

# TEXTUALISM IN ALABAMA

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## INTRODUCTION

Textualism is alive and well in Alabama. This interpretive doctrine teaches that legal texts have objective meaning and that it is the job of judges to find and apply that meaning. Justice Antonin Scalia and lexicographer Bryan Garner distilled the textualist philosophy and outlined its key operating principles in their seminal treatise *Reading Law*. But textualist principles are not new—they are time-tested tools that have guided Americans for centuries, including right here in Alabama.

This Essay seeks to demystify textualism and show how it operates in this state. I begin with a brief introduction to textualism—what it is, where it comes from, and why it is a foundational part of our legal system. Next, I describe how the court on which I serve, the Supreme Court of Alabama, has relied on (or, in some cases, departed from) textualist principles. I then highlight some open questions and gray areas in our caselaw. Finally, I include an appendix summarizing how the Supreme Court of Alabama has applied the canons of construction featured in *Reading Law*. My hope is that this Essay will help litigants, attorneys, scholars, and citizens understand how legal interpretation works in this state.

## I. A BRIEF INTRODUCTION TO TEXTUALISM

Textualism, in its simplest form, is the idea that a law's text *is* the law.<sup>1</sup> This principle applies to all written law—constitutional and statutory alike.<sup>2</sup> When presented with a dispute over the meaning of written law, a textualist judge does not speculate about what legislators privately *wanted* the law to accomplish nor does he ask what a more sensible law *should* have said. He asks only how the text would be best understood by a reasonable, well-informed person reading the text in its historical and linguistic context.

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\* Associate Justice, Supreme Court of Alabama. The views expressed in this Essay are my own, not necessarily those of my colleagues. I thank my law clerks for their helpful assistance with this Essay, especially Annie Wilson, who had the laboring oar on the research, and Hunter Myers and Zach Gillespie, who assembled the Appendix that appears at the end. I also thank Chief Judge William H. Pryor, Jr., Judge Kevin Newsom, Judge Andrew Brasher, Aditya Bamzai, Jeff Anderson, and Othni Lathram for their helpful conversations and comments.

1. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 397 (2012) (“The traditional view is that an enacted text is itself the law.”).

2. See Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 *YALE L.J.* 908, 938–39 (2017) (describing the traditional textualist view, originating with the Framers, that “constitutional interpretation should mimic ordinary statutory interpretation”).

In holding that the text itself constitutes the law, the doctrine of textualism stands in contrast to the competing doctrine of purposivism—which holds that the law is what legislators subjectively intended it to be<sup>3</sup>—and the various theories of judicial updating—which treat the written law as merely a starting point that can be revised by judges in a common-law fashion.<sup>4</sup> For textualists, a law’s meaning depends not on the wishes of legislators or the fiat of judges but on the “objective indication” of the law’s words.<sup>5</sup>

But just because the textualist inquiry is objective does not mean it is easy. Textualist judges are not robots. We understand that legal interpretation requires more than plugging a string of words into a dictionary and running with the first results that come up. A written law, like any text, acquires meaning from its context, and that context is often rich with nuance. Weighing all the relevant contextual clues can be difficult, especially when those clues conflict with each other. Even textualist judges can disagree about how to prioritize competing clues and, consequently, about the best interpretation of a law.<sup>6</sup> But

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3. Justice David Brewer captured the essence of purposivism in his majority opinion in *Church of the Holy Trinity v. United States*, when he wrote that “a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.” 143 U.S. 457, 459 (1892). For Justice Brewer, the way to ascertain the intention of a law’s makers was not simply to analyze the law’s text but rather to examine “the evil which [congressmen] intended to be remedied, the circumstances surrounding the appeal to congress, [and] the reports of the committee of each house.” *Id.* at 465. *Holy Trinity*-style reasoning had its heyday in the twentieth century but was abandoned by the U.S. Supreme Court before that century came to a close. SCALIA & GARNER, *supra* note 1, at 12–13. Even legal-process purposivists—a more modern school of purposivists who “cast purposivism as an objective framework that aspires to reconstruct the policy that a hypothetical ‘reasonable legislator’ would have adopted”—differ from textualists in that they care more about how “a reasonable person would address the mischief being remedied” by a law than they do about how “a reasonable person would [understand the law’s] language.” See John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 76 (2006). Purposivists of all stripes are united by a willingness to subordinate a law’s most plausible semantic meaning to the law’s perceived background “purpose.” *Id.* I note that some scholars have advocated that “purposivism” be reserved only for objective-framework purposivists while “intentionalism” be used for purposivists focused on subjective intent. See Lawrence B. Solum, *Legal Theory Lexicon 078: Theories of Statutory Interpretation and Construction*, LEGAL THEORY LEXICON (July 24, 2022), [https://lsolum.typepad.com/legal\\_theory\\_lexicon/2017/05/theories-of-statutory-interpretation.html](https://lsolum.typepad.com/legal_theory_lexicon/2017/05/theories-of-statutory-interpretation.html). This Essay, however, uses “purposivism” in its broader sense.

4. See, e.g., David A. Strauss, *Do We Have a Living Constitution?*, 59 DRAKE L. REV. 973, 976–77 (2011) (urging judges to take a “common law approach” to the Constitution, which Strauss describes as an approach that “emphasizes precedent and tradition but that allows for [judicial] innovation” in contravention to the “original understanding” of the Constitution’s text); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010) (similar); *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 353, 357 (7th Cir. 2017) (Posner, J., concurring) (arguing that judges should embrace the philosophy of “judicial interpretive updating,” which would allow judges to “updat[e] old statutes” to keep pace with changing times, even if the judges know that “the Congress that enacted [the statute] would not have accepted” the “updated” meaning).

5. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 29 (1997).

6. For an example involving constitutional interpretation, compare *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 358–71 (1995) (Thomas, J., concurring in judgment) (concluding that the “historical evidence from the framing” supports the view that the “freedom of speech” protected by the First Amendment includes anonymous speech), with *id.* at 371–85 (Scalia, J., dissenting) (reaching the opposite conclusion). For an example involving statutory interpretation, compare *Van Buren v. United States*, 141 S. Ct. 1648, 1654–61 (2021) (holding, after extensive textualist analysis, that the Computer Fraud and Abuse Act does not criminalize the act of using a computer to obtain information for a forbidden purpose), with *id.* at 1663–68 (Thomas, J., dissenting) (reaching the opposite conclusion).

textualists are united in their convictions that legal texts have objective meaning,<sup>7</sup> that judges are capable of discerning that meaning, and that the meaning of a law's text *is* the law.<sup>8</sup>

Textualism is often discussed alongside a related term: originalism. Judges and scholars do not always agree about what, if any, differences exist between these two terms. Some use the word “textualism” to apply only to statutes and use “originalism” to describe the application of textualist principles to the federal Constitution.<sup>9</sup> Others describe originalism as a canon of textualist interpretation<sup>10</sup> or else use the terms interchangeably.<sup>11</sup> Terminology aside, in practice both doctrines reflect the same underlying commitments: the belief that a law's text *is* the law and the belief that the meaning of a text is fixed at the time of its enactment.<sup>12</sup> In other words, the meaning of a law is its *original public* meaning, not its *modern* meaning.

The distinction between original meaning and modern meaning matters little for recent laws, but it can matter a great deal for older constitutional provisions and statutes whose language might have undergone linguistic drift.<sup>13</sup> For example, the federal government's constitutional obligation to protect against “domestic violence” requires the national government to defend states from riots and insurrections within a state's territory (the eighteenth-century

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7. Sometimes a text's objective meaning is indeterminate or nonsensical. In that case, the law cannot be applied because unintelligible texts are inoperative. See SCALIA & GARNER, *supra* note 1, at 134; *Standard Oil Co. v. State*, 59 So. 667, 667 (Ala. 1912) (stating that a law with no “intelligible application” is “simply void”); *Upson v. Austin*, 4 Ala. 124, 128 (1842) (explaining that laws can be “ineffectual for uncertainty”).

8. SCALIA, *supra* note 5, at 29; Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1120 (1998) (describing textualism as the belief that “the judicial branch serves best by enforcing enacted words rather than unenacted (more likely, imagined) intents, purposes, and wills”).

9. Justice Neil Gorsuch has, at times, adopted this practice. See Rachel del Guidice, *Gorsuch Touts Originalism, Textualism in Address to Conservative Legal Society*, DAILY SIGNAL (Nov. 17, 2017), <https://www.dailysignal.com/2017/11/17/gorsuch-touts-originalism-textualism-in-address-to-conservative-legal-society/> (“Originalism has regained its place at the table with the Constitution interpretation and textualism in the reading of statutes . . .”).

10. Justice Scalia, for instance, described originalism as the instantiation of the fixed-meaning canon. SCALIA & GARNER, *supra* note 1, at 78–92.

11. See Joseph S. Diedrich, *A Jurist's Language of Interpretation*, WIS. LAW. (July 27, 2020), <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=93&Issue=7&ArticleID=27865> (“Many lawyers and laypeople perceive textualism and originalism as two sides of the same coin.”).

12. See Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 367 (2005) (“[I]he typical textualist judge seeks to unearth the statutes' *original* meanings.”); *id.* at 376 (“When confronting a statute, all mainstream interpreters start with the linguistic conventions (as to syntax, vocabulary, and other aspects of usage) that were prevalent at the time of enactment.”).

