record or document.[64] Justice Alito's concurrence also includes a compelling explanation for *why* Congress might have chosen the seemingly

54. *Id.*
55. *Id.* at 1087–88.
56. *See id.* at 1088.
57. 73 AM. JUR. 2D *Statutes* § 188 (2016).
58. *Yates*, 135 S. Ct. at 1088 (emphasis in original).
59. *Id.* at 1089 (Alito, J., concurring).
60. *Id.*
61. *See id.*
62. *See id.* at 1089–90.
63. *Id.* at 1089.
64. *Id.*

open-ended expression "tangible object" to convey such a narrow meaning: the use of broad language, confined to the surrounding context, allows the statute to expand to encompass new technologies yet remain consistent with the purpose of the statute.[65]

Discussing § 1519's verbs, Justice Alito writes, "Although many of those verbs could apply to nouns as far-flung as salamanders, satellites, or sand dunes, the last phrase in the list—'makes a false entry in'—makes no sense outside of filekeeping. How does one make a false entry in a fish?"[66] But he then concedes that Congress needn't always write statutes such that every verb applies to every noun.[67] In this case, however, if "tangible objects" refers to a category of nouns that relate to file keeping, then each verb seems to apply.[68]

The final component of Justice Alito's analysis is the title of § 1519.[69] Of § 1519's nouns included in his preceding analysis, the title contains only "records."[70] If § 1519 had been intended to apply as broadly as the government contends, one might expect the title to read "Destruction, alteration, or falsification of *evidence* . . ." instead. But the reference to "records" in § 1519's title, for Justice Alito, confirms his analysis of the section's "nouns and verbs,"[71] giving Yates's argument the edge.

iii. Kagan's Dissent

Beyond the fact that Justice Kagan dissented in *Yates* in the first place, it's somewhat interesting that she authored the dissent, with Justices Scalia, Kennedy, and Thomas joining. One imagines that Justice Scalia in particular would have been borderline incensed by Justice Ginsburg's opening claim that "[w]hether a statutory term is unambiguous, however, does not turn solely on dictionary definitions of its component words."[72] But Justice Kagan instead wrote—with all the wit and humor Court observers have come to expect from her,[73] if perhaps with an extra dose of snark—what is essentially a call to common-sense: A fish is a tangible object.

Justice Kagan does not begin her opinion by attacking the plurality's claim that context can introduce ambiguity. She instead writes early in the opinion, "[C]ontext confirms what bare text says: All the words surrounding 'tangible object' show that Congress meant the term to have a wide range. That fits with Congress's evident purpose in enacting § 1519: to punish those who alter or destroy physical evidence—*any* physical evidence—with the intent of thwarting federal law enforcement."[74] This

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65. *See id.*
66. *Id.* at 1090.
67. *See id.*
68. *Cf. id.*
69. *See id.*
70. *See id.* (quoting 18 U.S.C. § 1519 (2012)).
71. *See id.*
72. *Yates*, 135 S. Ct. at 1081; *see* SCALIA & GARNER, *supra* note 29, at 57 ("[E]xcept in the rare case of an obvious scrivener's error, purpose—even purpose as most narrowly defined—cannot be used to contradict the text or supplement it. Purpose sheds light only on deciding which of various *textually permissible meanings* should be adopted." (emphasis in original)).
73. *See generally*, Laura Krugman Ray, *Doctrinal Conversation: Justice Kagan's Supreme Court Opinions*, 89 IND. L.J. SUPPLEMENT 1 (2012).
74. *Yates*, 135 S. Ct. at 1091 (emphasis in original).

claim may arguably be overreaching, but the dissent does manage to call into question the extent to which § 1519's internal and external context supports the plurality's narrow reading.