13. See, e.g., *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (discussing and applying the “‘fundamental canon of statutory construction’ that words generally should be ‘interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute’” (quoting *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018))); *accord* *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 320 n.\* (2005) (Thomas, J., concurring) (noting the possibility that the meaning of “arising under” shifted between the time of the federal Constitution's ratification in 1788 and the enactment of 28 U.S.C. § 1331 in 1948).

meaning of “domestic violence”) but does not require it to prevent spousal abuse (the modern meaning).<sup>14</sup>

#### A. Textualism’s Origins and Development

Textualism is sometimes characterized (usually by its detractors) as a novel innovation or even as the wholesale creation of Justices Scalia and Clarence Thomas. While it is true that Justices Scalia and Thomas have done much to popularize textualism, the doctrine itself is not new.

As far back as *Marbury v. Madison*, Americans understood that the text of the Constitution is our nation’s supreme law and that “courts, as well as other departments, are bound by that instrument” as written.<sup>15</sup> It was, after all, Chief Justice John Marshall’s conviction that “the written text” of a law *is* the law that formed “the core of the argument for the power of judicial review” embraced in *Marbury*.<sup>16</sup> As Chief Justice Marshall explained, the reason courts can (and must) refuse to enforce unconstitutional laws is not because the judicial branch somehow trumps the legislative branch—it emphatically does not<sup>17</sup>—but because both branches are jointly subordinate to a “supreme law”: the written Constitution.<sup>18</sup>

*Marbury* focused on the paramount importance of the written *Constitution*, but early American courts took a similarly text-focused approach to *statutes*. Justice Samuel Chase, riding circuit in 1800, captured the spirit of the age when he wrote:

By the rules, which are laid down in *England* for the construction of statutes, and the latitude which has been indulged in their application, the *British* Judges have assumed a legislative power . . . . Of those rules of construction, none can be more dangerous, than that, which distinguishing between the intent, and the words, of the legislature, declares, that a case not within the meaning of a statute, according to the opinion of the Judges, shall not be embraced in the operation of the statute, although it is clearly within the words . . . .

For my part, . . . I shall always deem it a duty to conform to the expressions of the legislature, to the letter of the statute, when free from ambiguity and

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14. Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 281 (2017); U.S. CONST. art. IV, § 4.

15. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803).

16. Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2741 (2003) (emphasis omitted).

17. See THE FEDERALIST NO. 78 (Alexander Hamilton); see also Birmingham–Jefferson Civic Ctr. Auth. v. City of Birmingham, 912 So. 2d 204, 223 & n.21 (Ala. 2005) (Parker, J., concurring specially) (explaining the difference between the legitimate power of judicial review announced in *Marbury* and the illegitimate power of judicial supremacy asserted in, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18 (1958)).

18. The Supreme Court of Alabama has adopted this justification in its own exercise of judicial review. See, e.g., *S. Express Co. v. Whittle*, 69 So. 652, 659 (Ala. 1915).

doubt; without indulging a speculation, either upon the impolicy, or the hardship, of the law.<sup>19</sup>

Justice Chase was reminding the parties that courts lack authority to override a statute's clear semantic meaning, even if the judge thinks doing so would avoid injustice or better conform the statute to its background policy goals.<sup>20</sup> Other members of the Founding generation, including Thomas Jefferson,<sup>21</sup> James Madison,<sup>22</sup> Alexander Hamilton,<sup>23</sup> and Brutus (the most influential antifederalist),<sup>24</sup> echoed Justice Chase's sentiment when they warned against the dangers of atextual interpretation.

It is little surprise that the Founding generation, which had just fought a bloody revolution to establish a “[g]overnment of laws, and not of men,”<sup>25</sup> viewed fidelity to written law as paramount. Experience had taught them that judges who viewed themselves as empowered to prioritize “the reasoning spirit” of laws “without being confined to the[ir] words or letter” would

19. *Priestman v. United States*, 4 U.S. (4 Dall.) 28, 30 n.a (1800); *see also* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 86 n.336 (2001).

20. *See* Manning, *supra* note 19, at 92 (explaining that the U.S. Supreme Court in the early nineteenth century “expressly disclaimed authority to adjust an otherwise *clear* statute in order to avoid a perceived hardship or injustice or supply an omission thought to be warranted by the statute’s overall policy”); *see also, e.g.*, *Evans v. Jordan*, 13 U.S. (9 Cranch) 199, 203 (1815) (“[T]his Court would transgress the limits of judicial power by an attempt to supply, by construction, this supposed omission of the legislature. [An] argument, founded upon the hardship of this and similar cases, would be entitled to great weight, if the words of this [statute] were obscure and open to construction. But considerations of this nature can never sanction a construction at variance with the manifest meaning of the legislature, expressed in plain and unambiguous language.”).

21. *See* Letter from Thomas Jefferson to Wilson C. Nicholas (Sept. 7, 1803) (“[O]ur peculiar security is in the possession of a written [C]onstitution. [L]et us not make it a blank paper by construction.”), <https://founders.archives.gov/documents/Jefferson/01-41-02-0255#TSJN-01-41-02-0255-fn-0001-ptr>.

22. *See* Letter from James Madison to Sherman Converse (Mar. 10, 1826) (“In the exposition of laws, [and] even of Constitutions, how many important errors, may be produced by mere innovations in the use of words [and] phrases, if not controuled [sic] by a recurrence to the original and authentic meaning attached to them.”), <https://founders.archives.gov/documents/Madison/99-02-02-0630>; *see also* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 536 & nn.75–76 (2003) (collecting similar quotes).

23. Nelson, *supra* note 22, at 544 n.117 (citing Alexander Hamilton, *Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank* (Feb. 23, 1791) (“[W]hatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself, according to the usual & established rules of construction. . . . [A]rguments drawn from extrinsic circumstances, regarding the intention of the [lawmakers], must be rejected.”), <https://founders.archives.gov/documents/Hamilton/01-08-02-0060-0003>).

24. ANTI-FEDERALIST PAPER NO. 11 (Brutus) (warning that allowing judges to prioritize the “spirit” of laws above their “letter” would “enable them to mould the government, into almost any shape they please”), <https://teachingamericanhistory.org/document/brutus-xi/>. The Federalists agreed with Brutus that atextual exercise of the judicial power was anathema, and they denied that the Constitution granted federal judges any such power. *See supra* notes 20–23; *see also* Manning, *supra* note 19, at 79–85.

25. *See* JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 304, at 184 (New York, Harper & Bros. 1840) (describing the principle that government “ought to be a [g]overnment of laws, and not of men” as “the fundamental maxim of a republic”).

inevitably “erode the principle of a government of limited and enumerated powers.”<sup>26</sup>

The Court continued to reflect that understanding well into the nineteenth century,<sup>27</sup> admonishing litigants in 1845:

[T]he judgment of *the court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress* in the debate which took place on its passage, *nor by the motives or reasons assigned by them* for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and *the only mode in which that will is spoken is in the act itself.*<sup>28</sup>

At the turn of the century, Justice Oliver Wendell Holmes similarly wrote:

[W]e ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used . . . . *We do not inquire what the legislature meant; we ask only what the statute means.*<sup>29</sup>

Courts, of course, have strayed from textualist principles from time to time, most famously during the Warren Court’s heyday of living constitutionalism.<sup>30</sup> But it is the deviation from textualism, not textualism itself, that is remarkable in our nation’s history.<sup>31</sup> Since the Warren Court era—thanks in large part to the influence of Justices Scalia and Thomas—textualism has been restored to its preeminent role.<sup>32</sup> As Justice Elena Kagan observed, “we’re all textualists now.”<sup>33</sup>

26. Manning, *supra* note 19, at 80.

27. There were, of course, fits and starts along the way. See Manning, *supra* note 19, at 101–02 (conceding that lower federal courts, “at times,” departed from a text-focused approach in favor of a purposivist approach and that “[e]ven the Supreme Court did so on occasion”).

28. *Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1845) (emphasis added).

29. Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417–19 (1899) (emphasis added). Justice Felix Frankfurter would later echo this sentiment, explaining, “We [judges] are not concerned with anything subjective. We do not delve into the mind of legislators or their draftsmen, or committee members.” Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 539 (1947).

30. See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961); *Reynolds v. Sims*, 377 U.S. 533, 564–65 (1964); *Griswold v. Connecticut*, 381 U.S. 479, 482–86 (1965); *Miranda v. Arizona*, 384 U.S. 436, 459–60 (1966).

31. Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U. CHI. L. REV. 81, 81 (2017) (observing that the U.S. “Supreme Court is dominantly textualist” and that “[n]o Justice these days is a purposivist”).

32. See generally William H. Pryor, Jr., *Textualism After Antonin Scalia: A Tribute to the Late Great Justice*, 8 FAULKNER L. REV. 29 (2016).

33. Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFt0Tg>; Diarmuid F. O’Scannlain, Remarks, “*We Are All Textualists Now*”: *The Legacy of Justice Antonin Scalia*, 91 ST. JOHN’S L. REV. 303, 304 (2017).