In terms of external context, Justice Kagan points to other references to the term "tangible object." She cites a litany of federal and state statutes that include some reference to "tangible object" or "tangible thing," and writes, "To my knowledge, no court has ever read any such provision to exclude things that don't record or preserve data; rather, all courts have adhered to the statutory language's ordinary (*i.e.*, [sic] expansive) meaning."[75] The dissent references the 1962 MPC provision,[76] as anticipated by the plurality, as well as § 1512's use of the phrase "record, document, or other object."[77] Rather than distinguishing § 1519's scope, the dissent argues that these provisions offer more evidence of the proper breadth of the term "tangible object."[78] It goes on to argue that "typically 'only the most compelling evidence' will persuade this Court that Congress intended 'nearly identical language' in provisions dealing with related subjects to bear different meanings."[79]

The dissent demonstrates little patience with the plurality's discussion of § 1519's title and its placement within Chapter 73 of Title 18. To both arguments, the dissent replies that the Court has never used such evidence to override a statute's plain meaning.[80]

In terms of internal context, Justice Kagan notes that "[s]ection 1519 refers to "any" tangible object, thus indicating (in line with *that* word's plain meaning) a tangible object 'of whatever kind.'"[81] The dissent also claims that the long list of verbs accompanying the phrase further demonstrates the intended broad range of the statute.[82]

The dissent then begins its assault on the plurality's invocation of canons of construction. Regarding the rule against surplusage, Justice Kagan argues that a broad reading of § 1519 would not render § 1512(c)(1) superfluous because only the latter prohibits tampering with evidence in federal litigation between private parties.[83] The dissent then attempts to cut into the plurality's *noscitur a sociis* and *ejusdem generis* analysis—at this point, the charge that context cannot create

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75. *Id.* at 1091–92.

76. MODEL PENAL CODE § 241.7(1) (Proposed Official Draft 1962).

77. 18 U.S.C. § 1512(c)(1) (2002).

78. *Yates*, 135 S. Ct. at 1091.

79. *Yates*, 135 S. Ct. at 1093 (quoting Commc'ns Workers v. Beck, 487 U.S. 735, 754 (1988)).

80. *Id.* at 1094–95 ("I know of no other case in which we have *begun* our interpretation of a statute with the title, or relied on a title to override the law's clear terms. . . . [And a]s far as I can tell, this Court has never once suggested that the section number assigned to a law bears upon its meaning." (emphasis in original) (citing SCALIA & GARNER, *supra* note 29, at xi–xvi)).

81. *Id.* at 1092 (emphasis in original).

82. *Id.* ("[T]he adjacent laundry list of verbs in § 1519 ('alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry') further shows that Congress wrote a statute with a wide scope. Those words are supposed to ensure—just as 'tangible object' is meant to—that § 1519 covers the whole world of evidence-tampering, in all its prodigious variety." (citing United States v. Rodgers, 466 U.S. 475, 480 (1984))).

83. *Id.* at 1095–96.

ambiguity begins in earnest.[84] And as before, the dissent claims that a proper understanding of those canons better supports its argument, because records and documents not only store information, but also provide it; records, documents, and the wide universe of all tangible objects share a common trait in that they can potentially serve as evidence in legal disputes.[85] In the dissent's view, the rule of lenity also offers no support to the plurality's argument, for the simple fact that § 1519 is not ambiguous.[86]

Lastly, the dissent addresses Justice Alito's concurrence. As his arguments mirror the plurality's, the dissent repeats its criticisms with minor adjustments.[87] In Justice Alito's concurrence, he attempts to apply the *noscitur a sociis* and *ejusdem generis* canons to the case in nontechnical, plain English, by asking, "[W]ho wouldn't raise an eyebrow if a neighbor, when asked to identify something similar to a 'record' or 'document,' said 'crocodile'?"[88] Justice Kagan treats Justice Alito's hypothetical not as reaching out to readers outside the legal profession, but as a misunderstanding of the canons themselves: "Courts sometimes say, when explaining the Latin maxims, that the 'words of a statute should be interpreted consistent with their neighbors.' . . . The concurrence takes that expression literally."[89] The better question, the dissent suggests, is whether anyone would claim that a fish, or a crocodile for that matter, is not a tangible object.[90]