### B. *Why Textualism?*

When I became a judge, I swore an oath to uphold the Constitutions of the United States and this state.<sup>34</sup> Both the U.S. Constitution and the Alabama Constitution refer to their own text as law and establish specific requirements for making additional laws.<sup>35</sup> According to those requirements, a statutory law is a text enacted by both branches of the legislature and signed by the executive (or enacted on reconsideration over the executive's veto).<sup>36</sup> Under our Constitutions, the unexpressed intentions of individual legislators are not law and neither are the policy preferences of judges.<sup>37</sup> Only a document that has gone through the rigorous process of bicameralism and presentment (or constitutional amendment) qualifies.<sup>38</sup> The rule of bicameralism and presentment requires agreement between both branches of the legislature—and, usually, the executive—as to a specific set of words. A judge who casts aside those words in favor of something (such as an unexpressed intention or policy goal) has usurped legislative power by enforcing as “law” a rule that was not validly enacted. That usurpation contravenes both the U.S. Constitution and the Alabama Constitution and the oath we judges swear to defend them. “Sneering at the promise in the oath is common in the academy,” as Judge Easterbrook once observed, but the oath “matters greatly to conscientious public officials.”<sup>39</sup> It matters to me, and it should matter to everyone who cares about how and by whom we are governed.

That, in my view, is reason enough to be a textualist. But there are practical reasons to be one too. First among them is that textualism safeguards predictability and stability in law. By anchoring the meaning of a text to the objective indication of its words at a fixed point in time, textualism constrains judges' abilities to “update” laws as they go along. For the textualist judge, a

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34. See ALA. CONST. art. XVI, § 279.

35. See U.S. CONST. art. VI, § 2 (“This Constitution . . . shall be the supreme Law of the Land . . .”); ALA. CONST. pmb1. (“[T]he following Constitution . . . [controls the] form of government for the State of Alabama . . .”).

36. See U.S. CONST. art. I, § 7; ALA. CONST. art. V, § 125.

37. Judges are empowered to decide individual *cases* and *controversies*, but we are not empowered to promulgate or repeal laws. See Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 936 (2018) (“[C]ourts have no authority to erase a duly enacted law from the statute books. . . .”). Even judges acting in their common-law capacity cannot invent or promulgate new laws in the fashion of a legislature. *Gamble v. United States*, 139 S. Ct. 1960, 1983 (2019) (Thomas, J., concurring). And, in Alabama, judges' common-law powers are simultaneously granted and constrained by statutory law. See ALA. CODE § 1-3-1 (1975).

38. *Ex parte* Christopher, 145 So. 3d 60, 69 (Ala. 2013) (“No law can be enacted or amended apart from the constitutionally mandated procedure, known as bicameralism and presentment.”); *Pruitt v. Oliver*, 331 So. 3d 99, 111–12 (Ala. 2021) (emphasizing that courts “are not at liberty to amend statutes to conform to what we might think the legislature should have done” and cannot “assume the legislative prerogative to correct defective legislation”).

39. Easterbrook, *supra* note 8, at 1122; see also William H. Pryor, Jr., *Against Living Common Goodism*, 23 FEDERALIST SOC'Y REV. 24, 29 (2022) (“The judicial oath obliges judges, as a moral duty, to support the written text that is our Constitution.”).

statute enacted in 1789 carries the same meaning today as it did two hundred years ago, and it will continue to carry that meaning until it is amended or repealed by the people's elected representatives. This commitment to fixed meaning allows members of the public to govern themselves and structure their affairs without having to worry that next year's judges will pull the rug out from under them.

In a similar vein, textualism promotes fair notice.<sup>40</sup> By focusing on what a reasonable citizen would understand the law to mean—rather than on legislators' intentions or judges' preferences—textualism ensures that the law is accessible to the people who are bound by it.

Textualism also promotes legislative competence. When judges refuse to fix policy problems for the legislature, the legislative branch has a stronger incentive to draft clear, coherent laws at the outset. In contrast, purposivism encourages strategic behavior by legislators (who know they can circumvent the legislative process by sprinkling their preferred language into committee reports, floor debates, or amicus briefs—even if that language never would have been able to garner a majority of votes), and judicial updating encourages legislative laziness (Why take pains to avoid mistakes or think through additional contingencies if you know judges will do it for you?).

This is not to say that textualism is foolproof. Judges are human beings. Despite our best efforts, we make mistakes. Neither textualism nor any other interpretive approach can eliminate the possibility of judicial error. But textualism is far less error-prone than its two competitors.

Compare it, first, with judicial updating. While textualism confines judges to our narrow sphere of expertise and training (the interpretation and application of legal texts), judicial updating invites judges to opine on all sorts of abstract and far-reaching political, social, and economic questions outside the judicial wheelhouse. There is a reason that the people elected *legislators* to formulate public policy, and there is every reason to think they are better at it and better situated to be accountable for their choices than judges are.

Now consider purposivism. Unlike judicial updating, purposivism correctly recognizes that policy judgments belong to the legislative branch. But purposivism goes astray by misunderstanding what the legislative branch is and does. Purposivists assume that since legislators have the power to make law, the law must be defined as whatever legislators wanted it to be, regardless of whether they express their desires in the text or not.<sup>41</sup> Thus, for a purposivist, the meaning of a law's text is only *evidence* of the law's true meaning—and the text-based evidence can be overcome by legislative history or other subjective-intent evidence (such as amicus briefs filed on behalf of legislators) indicating that the legislators *wanted* the law to mean something other than what the law

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40. See generally Note, *Textualism as Fair Notice*, 123 HARV. L. REV. 542 (2009).

41. Manning, *supra* note 3, at 71–72.

actually says.<sup>42</sup> As explained above, that view is wrong as a matter of first principles: the U.S. Constitution and the Alabama Constitution authorize the enactment of texts, not the enactment of intentions.<sup>43</sup> But even setting aside that objection, the subjective inquiry required by purposivism is inherently unreliable. That is so for several reasons.

For one thing, evidence of legislative purpose is highly vulnerable to strategic manipulation.<sup>44</sup> Legislators who know that courts will rely on their statements to extend (or limit) a statute beyond its text can easily mislead judges by asserting—either in the legislative record or in amicus briefs—that the proposed law enacts their policy preferences, even if they know those preferences are not shared by their colleagues.

A deeper problem is that evidence of subjective intent is almost always nonrepresentative. Even if we leave aside the possibility of strategic manipulation and assume that all statements made by individual legislators are uttered in good faith, the fact remains that each statement represents the views of only the legislator who made it.<sup>45</sup> Usually, only a handful of legislators give statements on a bill, and there is no reason to assume that statements of *those* legislators represent the views of the median, or “swing,” legislator—i.e., the views of the legislator whose vote was necessary to ensure the law’s passage. If anything, the opposite is true: the legislators most likely to comment on a law are usually those who are either strongly opposed to, or strongly in favor of, its enactment.<sup>46</sup>

Subjective-intent evidence is nonrepresentative in another way too: it discounts the role of the executive branch. Even perfect evidence of legislators’ intent would tell us nothing about the intent of the executive, whose approval (absent legislative override of the executive’s veto) is often necessary for a bill to become law.<sup>47</sup> If we care about lawmakers’ intents, the executive’s intent should matter too because she is an integral part of the lawmaking process.

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42. See, e.g., David K. Ismay & M. Anthony Brown, *The Not So New Textualism: A Critique of John Manning’s Second Generation Textualism*, 31 J.L. & POL. 187, 190–91 (2015) (defending purposivism by arguing “that purposivists, who are more willing to consult the full range of available evidence of statutory intent, are more likely to discern what Congress was actually trying to accomplish when passing a statute”).

43. See Easterbrook, *supra* note 31, at 82 (“Intent is irrelevant even if discernible (which they aren’t), because our Constitution provides for the enactment and approval of texts, not of intents. The text is not evidence of the law; it *is* the law.”); SCALIA & GARNER, *supra* note 1, at 397–98 (objecting to the “false notion” that a statute’s text is merely “evidence” of legislative intent).

44. Jarrod Shobe, *Enacted Legislative Findings and Purposes*, 86 U. CHI. L. REV. 669, 718–19 (2019) (explaining the subjective nature of an explicit legislative purpose).

45. See *State v. \$223,405.86*, 203 So. 3d 816, 848 (Ala. 2016) (Shaw, J., concurring in the result) (making this point and explaining that “[t]he views of a single legislator are irrelevant”).

46. See Easterbrook, *supra* note 31, at 91.

47. In Alabama, a bill can also become a law without the Governor’s signature if the Governor takes no action on the bill within a certain timeframe. See ALA. CONST. art. V, § 125.

And the executive's veto is just one example of the many "veto gates" that are built into the legislative process.<sup>48</sup> There are numerous other ways in which the lawmaking process gives "political minorities extraordinary power to block legislation,"<sup>49</sup> such as committees' drafting rules, the threat of filibuster, and "countless other procedural devices that temper unchecked majoritarianism."<sup>50</sup> The ultimate statutory language that comes out of this process often does not represent a singular coherent purpose. The text, rather, is usually the product of an awkward but carefully crafted compromise. A judge who prioritizes the legislature's perceived overall purpose above the ordinary semantic meaning of the enacted text risks undoing the legislative bargain that enabled the law's enactment in the first place.<sup>51</sup>

I have saved the most technical problem with subjective-intent evidence for last. Even if we assume that a judge has perfect information about the mental states of everyone involved in the legislative process, subjective intent *still* would not be a reliable way of giving meaning to a law. That is because there is no principled method judges can rely on to aggregate individual politicians' subjective intentions into a unitary group intention. To see this problem in action, consider the following classic illustration, in which three legislators (1, 2, and 3) enact an ambiguous statute that has three plausible meanings (A, B, and C):

Legislator 1 prefers A to B to C;  
Legislator 2 prefers B to C to A; and  
Legislator 3 prefers C to A to B.

Now imagine that you are a purposivist judge trying to decide which meaning the legislature as a whole preferred. You will quickly run into a problem: in a contest between A and B, A wins 2–1; in a contest between B and C, B wins 2–1; but in a contest between C and A, C wins 2–1. The legislature prefers A to B, prefers B to C, yet—somehow!—prefers C to A. Even though each individual legislator has a rational set of preferences, aggregating those preferences into a unitary "group preference" or "legislative intention" yields an irrational result: an endless cycle with no winner.<sup>52</sup> It is

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48. Manning, *supra* note 3, at 77.

49. *Id.*

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

51. See *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (explaining that "no legislation pursues its purposes at all costs" and rejecting the assumption that "whatever furthers the statute's primary objective must be the law" (emphasis omitted)).

52. See generally KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963) (formally proving that such an irrational result cannot be avoided when three or more individuals are faced with three or more alternatives).

impossible for a judge in such a scenario—even one who knows *everything* about *every* legislator’s mental state—to say which preference should control.<sup>53</sup>

The textualist judge faces no such obstacle. The textualist judge simply asks which of the possible meanings is the most objectively reasonable and then applies that meaning.<sup>54</sup> Discerning objective meaning is not always easy, but it is far less fraught than trying to peer into the heads of over a hundred legislators and aggregate their individual desires into a coherent whole.

## II. TEXTUALISM IN THE SUPREME COURT OF ALABAMA

Since its earliest days, the Supreme Court of Alabama has endorsed textualist principles. But we have not always faithfully applied those principles, and we sometimes describe our interpretive approach in confusing or conflicting ways. A primary goal of this Essay is to clear up some of that confusion and—when it cannot be cleared up—to flag the open questions.

The simplest place to begin is with our modern court’s canonical statements of legal interpretation. Below are two typical examples. The first deals with constitutional interpretation and the second with statutory interpretation. But, as you can see, the fundamental idea in each statement is the same. Start with the constitution:

[W]e look to the plain and commonly understood meaning of the terms used in [a constitutional] provision to discern its meaning . . . . “The object of all construction is to ascertain and effectuate the intention of the people in the adoption of the constitution. The intention is collected from the words of the instrument, read and interpreted in the light of its history.”<sup>55</sup>

Now statutes:

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53. Our legislative voting systems put an end to preference cycling by picking a policy proposal, fixing that proposal to text, and then holding up-and-down votes on each proposal until one gets a majority. The ultimate outcome thus depends on the order in which proposals are considered, which means that the legislators who control the order in which proposals are voted—that is, the legislators who “control the agenda”—have enormous power over which proposal ultimately gets adopted. “The existence of agenda control makes it impossible for a court—even one that knows each legislator’s complete table of preferences—to say what the whole body would have done with a proposal it did not consider in fact.” Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 547–48 (1983).

54. If all three meanings are equally plausible, the textualist judge must turn to some other rule of decision, such as the “rule . . . [that] a tie goes to the defendant,” *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 330 (2007) (Scalia, J., concurring in the judgment), or the rule that “unintelligible [laws are] inoperative,” *see* SCALIA & GARNER, *supra* note 1, at 134; *cf.* Easterbrook, *supra* note 31, at 82 (“When texts run out of meaning, we should put them down and go to other sources of law, rather than invent things in their name.”).

55. *Barber v. Cornerstone Cmty. Outreach, Inc.*, 42 So. 3d 65, 79 (Ala. 2009) (quoting *State v. Sayre*, 24 So. 89, 92 (Ala. 1897)). *See generally* Clint Bolick, *Principles of State Constitutional Interpretation*, 53 ARIZ. ST. L.J. 771 (2021) (explaining that state constitutions must be interpreted according to the meaning those provisions bore to the ratifying public *in that state* and cautioning against interpreting state constitutions in lockstep with the federal Constitution).

The cardinal rule of statutory interpretation is to determine and give effect to the intent of the legislature as manifested in the language of the statute. . . . Words must be given their natural, ordinary, commonly understood meaning, and where plain language is used, the court is bound to interpret that language to mean exactly what it says.<sup>56</sup>

These formulations may seem simple enough at first glance, but they contain some nuances that can trip up unwary litigants. A few aspects of our interpretive approach, in particular, deserve unpacking.

#### A. *The Role of “Intent”*

The most common stumbling block for Alabama litigants involves our court’s use of the word “intent.” As the two quotations above illustrate, our caselaw routinely asserts that the goal of legal interpretation is to ascertain the law’s intent, which sometimes leads litigants to assume that our court endorses purposivism.<sup>57</sup> In fact, the opposite is true. As the quotations above go on to explain, the only intent Alabama courts are supposed to consider is the intent “manifested in the language” or words of the law.<sup>58</sup> That qualification is crucial. It means that the process of ascertaining a law’s intent is an objective exercise focused on the statute’s text, not a subjective one focused on lawmakers’ unexpressed goals or desires. Our court has spelled out that point many times over the centuries. As far back as 1890, the court wrote:

The office of construction is to ascertain what the language of an act means, and not what the legislature may have intended. “*Index animi sermo.*”<sup>59</sup> *The court knows nothing of the intention of an act, except from the words in which it is expressed, applied to the facts existing at the time; the meaning of the law being the law itself.*<sup>60</sup>

And again in 2020, the court wrote:

The intention of the Legislature, to which effect must be given, is that expressed in the act, and the courts will not inquire into the motives which influenced the Legislature or individual members in voting for its passage, nor indeed as to the intention of the draftsman or of the Legislature so far as it has not been expressed in the act. So in ascertaining the meaning of an act the court will not be governed or influenced by the views or opinions of any or

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56. *Swindle v. Remington*, 291 So. 3d 439, 457 (Ala. 2019) (quoting *Slagle v. Ross*, 125 So. 3d 117, 123 (Ala. 2012)).

57. Recall that purposivism is the belief that the meaning of a law is determined by the lawmakers’ intentions, purposes, or goals rather than by the objective indication of the law’s words. Accordingly, purposivists prioritize a law’s (perceived) animating purpose over its text. *See supra* Part I.

58. *See Swindle*, 291 So. 3d at 457.

59. “Speech is the index of the mind.”

60. *Maxwell v. State*, 7 So. 824, 827 (Ala. 1890) (second emphasis added).

all of the members of the Legislature, or its legislative committees or any other person.<sup>61</sup>

The upshot here is that when our caselaw speaks about the intent of a law, it is usually describing the intent that a reasonable member of the public would ascribe to a reasonable lawmaker based simply on reading the law's text in context.<sup>62</sup> Alabama courts do not—or, at least, are not supposed to—inquire about *actual* legislators' subjective goals or purposes.<sup>63</sup> When a law's objective semantic meaning diverges from the subjective intentions of the legislators who enacted it, only the former governs; the latter is irrelevant.<sup>64</sup> If the rule were otherwise, judges could decide legal disputes by taking legislative-opinion polls and ignore enacted text entirely.<sup>65</sup>

Our court's reliance on an objective concept of intent “track[s] a long tradition of discerning intent ‘solely on the basis of the words of the law,’” read objectively in light of their context, “and not . . . investigating any other source of information about the lawgiver's purposes.”<sup>66</sup> Even so, I try to avoid the term “intent” when I write judicial opinions because I am concerned it has become a source of confusion. Many modern-day lawyers—including some appellate lawyers—are unfamiliar with the technical, objective sense in which judges have long used that word, so they mistakenly equate any talk of intent with *subjective* intent or purposivism. That mistake leads them to argue for their preferred interpretation by appealing to legislators' subjective goals, beliefs, or purposes (usually by arguing that a contrary result would amount to poor public policy and thus would be inconsistent with legislators' desires) rather than by analyzing the statute's objective semantic meaning. I think that judges could probably avoid most of that confusion if we spoke more in terms of *meaning* and less in terms of *intent*. *Meaning* is clearer<sup>67</sup> and more intuitive to most

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61. *State v. Epic Tech, LLC*, 323 So. 3d 572, 596–97 (Ala. 2020) (internal alteration marks omitted) (emphasis added) (quoting *James v. Todd*, 103 So. 2d 19, 28–29 (Ala. 1957)).

62. *Maxwell*, 7 So. at 827; *Epic Tech*, 323 So. 3d at 597.

63. *Bynum v. City of Oneonta*, 175 So. 3d 63, 69–70 (Ala. 2015) (“[I]n ascertaining the meaning of a statute the court will not be governed or influenced by the views or opinions of any or all of the members of the Legislature, or its legislative committees or any other person.” (quoting *James*, 103 So. 2d at 28)); see also Manning, *supra* note 3, at 83 (explaining that the “‘reasonable’ legislator” is an “idealized, rather than actual, legislator”).

64. See, e.g., *Fulton v. State*, 54 So. 688, 689 (Ala. 1911) (“[I]f the intention of the lawmakers has not been carried into effect by the language used, it is better that we should abide the words of the statute, than to reform it according to the supposed intention.”).