In the end, the dissent does find some common ground with the plurality and concurrence. Justice Kagan ends by agreeing that the twenty-year statutory maximum under § 1519 provides for the possibility of prosecutorial overreach: "Still and all, I tend to think, for the reasons the plurality gives, that § 1519 is a bad law—too broad and undifferentiated, with too-high maximum penalties, which give prosecutors too much leverage and sentencers too much discretion."[91] But where the plurality and concurrence employed established canons of construction, albeit perhaps applying them more liberally than is typical, to attempt to remedy this problem, the dissent throws up its hands, claiming that the arbitrariness in enforcement allowable by § 1519's broad language is in fact a recurring characteristic of the federal criminal code.[92]

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84. *See id.* at 1097 ("As an initial matter, this Court uses *noscitur a sociis* and *ejusdem generis* to resolve ambiguity, not create it. Those principles are 'useful rule[s] of construction where words are of obscure or doubtful meaning.'" (quoting Russell Motor Car Co. v. United States, 261 U.S. 514, 520 (1923))).

85. *See id.*

86. *See id.*

87. *See id.* at 1099 ("The concurring opinion is a shorter, vaguer version of the plurality's.").

88. *Id.* at 1089.

89. *Id.* at 1099 (citation omitted) (quoting United States v. Locke, 529 U.S. 89, 105 (2000)).

90. *See id.*

91. *Id.* at 1101.

92. *See id.* at 1100–01.

B. The Importance of Yates

There are several lessons to glean from the *Yates* decision. As mentioned in the Introduction, much of the early literature surrounding the case has been about what it tells us regarding the Supreme Court's attitudes towards overcriminalization and prosecutorial discretion.[93] But *Yates* has much farther-reaching implications in terms of the way the Court approaches statutory interpretation.

In 1998, Jonathan Siegel made the prescient observation that "we are all textualists now."[94] The *Yates* decision's lack of emphasis toward legislative history surely bears testimony to the accuracy of Siegel's statement. On today's Supreme Court, textualist canons account for most of the artillery in closely fought cases.[95]

Textualists have rallied around Judge Harold Leventhal's oft-quoted critique of legislative history—that it is akin to "looking over a crowd and picking out your friends."[96] Essentially, the textualists charge, legislative history allows judges too much freedom to cherry-pick interpretations of legislative purpose that comport with their own political dispositions. *Yates*, however, shows that judges need neither legislative history nor compelling political incentives to "pick out their friends." *Yates* illustrates that mere reliance on textualist canons provides more than enough freedom for judges to reach wholly contradictory conclusions.

II. COMPETING CANONS

Justice Scalia, with his coauthor Bryan Garner, wrote in their 2012 tome *Reading Law* that "[t]extualism is not well designed to achieve ideological ends, relying as it does on the most objective criterion available: the accepted contextual meaning that the words had when the law was enacted."[97] In that book, the authors identified fifty-

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93. *See, e.g.*, Adeel Bashir, *Fish Jokes Aside:* Yates *Hints at the Court's View of Prosecutorial Discretion*, CRIM. JUST., FALL 2015, at 18; Todd Haugh, *Overcriminalization's New Harm Paradigm*, 68 VAND. L. REV. 1191 (2015); John G. Malcolm, *Hook, Line & Sinker: Supreme Court Holds (Barely!) that Sarbanes-Oxley's Anti-Shredding Statute Doesn't Apply to Fish*, 2014–2015 CATO SUP. CT. REV. 227 (2015); Wesley M. Oliver, *Charles Lindbergh, Caryl Chessman, and the Exception Proving the (Potentially Waning) Rule of Broad Prosecutorial Discretion*, 20 BERKELEY J. CRIM. L. 1, 68–72 (2015); *The Supreme Court, 2014 Term—Leading Cases* 129 HARV. L. REV 181, 361 (2015).

94. Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1057 (1998).

95. *Cf.* Abbe R. Gluck, Comment, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 73 (2015) ("Every major recent statutory opinion, from every Justice on the Court, has relied heavily on interpretive canons to decide cases; their rise derives from textualism's impact on the tools—text and presumptions, not legislative history and purpose—that virtually all judges now use to interpret statutes.").

96. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (citing a conversation with Harold Leventhal).

97. SCALIA & GARNER, *supra* note 29, at 16.

seven "valid canons" of construction that, if faithfully followed, will minimize ideologically motivated judging[98] and promote "sound interpretation."[99]

William Eskridge argues that Scalia and Garner's approach fails to prevent the type of normative judging it purports to.[100] Complex cases afford judges opportunities to select canons that support the result that accords with their predilections.[101] The choice between canons requires normative judgments, and these judgments often hinge on a judge's assessment of a statute's purpose.[102] In light of the *Yates* decision, this criticism rings especially true. But this line of criticism is hardly new—over half a century ago, Karl Llewellyn described how "dueling canons" could be used to justify contradictory interpretations.[103]

Textualism has become the Court's dominant approach to statutory interpretation despite its long-recognized failure to preclude normative judging. Perhaps the ascendency of textualism is merely an historical accident. More likely, other aspects of textualism—its fidelity to democratic principals, for example[104]—contributed to its dominance. The Court's adoption of textualism as its primary interpretive approach may still be beneficial, regardless of the reasons for that development. The intellectual incompatibility of textualism and purposivism had stymied the discourse concerning statutory interpretation. As a shared approach, textualism provides a common framework for the Justices to engage the particularities of each case, rather than expend energy critiquing each other's approach.

A. Karl Llewellyn's Critique

In 1950, Karl Llewellyn published his *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*.[105] In it, he lays out twenty-eight established canons of construction and twenty-eight more that are directly contradictory.[106] For example, he points to the competing canons that state, "Titles do not control meaning; preambles do not expand scope; section headings do not change language,"[107] and "The title may be consulted as a guide when there is doubt or obscurity in the body; preambles may be consulted to determine rationale, and thus the true construction of terms; section headings may be

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98. *See id.* at 17.

99. *Id.* at 29.

100. *See* Eskridge, *supra* note 24, at 536 ("One problem is that even their fragmentary list of approved canons reveals significant possibilities for judicial cherry-picking." (footnote omitted) (citing SCALIA & GARNER, *supra* note 29, at xi–xvi)).

101. *See id.*

102. *See id.* at 537.

103. *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); Part II.A *infra*.

104. *See* SCALIA & GARNER, *supra* note 29, at xxviii.

105. *See* Llewellyn, *supra* note 103.

106. *Id.* at 401–06.

107. *Id.* at 403 (citing Westbrook v. McDonald, 44 S.W. 2d 331 (Ark. 1931); Huntworth v. Tanner, 152 P. 523 (Wash. 1915); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS §§ 83-85 (2d ed. 1911); SUTHERLAND, STATUTORY CONSTRUCTION §§ 339-42 (2d ed. 1904); 59 C.J. *Statutes* § 599 (1932); 25 R.C.L., *Statutes* §§ 266-267 (1919)).

looked upon as part of the statute itself."[108] Given a particular statute, how is a judge to decide which to apply? (Scalia and Garner, for what it's worth, did claim that "title[s] and headings are permissible indicators of meaning . . . [b]ut a title or heading should never be allowed to override the plain words of a text.")[109]

Llewellyn claimed that, faced with competing canons, a judge decides cases based on "the sense of the situation as seen by the court."[110] Precedent may constrain that decision to some extent,[111] but the judge can still use the canons as formal justifications for the reaching the result that best accords with her "sense" of the case. In *Yates*, the plurality and concurring opinions were guided by the sense that Yates's conduct was not within the intended scope of § 1519, and the dissent was guided by the sense that § 1519's language was unambiguously applicable. Both outcomes were reasonable; the former just happened to gain more support.