65. See Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988) (“Imagine how we would react to a bill that said, ‘From today forward, the result of any opinion poll among members of Congress shall have the effect of law.’ We would think the law a joke at best, unconstitutional at worst. This silly ‘law’ comes uncomfortably close, however, to the method by which courts deduce the content of legislation when they look to subjective intent.”).

66. Pryor, *supra* note 39, at 36 (quoting H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 895 (1985)).

67. See Frankfurter, *supra* note 29, at 538–39 (noting that “it is better to use a less beclouding characterization” than the word “intent”); Easterbrook, *supra* note 31, at 81 (“At the same time as the Justices

litigants, and it serves as a useful reminder that legislators' private intentions—even if they were known (which they usually are not<sup>68</sup>)—are not law.

### B. *Interpreting Language as “Commonly Understood”*

A second common pitfall involves the rule that judges must give a law's words their “natural,” “ordinary,” or “commonly understood meaning.” Some litigants assume this rule requires a mechanistic or hyperliteral approach to legal interpretation. Again, that assumption is mistaken.

When judges say words should be given their “ordinary” meaning, we do not mean that each word in a text always takes its literal meaning or its most statistically common meaning. We mean instead that words must be given the meaning that an ordinary reasonable person would ascribe to them after reading them in context. The reasonable person is not a robotic literalist, so a textualist cannot be either.<sup>69</sup> Textualists understand that words do not exist in a vacuum and that sometimes, contextual clues reveal that a term carries an idiomatic or technical meaning as opposed to a more common meaning.

To see this principle in action, consider two scenarios. In the first scenario, the legislature passes a statute containing a single provision that criminalizes “deliberate importation or introduction of new viruses into the State of Alabama.” Every court would hold that the text's ordinary meaning prohibits people from intentionally bringing new infectious diseases into the state.

In the second scenario, the legislature enacts the same text, but this time, it does so as part of the Alabama Cybersecurity Act, in which every other provision deals with computer crimes. This time, every court (and every reasonable citizen) would recognize that the word “virus” carries its idiomatic meaning of “malicious software” rather than its more common meaning of “biological disease.” In both instances, the meaning of the law is clear to any reasonable reader even though the meaning is different in the second scenario than in the first. Context does all the work.

It bears repeating here that the contextual inquiry is an objective one. Judges care about context because it affects how a reasonable reader would understand the text, not because it reveals the inner workings of legislators' minds. To stick with the virus example: in the first scenario, where the no-new-viruses law was passed in isolation, courts would (correctly) refuse to consider evidence that legislators subjectively intended “virus” to mean “computer

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tell us to pay heed to the ‘intent’ of Congress, they concede that ‘intent’ is empty and that meaning is objective . . .”).

68. See *supra* Subpart I.B.

69. See, e.g., *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1498 (2019) (condemning “ahistorical literalism” (quoting *Alden v. Maine*, 527 U.S. 706, 730 (1999))); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1825 (2020) (Alito, J., dissenting) (“As Justice Scalia explained, ‘the good textualist is not a literalist.’” (quoting SCALIA, *supra* note 5, at 24)).

virus” because the latter meaning is nonstandard and is unsupported by any contextual clues. Even if a survey showed that *every single* legislator privately intended “virus” to mean “computer virus,” it would not matter—under the U.S. Constitution and the Alabama Constitution, intentions are not laws, only texts are.<sup>70</sup> Likewise, in the second scenario, courts would refuse to consider evidence indicating that legislators secretly wanted “virus” to mean “biological disease” because no reasonable person would assume that the word “virus” carries its biological meaning when used in the context of a computer-crimes act. In both cases, the subjective intent of legislators is irrelevant. All that matters is how a reasonable reader would interpret the text in context. That is what our court means when it says that a text’s “normal” or “plain” meaning “may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens.”<sup>71</sup>

### C. “Construction” and the Canons

Like all courts, the Supreme Court of Alabama relies on canons of construction to aid our textual interpretation. A canon of construction is any “principle that guides the interpreter of a text.”<sup>72</sup> If that definition sounds broad, that is because it is. Canons are rules of thumb that describe how people interpret texts, so *every* principle of interpretation is a canon.<sup>73</sup>

At a high level, canons of construction can be sorted into two buckets: descriptive and prescriptive. Descriptive canons, as their name suggests, help judges (indeed, all readers) ascertain the most plausible meaning of a text by describing how English text is ordinarily understood. Descriptive canons—also called *semantic* or *linguistic* canons—encompass all rules of grammar, usage, and

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70. See *Bynum v. City of Oneonta*, 175 So. 3d 63, 69–70 (Ala. 2015) (“[I]n ascertaining the meaning of a statute the court will not be governed or influenced by the views or opinions of any or all of the members of the Legislature . . . .” (emphasis added) (quoting *James v. Todd*, 103 So. 2d 19, 28 (Ala. 1957))); see also *Young Ams. for Liberty v. St. John IV*, No. 1210309, 2022 WL 17073690, at \*14 (Ala. Nov. 18, 2022) (Mitchell, J., concurring in part and concurring in the result) (“[T]he subjective intentions that animate a law are not the law; only the text of a law is the law.”); *State v. \$223,405.86*, 203 So. 3d 816, 848 (Ala. 2016) (Shaw, J., concurring in the result) (“[T]o seek the intent of the provision’s drafters or to attempt to aggregate the intentions of [the] voters into some abstract general purpose underlying the Amendment, contrary to the intent expressed by the provision’s clear textual meaning, is not the proper way to perform constitutional interpretation. . . . The words of a law must speak for themselves.” (alteration in original) (quoting *Thomas v. Nev. Yellow Cab Corp.*, 327 P.3d 518, 522 (Nev. 2014))).

71. *Barber v. Cornerstone Cmty. Outreach, Inc.*, 42 So. 3d 65, 79 (Ala. 2009) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 576–77 (2008)).

72. *Canon*, BLACK’S LAW DICTIONARY (11th ed. 2019).

73. Karl Llewellyn once argued that canons have limited utility because “there are two opposing canons on almost every point.” Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401 (1950). Textualists often dispute Llewellyn’s critique by pointing out that many of the “canons” he cites are not actually canonical at all (in the sense of being well established) but rather are simply obscure, silly, or widely contradicted judicial assertions. See SCALIA & GARNER, *supra* note 1, at 59–62.

context that help a reader understand what a text means.<sup>74</sup> Familiar examples include the general/specific canon (if there is a conflict between a general statement and a specific one, the specific prevails), the associated-words canon (words in a list bear on each other's meaning), and the gender/number canon (abstract masculine pronouns include the feminine, abstract singular nouns include plural nouns, and vice versa). While there are many varieties of descriptive canons—"semantic," "syntactic," "contextual," and so on—the ultimate point of each is the same: to describe how reasonable English speakers use and understand our language, including legal language.

Prescriptive canons are different. Prescriptive canons—sometimes called *substantive* or *normative* canons—do not tell judges how to ascertain the most plausible meaning of a text; instead, they tell judges how to choose between multiple (already-ascertained) possible meanings, usually by appealing to policy-based principles. The most notable examples of prescriptive canons include the federal doctrine of *Chevron* deference,<sup>75</sup> and Alabama's parallel doctrine that judges should defer to an agency's interpretation of a statute that the agency is charged with enforcing,<sup>76</sup> even if the agency's interpretation "may not appear as reasonable as some other interpretation."<sup>77</sup>

Canons of construction undergird all interpretation, but not all canons are equally useful—some may be entirely illegitimate<sup>78</sup>—and no canon is absolute.<sup>79</sup> Litigants often go astray by treating canons as algorithms rather than guideposts.<sup>80</sup> It is not enough to recite a canon, assert its applicability, and declare the case won. The difficult work of legal interpretation lies in analyzing

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74. See generally SCALIA & GARNER, *supra* note 1 (cataloguing several of these canons).

75. See generally *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). There is some dispute about whether *Chevron* deference is best described as a "canon" or as something else. See Kristin Hickman, *Categorizing Chevron*, 81 OHIO ST. L.J. 611, 634–39 (2020). But the doctrine plainly fits within the definition of a canon provided by *Black's Law Dictionary* because it is a "principle" that purports to "guide[] the interpreter of a text." See *Canon*, BLACK'S LAW DICTIONARY (11th ed. 2019).

76. See *Ex parte Chestnut*, 208 So. 3d 624, 640 (Ala. 2016).

77. *Kids' Klub, Inc. v. State Dep't of Hum. Res.*, 874 So. 2d 1075, 1092 (Ala. Civ. App. 2003) (quoting *State Health Plan. Dev. Agency v. Baptist Health Sys., Inc.*, 766 So. 2d 176, 181 (Ala. Civ. App. 1998)). Another example of a prescriptive canon that courts often confront is the *Moses H. Cone* canon, which holds that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983). But see *Calderon v. Sixth Rent a Car, LLC*, 5 F.4th 1204, 1215 (11th Cir. 2021) (Newsom, J., concurring) (arguing that "the *Moses H. Cone* canon is just made up" and that courts "should rethink it").

78. See *infra* text accompanying notes 117–122 and Subpart III.D.

79. The rule that no canon is absolute is itself a canon. SCALIA & GARNER, *supra* note 1, at 59 ("No canon of interpretation is absolute."). So a more precise statement would be, "No canon is absolute, except for this one."

80. See, e.g., *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1175 (2021) (Alito, J., concurring in the judgment) ("Canons of interpretation can help in figuring out the meaning of troublesome statutory language, but if they are treated like rigid rules, they can lead us astray."); *Heyman v. Cooper*, 31 F.4th 1315, 1323 (11th Cir. 2022) ("[L]ike all tools, the canons are sometimes of limited utility. When that's true, we shouldn't stubbornly insist on pounding square pegs into round holes. If we do, we're likely to do more harm than good. Our obligation remains to the duly enacted text.").

the canon's relevance to the case at hand and the extent to which it is complemented—or contradicted—by other indicia of meaning.<sup>81</sup>

An example from one of our recent cases illustrates the point nicely. Alabama's Workers' Compensation Act provides that certain settlement agreements become irrevocable "unless within 60 days after the agreement is signed . . . the court on a finding of fraud, newly discovered evidence, or other good cause, [relieves] all parties of the effect of the agreement."<sup>82</sup> The question before our court in *Ex Parte ACIPCO*<sup>83</sup> was whether a settlement contract could be set aside after the sixty-day period based on a finding of mental incompetence. The insurance company thought not. In its view, mental incompetence is a form of "other good cause" for setting aside an agreement, so it is included within the types of claims that are subject to the 60-day deadline. The injured worker disagreed, pointing to Title 8, Article 9, Section 1701 of the Alabama Code, which says that contracts entered into by incompetent persons are void at the outset and cannot be enforced.<sup>84</sup> The insurer responded by citing the general/specific canon, which provides that when two statutory provisions conflict, the specific provision trumps the general. The insurance company correctly identified and described the general/specific canon, but the parties—and the court—disagreed about how to apply that canon.<sup>85</sup>

To start, there was disagreement over which statute is the "general" and which is the "specific." The workers' compensation statute is more specific with respect to workers' compensation settlements, but the incompetency statute is more specific with respect to contracts by incompetent persons. In a case involving the effect of mental incompetency on a workers' compensation settlement, which type of specificity matters more? The answer was not immediately obvious, and good arguments could be (and were) made on both sides.<sup>86</sup>

Even assuming that the workers' compensation statute is more specific—and therefore trumps the incompetency statute in the event of a conflict—that still left the question of whether the two statutes really do conflict with each other. In her opinion for the court, Justice Sarah Stewart explained that there was no conflict because the incompetency statute and the workers'

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81. The nineteenth-century English jurist James Fitzjames Stephen once quipped that canons of construction should be called "minims than maxims," because "the exceptions and disqualifications to them are more important than the so-called rules" themselves. 2 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 94 n.1 (London, Macmillan & Co. 1883).

82. ALA. CODE § 25-5-292 (1975).

83. *Ex parte Am. Cast Iron Pipe Co. (Ex parte ACIPCO)*, No. 1200500, 2022 WL 4395533 (Ala. Sept. 23, 2022).

84. *See* § 8-1-170.

85. *ACIPCO*, 2022 WL 4395533, at \*5.

86. *Id.* at \*5-7.

compensation statute could be read harmoniously.<sup>87</sup> She pointed out that both statutes are compatible with the common law doctrine that an “agreement” requires mutual assent: since mentally incompetent people lack capacity to assent, the injured worker’s settlement contract was never a legally valid “agreement” under either statute and thus was not subject to the sixty-day deadline under the workers’ compensation statute.<sup>88</sup> Justice William Sellers’s dissenting opinion took a different view about the definition of “agreement” and the applicability of the general/specific canon,<sup>89</sup> which goes to show that even after extensive briefing and argument, judges can disagree about whether and how canons apply. The case also illustrates why it is crucial for litigants to know the canons and their limitations.

Ten years ago, Justice Scalia and Bryan Garner wrote a book on textualist methodology called *Reading Law*, which highlights fifty-seven of the most important canons, provides prototypical examples of when they do and do not apply, and gives advice about how to weigh them in the event of a conflict or tension between the canons.<sup>90</sup> Perhaps most helpfully of all, *Reading Law* also refutes over a dozen false canons—interpretive rules that lawyers or judges often invoke but that lack any solid foundation.<sup>91</sup> Our court, along with the U.S. Supreme Court and courts within the United States Court of Appeals for the Eleventh Circuit, has cited *Reading Law* numerous times.<sup>92</sup> It is a resource that many other jurists and I turn to when we are confronted with a difficult interpretive question.

Last year, my law clerks and I put together a field guide that indicates whether and to what extent our court has relied on (or rejected) each of the canons described in *Reading Law*. I have included that document as an Appendix to this Essay in the hopes that Alabama judges and practitioners might find it useful.

A word of caution, however: like the canons themselves, the Appendix is neither exhaustive nor infallible. Some canons, even well-known ones, are not discussed in *Reading Law* and therefore do not show up in the Appendix.<sup>93</sup> And some canons that are praised in *Reading Law*—and even in our court’s precedent—might be limited in scope.<sup>94</sup> The Appendix is meant to serve as a

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87. *Id.* at \*5.

88. *Id.* at \*5–6.

89. *See id.* at \*7–8 (Sellers, J., dissenting).

90. *See* SCALIA & GARNER, *supra* note 1, at xxvii–xxx, 51.

91. *See id.* at xvii.

92. By my count, there are over four hundred opinions citing *Reading Law* from our court, the Supreme Court, and courts within the Eleventh Circuit—though some of these citations come from special writings rather than main opinions.

93. *Black’s Law Dictionary* catalogues hundreds of canons of construction, most of which do not appear (at least not directly) in *Reading Law*. *See Legal Maxims*, BLACK’S LAW DICTIONARY (11th ed. 2019).

94. *See, e.g.,* Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1173–75 (2021) (Alito, J., concurring in the judgment) (critiquing the majority’s application of the series-qualifier canon); Adam G. Crews, 116 NW. U. L. REV. ONLINE 198, 212 (2021), <https://scholarlycommons.law.northwestern.edu/cgi>

helpful starting point—a reference guide to the interpretive principles in Alabama as they currently stand—not as a be-all, end-all.

*D. Alabama’s Plain-Meaning Rule: “Construe Only if Ambiguous”*

All this discussion about canons of construction brings us to another feature of textualism in Alabama: the so-called “plain-meaning rule.” The plain-meaning rule is a canon created by judges, for judges. It essentially says that courts should not resort to “judicial construction” when interpreting a law if the law’s text is “unambiguous.”<sup>95</sup> Or, to put the same point differently, if the text’s meaning is “plain,” “then there is no room for judicial construction.”<sup>96</sup>

The plain-meaning rule is often described as the most important feature of textualism in Alabama,<sup>97</sup> but the meaning of this rule is—well—not exactly plain.<sup>98</sup> Several features of the rule can make it difficult for litigants (and judges) to navigate.

To begin, the name of the rule itself is confusing. The “plain-meaning rule,” as our court has described it, is *not* the same thing as the principle, discussed in Subpart II.B above, that words should be given their “plain” (as in “natural” or “commonly understood”) meaning. Rather, according to our court, the plain-meaning rule functions as a bar on certain types of outside sources by telling judges not to consider those sources unless the law’s “plain” (as in “clear” or “obvious”) meaning is ambiguous.<sup>99</sup> The rule effectively operates in Alabama as a two-step injunction:

Step 1: Read the text and decide—without engaging in “construction”—whether the meaning of the text is plain.

/viewcontent.cgi?article=1316&context=nulr\_online (arguing that the series-qualifier canon is “not a deep-rooted background principle of interpretation” and that judges’ reliance on the canon is “unjustified”). *But see* Pryor, *supra* note 32, at 41–42 (praising Justice Kagan’s use of the series-qualifier canon in her dissenting opinion in *Lockhart v. United States*, 577 U.S. 347, 364–68 (2016) (Kagan, J., dissenting)).

95. *Ex parte McCormick*, 932 So. 2d 124, 132 (Ala. 2005) (citing *Blue Cross & Blue Shield of Ala., Inc. v. Nielsen*, 714 So. 2d 293, 296 (Ala. 1998)).

96. *Id.*

97. *See* Marc James Ayers, *Unpacking Alabama’s Plain-Meaning Rule of Statutory Construction*, 67 ALA. LAW. 31, 32 (2006) (“In Alabama, while all of the various canons are certainly recognized, one has achieved ‘primary’ status: the Plain Meaning Rule.”).

98. Something similar may be true of the version of the “plain-meaning rule” applied in federal courts. *See, e.g.*, Arthur W. Murphy, *Old Maxims Never Die: The “Plain-Meaning Rule” and Statutory Interpretation in the “Modern” Federal Courts*, 75 COLUM. L. REV. 1299, 1308 (1975) (arguing that federal “courts have no clear idea about what the plain meaning rule is . . . . Indeed, it frequently seems that some courts feel that recitation of the plain meaning rule in one of its forms is a compulsory rite, the meaning of which is lost in antiquity” and “is essentially meaningless” in practice).