B. Speaking the Same Language?

Yates v. United States provides several examples of the plurality and dissent choosing canons that conflict with each other.[112] But the larger differences in that case arise not from choosing conflicting canons, but from applying the same canon—the "ordinary-meaning canon"—differently. Scalia and Garner described the ordinary-meaning canon thusly: "Words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense."[113] They called this rule "the most fundamental semantic rule of interpretation."[114] But what did the plurality do if not determine that "tangible object" "bear[s] a technical sense" in the context of 18 U.S.C. § 1519?

Whether ambiguity exists in the term "tangible object" is reducible to a judgment call about the purpose of the Sarbanes–Oxley Act, and to § 1519 in particular. Before textualism made consideration of legislative history taboo, congressional hearings, floor debates, Committee reports, and all other forms of legislative documents would have at least been available to help inform this decision.[115] Dismissing legislative history has not made these kinds of questions disappear—statutory interpretation has not become any more consistent; ambiguities

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108. *Id.* (citing Gulley v. Jackson Int'l Co., 145 So. 905 (Miss. 1933); Brown v. Robinson, 175 N.E. 269 (Mass. 1931); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS §§ 83-85 (2d ed. 1911); SUTHERLAND, STATUTORY CONSTRUCTION §§ 339-42 (2d ed. 1904); 59 C.J. *Statutes* §§ 598-99 (1932); 25 R.C.L., *Statutes* §§ 266, 267 (1919)).

109. SCALIA & GARNER, *supra* note 29, at 221–22.

110. Llewellyn, *supra* note 103, at 397 (emphasis omitted).

111. *See id.* at 397–98.

112. *See supra* notes 34–36, 79and accompanying text.

113. SCALIA & GARNER, *supra* note 29, at 69.

114. *Id.*

115. *See, e.g.*, United States v. Monia, 317 U.S. 424, 432 (1943) (Frankfurter, J., dissenting) ("A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute, like the one before us, is part of a legislative process having a history and a purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment—that to which it gave rise as well as that which gave rise to it—can yield its true meaning.").

(and ambiguity about ambiguities) will always be a facet of statutory language. What textualism has done is make the judgment involved in statutory interpretation less visible. A judge who is confronted with a statutory provision can make his decision about what the outcome of a case should be based on his own political or ideological preferences, or what he had for breakfast, or whether traffic was bad—and then pull from the multifarious canons of construction ones that will support his decision.

But purposivism's use of legislative history was no less opaque.[116] It is beyond the scope of this Note to decide *a priori* whether purposivism or textualism is a better approach. Textualism appears to have won that battle for now. The more central point is that prior to textualism becoming the dominant approach to statutory interpretation on the Supreme Court, the textualists referred to canons of construction and the purposivists referred to legislative history. When the two factions were in disagreement, they wrote opinions that focused on the systemic shortcomings of the other's jurisprudential approach. Now that textualism has become the dominant approach, the Court will be more likely to produce dissenting opinions that engage the holding on its own terms, and the Justices to hold each other accountable, so that textualism might be able to live up to its initial promise of ideologically neutral, sound interpretation.

The Justices' shared reliance on textualism effects these benefits by altering the scope of inquiry. When purposivists relied on legislative history and textualists relied on canons of construction, the discourse focused too broadly on methodological critiques of each side's approach. By using the shared vocabulary and tools of textualism, the Justices can focus their disagreements more narrowly over the specific language of a statute and the proper application of canons of construction. Widespread acceptance of textualism will not bring an end to legal indeterminacy or preclude normative judgment. It will, however, afford Justices an opportunity to challenge one another on equal footing, enriching the Court's statutory interpretation jurisprudence.