99. *See DeKalb Cnty. LP Gas Co. v. Suburban Gas, Inc.*, 729 So. 2d 270, 275 (Ala. 1998) (“If the language of the statute is unambiguous, then there is no room for judicial construction . . . .” (quoting *Nielsen*, 714 So. 2d at 296)); *id.* at 277 (“[W]e must look first to the plain meaning of the words the legislature used. We should turn to extrinsic aids to determine the meaning of a piece of legislation only if we can draw no rational conclusion from a straightforward application of the terms of the statute.”).

Step 2: If the meaning is plain, apply it. If not, resort to judicial “construction” to help illuminate its meaning.

That formulation raises two additional difficulties. The first is that the rule seems circular. Any act of ascribing meaning to words requires the reader to construe those words.<sup>100</sup> Telling a judge, “Don’t construe a statute unless it’s ambiguous,” is a bit like telling your accountant, “Don’t check my math unless it’s wrong.” Neither command makes much sense. Just as your accountant cannot know whether your math is wrong until she has checked it, a judge cannot know what a law means—let alone whether that meaning is “plain”—until he has construed it.

The way our court has avoided this circularity is by tacitly drawing a distinction between “interpretation” on the one hand and “construction” on the other. Interpretation—that is, the bare act of looking at written words and intuiting their meaning—is something all people do automatically whenever they read language. But “construction” (at least for purposes of our court’s plain-meaning-rule cases) involves something extra—some additional work or some extra considerations on the part of the judge—which judges are supposed to avoid unless the text is ambiguous.

So what is the plus factor that transforms (necessary) interpretation into (forbidden) construction? Our precedents do not give a clear answer. Some of our cases seem to indicate that judges engage in forbidden “construction” whenever they consult any source other than the isolated statutory provision.<sup>101</sup> Other cases suggest that the plain-meaning rule prevents judges from engaging in policy considerations or consulting subjective-intent evidence unless the text is ambiguous but that it does not prohibit judges from considering sources that shed light on the text’s objective semantic meaning (such as historical context, related statutory provisions, descriptive canons of construction, and so on).<sup>102</sup> That inconsistency permeates our plain-meaning-rule jurisprudence.<sup>103</sup>

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100. *Construe*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“To analyze and explain the meaning of.”); see also SCALIA & GARNER, *supra* note 1, at 13–15 (explaining that “construction” and “interpretation” are “interchangeabl[e]”).

101. See, e.g., *DeKalb Cnty. LP Gas Co.*, 729 So. 2d at 276–77 (declaring several descriptive canons, including the rule that all provisions of a statute be construed together, off limits to judges unless the provision read in isolation is ambiguous).

102. See, e.g., *State Farm Fire & Cas. Co. v. Lambert*, 285 So. 2d 917, 918 (Ala. 1973) (holding that questions of statutory interpretation “cannot be answered apart from the historical context within which the statute was passed”); *Bean Dredging, L.L.C. v. Ala. Dep’t of Revenue*, 855 So. 2d 513, 517 (Ala. 2003) (stating that interpretation requires courts to read statutes “as a whole,” rather than reading single provisions in isolation); *Winner v. Marion Cnty. Comm’n*, 415 So. 2d 1061, 1064 (Ala. 1982) (applying a descriptive canon—the associated-words canon—without a threshold finding of ambiguity); *Ex parte Emerald Mountain Expressway Bridge, L.L.C.*, 856 So. 2d 834, 843 (Ala. 2003) (applying a clear-statement canon before making a threshold determination of ambiguity).

103. See *Ayers*, *supra* note 97, at 36 n.5 (2006) (giving examples of cases that purport to rely on *DeKalb County* yet reach a contrary result).

The second difficulty with the plain-meaning rule is that there is no agreed-upon threshold for determining whether a statute's meaning is ambiguous.<sup>104</sup> Justice Brett Kavanaugh once observed that some judges “apply something approaching a 65-35 rule,” meaning that if the judges are moderately confident in their understanding of a statute's meaning, then they will declare the statute “clear and reject reliance on [post-interpretive] canons.”<sup>105</sup> Meanwhile, other judges “apply more of a 90-10 rule,” requiring a statute's meaning to be *overwhelmingly* obvious before they are willing to “call it clear.”<sup>106</sup> As far as I can tell, our court has never explored this issue.

I discuss the plain-meaning rule more below, but for now, the key takeaway is that the rule, whatever its drawbacks, is unavoidable in Alabama law. Litigants must be prepared to discuss the rule and its application anytime there is a dispute about statutory or constitutional interpretation. Marc Ayers has published an excellent practitioner's guide on Alabama's version of the plain-meaning rule in which he explains that Alabama litigants who want to rely on an external source or canon to advocate for their preferred interpretation of a text typically must convince the court that (1) the source or canon is a tool to determine the text's plain meaning rather than a gloss applied on top of (or in contravention to) that plain meaning; (2) the text is ambiguous on its face; or (3) the text is incoherent or absurd on its face.<sup>107</sup> That guide was published almost two decades ago, but it is still—and barring a major shift in our jurisprudence, will long remain—an important tool for navigating the plain-meaning rule in this state.

### III. ONGOING DEBATES AND OPEN QUESTIONS

No article about textualism in Alabama would be complete if it did not acknowledge the gaps and incongruities in our court's jurisprudence. Below is a list of some particularly important unresolved questions about how our court does—or should—approach legal interpretation. My hope is that practitioners and scholars will keep these questions in mind and, in appropriate cases, suggest sensible answers.

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104. *United States v. Turkette*, 452 U.S. 576, 580 (1981) (“[T]here is no errorless test for identifying or recognizing ‘plain’ or ‘unambiguous’ language.”); *see also, e.g.*, Easterbrook, *supra* note 65, at 62 (“There is no metric for clarity.”).

105. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2137 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)).

106. *Id.*

107. *See generally* Ayers, *supra* note 97, at 32–36.

*A. What Is the Meaning of the Plain-Meaning Rule?*

As just discussed, the plain-meaning rule simultaneously requires judges to *interpret* a law (which they must do in order to assess whether it is “plain”) and prohibits them from *construing* that law (unless it is not “plain”). In order for the plain-meaning rule to make sense, then, there must be some dividing line between ordinary “interpretation,” which the rule requires, and “construction,” which it restricts. What is that line?

Our earliest cases suggest that the type of construction prohibited by the plain-meaning rule was only the type of construction that enlarged or extended a statute beyond its natural meaning.<sup>108</sup> On that early understanding of construction, then, the plain-meaning rule may have been just another way of reminding judges not to subordinate a statute’s objective semantic meaning to the legislature’s perceived background purpose (or to the judge’s own policy goals). In other words, “don’t make it up.”

“Don’t make it up” is as unobjectionable a principle as you will find in the law. Indeed, it captures the entire textualist philosophy in a nutshell. But our modern cases have expanded the plain-meaning rule beyond that simple command. Some of our modern cases seem to assume that the type of construction prohibited by the plain-meaning rule is the reliance on *any* source apart from the provision at issue read in isolation.<sup>109</sup> On that view, the plain-meaning rule prohibits judges from relying on “outside” evidence of semantic meaning, even if that outside evidence reveals that a law’s original public meaning is different from the meaning that modern judges would ascribe to the law after reading it in isolation. (I have doubts about whether that formulation is coherent in theory or workable in practice; I tend to agree with Judge Henry Friendly that it is “illogical . . . to hold that a ‘plain meaning’ shuts off access to the very materials that might show it not to have been plain at all.”<sup>110</sup>)

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108. See, e.g., *Nashville & D.R. Co. v. State*, 30 So. 619, 622 (Ala. 1901) (“[T]he courts have no power to enlarge or diminish [a statute] by construction or amendment.”); *E. Tenn., Va. & Ga. R.R. Co. v. Bayliss*, 77 Ala. 429, 434 (1884) (“The statute ought not to be extended by construction to cases not included in its clear and unambiguous terms.”); *Noles v. State*, 24 Ala. 672, 696 (1854) (“This statute . . . may not be enlarged, by construction, beyond the plain import of the terms in which it is couched.”); *State v. Adams*, 2 Stew. 231, 243 (Ala. 1829) (Taylor, J.) (condemning “[t]he practice of extending statutes far beyond their legitimate meaning, indeed of often giving them a construction directly in opposition to the plain intention of those who made them”); *id.* at 246 (Saffold, J.) (“Courts have no authority, in order to carry into effect their own notions of expediency, to extend the operation of statutes, by construction, to persons or things not within their legitimate meaning, though they be equally within their reason.”); *White v. Saint Guirons, Minor* 331, 337 (Ala. 1824) (“[A statute’s] operation cannot by construction be extended to matter not mentioned.”).

109. See *DeKalb Cnty. LP Gas Co. v. Suburban Gas, Inc.*, 729 So. 2d 270, 276–77 (Ala. 1998).

110. See William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539, 548 (2017) (internal alteration marks omitted) (quoting HENRY J. FRIENDLY, *Mr. Justice Frankfurter and the Reading of Statutes*, in *BENCHMARKS* 196, 206 (1967)); see also, e.g., Frankfurter, *supra* note 29, at 541 (“If the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded.”).