Furthermore, just because Justice Scalia "(co)wrote the book" on canons of construction, does not mean that he had a monopoly on their proper application. The plurality and concurring opinions in *Yates* make at least that much clear. But Justice Scalia's role in shaping textualism should not be understated. Speaking at Harvard Law School in 2015, Justice Kagan said that Justice Scalia

> is going to go down as one of the most important, most historic figures in the Court. And there are a whole number of reasons for that . . . but I think the primary reason for that is that Justice Scalia has taught everybody how to do statutory interpretation differently. . . . I think we're all textualists now.[117]

The Court has much to grapple with in the wake of Justice Scalia's death, including whether textualism will remain the dominant approach to statutory interpretation. Nevertheless, Justice Kagan's explicit endorsement of textualism, and

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116. *See supra* note 96 and accompanying text.

117. Justice Elena Kagan, *Antonin Scalia Lecture at the Harvard Law School*, YOUTUBE (Nov. 18, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg [https://perma.cc/2LLJ-294E].

her characterization of Justice Scalia's legacy, are strong indicators that textualism is here to stay.

The more focused legal discourse regarding statutory interpretation envisioned here, comprising debate over the proper application of textualist canons and the close parsing of statutory text, resemble the concepts explicated by the great twentieth-century Austrian–British philosopher Ludwig Wittgenstein. In the *Philosophical Investigations*, Wittgenstein wrote, "For a *large* class of cases—though not for all—in which we employ the word 'meaning' it can be defined thus: the meaning of a word is its use in the language. And the *meaning* of a name is sometimes explained by pointing to its bearer."[118] In other words, usage plays a large part in a word's meaning. Dicta in the *Yates* decision may influence federal circuit and district courts by indicating that a statutory provision's purpose, and its context in a larger statutory scheme, should indeed be thought of as capable of introducing ambiguity into an otherwise unambiguous statutory phrase. The canons of construction judges employ to determine statutory meanings constantly require interpretation of their own, and their meanings continually shift as they are used in different cases.

This description of "meaning" as mutable and indeterminate might be unsettling to some. It shouldn't be. As Llewellyn realized,[119] judges always have and will continue to be guided by their "sense" of a particular case. If the Court continues to adhere to a textualist approach but accounts for the "shortcomings" of textualism—namely, that it does not restrict normative judging like its proponents have claimed—Justices in disagreement will have to address and make explicit their respective senses of the case. This will lead to greater transparency in the Court's opinions. The formalistic restrictions imposed by textualism as it is practiced today, Scalia and Garner's book being one iteration of these restrictions, guide the Justices towards common ground so that even when they disagree, their disagreements will have a strong foundation in the text relevant to the case at hand.

CONCLUSION

There will always be difficult cases concerning statutory interpretation, and it is highly unlikely that there will ever be complete agreement on the court regarding how statutes ought to be interpreted. The Supreme Court will likely continue to be under textualism's strong influence for some time to come, and the *Yates* decision indicates that Justices who are later-adopters of textualism's vocabulary will nevertheless play a role in its continued development.

Ardent textualists like the late Justice Scalia criticized judicial consideration of legislative history on the grounds that it allowed judges too much leeway to make normative judgments—it is akin to "looking over a crowd and picking out your friends."[120] But textualism does not prevent normative judging either.[121] Nevertheless, the Court's shared reliance on textualist principles bodes well for

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118. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 43 (G. E. M. Anscombe trans.) (1961).

119. *See supra* notes 110–111and accompanying text.

120. Wald, *supra* note 96.

121. *See supra* notes 100–102and accompanying text, Part II.A.

statutory interpretation jurisprudence. It appears that "we are all textualists now,"[122] and the *Yates* decision is a model of what we can expect from statutory interpretation decisions in the future: majority and dissenting opinions that engage fully with each other's reasoning, close readings of statutory text, and narrow focus on the facts of the case. The Justices will continue to disagree over the proper interpretation of a statute in hard cases, but at least these disagreements will now use mutually recognized, valid terms.

122. Kagan, *supra* note 117.