A competing line of cases suggests that the plain-meaning rule's limitation on construction applies only to prescriptive canons of construction<sup>111</sup> and to reliance on intent-focused evidence<sup>112</sup> but does not apply to descriptive canons. For example, our court has suggested that it is always appropriate to consult related statutory provisions,<sup>113</sup> historical context,<sup>114</sup> and certain clear-statement canons.<sup>115</sup> Under this latter line of cases, then, the plain-meaning rule prohibits judges from entertaining hardship or policy arguments if the text is unambiguous, but it does not prohibit judges from consulting outside sources that shed light on the text's semantic meaning.

In my own view, this latter line of cases makes more sense than the former. It is also more consistent with our earliest plain-meaning jurisprudence and with the separation-of-powers rationale that is often cited in support of the plain-meaning rule.<sup>116</sup> But it still leaves the question of why it is *ever* appropriate for judges to decide cases based on either policy considerations or subjective-intent evidence. On the textualist account, policy determinations belong to the legislature alone—and that is true whether a law's text is “ambiguous” or not.<sup>117</sup> Textualists recognize that legislative history and certain prescriptive canons<sup>118</sup> can shed light on the social and linguistic conventions that prevailed at the time

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111. See, e.g., *Ex parte Ankrom*, 152 So. 3d 397, 419–20 (Ala. 2013) (describing the plain-meaning rule as a restriction on consequentialist or policy-oriented reasoning). See also *supra* Subpart II.C.

112. See, e.g., *State v. \$223,405.86*, 203 So. 3d 816, 832–43 (Ala. 2016) (describing the plain-meaning rule as “a response to the constitutional mandate of the doctrine of the separation of powers set out in Art. III, § 43, Alabama Constitution of 1901” and indicating that the rule operates as a bar on “legislative history” and similar subjective-intent-focused evidence (quoting *City of Bessemer v. McClain*, 957 So. 2d 1061, 1082 (Ala. 2006) (Harwood, J., concurring in part and dissenting in part))).

113. See *Ala. Dep't of Revenue v. Greenetrack, Inc.*, No. 1200841, 2022 WL 2387030, at \*7 (Ala. June 30, 2022) (collecting cases).

114. See, e.g., *State Farm Fire & Cas. Co. v. Lambert*, 285 So. 2d 917, 918 (Ala. 1973) (determining that questions of statutory interpretation “cannot be answered apart from the historical context within which the statute was passed”).

115. See, e.g., *Ex parte Emerald Mountain Expressway Bridge, L.L.C.*, 856 So. 2d 834, 843 (Ala. 2003) (applying an anti-exemption canon without a threshold finding of ambiguity); *Ex parte Jenkins*, 723 So. 2d 649, 651 (Ala. 1998) (applying the anti-retroactivity canon without a threshold finding of ambiguity).

116. See *supra* note 112.

117. See *Baude & Doerfler*, *supra* note 110, at 540 (“[I]rrelevant information shouldn't become useful just because the text is less than clear.”).

118. It is possible that some of the so-called clear-statement canons—which often get tagged with the *prescriptive* or *substantive* label—serve a descriptive purpose rather than a prescriptive purpose. There are perhaps dozens of clear-statement canons, but to give a few well-known examples: judges usually require laws to contain a “clear statement” before interpreting the law to delegate vast power to an administrative agency; to strip courts of jurisdiction; to create new private causes of action; to override a state's sovereign immunity; to apply retroactively; or to derogate a longstanding common-law rule. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022); *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1351 (2020); *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996); *Pasquantino v. United States*, 544 U.S. 349, 359 (2005). Each of these clear-statement canons reflects the universal intuition that texts—including legal texts—are not usually interpreted to require highly unusual or drastic results unless the text says so in unmistakably clear terms. Properly applied, then, many clear-statement canons may simply provide guidance on what a text is most plausibly understood to mean in light of this country's legal history and tradition; they do not (or, at least, need not and should not) tell judges to discard the most plausible meaning in favor of a less plausible meaning.

of a law's enactment (because those conventions affect the law's original public meaning).<sup>119</sup> But—at least on the typical textualist account<sup>120</sup>—those tools cannot be used to reach a result at odds with the most plausible semantic meaning of the text,<sup>121</sup> nor can they be used to supply meaning to a text that is incoherent.<sup>122</sup>

B. *What Is a Principled Dividing Line Between “Plain Meaning” and “Ambiguity”?*

By restricting reliance on certain canons to cases of “ambiguity,” the plain-meaning rule requires judges to make threshold determinations about whether a statute's language is clear. How much clarity is enough? Our cases do not say. Sometimes our court will try to articulate a standard of clarity by saying something like, “A statute is ambiguous when it is of doubtful meaning,”<sup>123</sup> but that just raises the same question in different form—how much doubt is enough?

The reality is that most laws that produce litigation are at least a little unclear—at least *somewhat* susceptible to multiple interpretations. This is not to say that all interpretations are equally plausible (they rarely are) but just that colorable arguments can often be made on both sides. Litigation is expensive, and most people know better than to throw away a small fortune pursuing pie-in-the-sky legal theories. So if a little bit of unclarity were enough to render a text “not plain,” then there would not be much point to the plain-meaning rule because the ambiguity-dependent canons could be invoked in every non-frivolous case.

If a little bit of ambiguity is not enough, how much is? Should courts try to quantify the amount numerically, as Justice Kavanaugh did when he wrote that some judges apply a 90–10 rule while others apply something closer to 65–35?<sup>124</sup> Or perhaps there are other heuristics for assessing clarity, such as whether a competing interpretation has been adopted by other courts (if many other

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119. See *In re Sinclair*, 870 F.2d 1340, 1342–43 (7th Cir. 1989) (explaining that legislative history may be used to illuminate semantic meaning, including by shedding light on how words are typically used in a particular historical context, but cannot be used to show private intent at variance with the text).

120. Justice Amy Coney Barrett has argued that the standard textualist account is too quick to discount prescriptive canons, which she refers to as “substantive canons.” See generally Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 110 (2010) (arguing that certain substantive canons are permissible exercises of “the judicial Power” as that phrase was originally understood).

121. See SCALIA & GARNER, *supra* note 1, at 343 (rejecting “[t]he false notion that the spirit of a statute should prevail over its letter”). See generally Bamzai, *supra* note 2, at 1001 (arguing that the modern prescriptive principle of deferring to administrative agencies has no basis “in traditional interpretive methodology” or in “the views of the Framers”).

122. See SCALIA & GARNER, *supra* note 1, at 134 (“An unintelligible text is inoperative.”).

123. *S & S Distrib. Co. v. Town of New Hope*, 334 So. 2d 905, 907 (Ala. 1976).

124. See Kavanaugh, *supra* note 105, at 2137–38.

judges disagree about what a statute means, perhaps that in itself is proof that the meaning is unclear).

If the answer to these questions is that there is no way of drawing a principled and useful dividing line between plain meaning and ambiguity, then perhaps—as Justice Kavanaugh<sup>125</sup> and others<sup>126</sup> have suggested—our court should do away with the plain-meaning rule and replace it with a simpler maxim: “If an outside source helps ascertain the original public meaning, consider it; if not, don’t.”

### C. *What Assumptions Should Judges Make About the “Reasonable” or “Ordinary” Reader?*

I have now mentioned several times that textualism requires judges to ask themselves how a reasonable person would understand the law’s text. This raises an obvious question—what are the attributes of such a person? Is he the average person on the street? Probably not—our cases say he must be “reasonably well informed.”<sup>127</sup> Fair enough. But what does it mean for a reader to be reasonably well-informed? Are judges to assume that a well-informed reader would have consulted a dictionary? Consulted casebooks? Our precedents do not give a clear answer. There is not even a consensus among textualists about this point.<sup>128</sup> But the answer matters a great deal to legal interpretation, particularly when it comes to provisions that employ technical terms whose significance might not be at all apparent to the average person.<sup>129</sup>

### D. *Are Certain Descriptive Canons Faulty?*

I have already expressed skepticism about the legitimacy of prescriptive canons and will not rehash those concerns here.<sup>130</sup> The controversy surrounding whether judges can or should consider prescriptive canons is a philosophical one—a fundamental dispute about the scope of judicial power.

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125. *Id.*

126. *See, e.g.*, Baude & Doerfler, *supra* note 110, at 541 (“The plain meaning rule . . . has not been justified, and perhaps cannot be.”); Frankfurter, *supra* note 29, at 541 (“If the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded.”).

127. *See, e.g.*, *S & S Distrib. Co.*, 334 So. 2d at 907 (quoting State *ex rel.* Neelen v. Lucas, 128 N.W.2d 425, 428 (Wis. 1964)).

128. *Compare, e.g.*, Easterbrook, *supra* note 31, at 82 (stating that a law means what the “median voter” would take it to mean), *with* Easterbrook, *supra* note 65, at 61, 65 (stating that a law means what “a skilled, objectively reasonable user of words” who was “thinking about the same problem” as the legislature would take it to mean); *compare* SCALIA & GARNER, *supra* note 1, at 69 (stating that a law means what “common” people would reasonably understand it to mean), *with id.* at 324 (stating that a law means what “the members of the bar practicing in that field reasonably enough assume” that it means).

129. One common example of such a term is “person”—a term which, when used in the legal context, almost always includes corporations and other “artificial persons” in addition to human persons.

130. *See supra* Subpart III.A.

Descriptive canons do not raise that sort of philosophical concern (everyone agrees that judges can consult objective indicia of meaning when interpreting texts), but they do raise empirical concerns. Because descriptive canons are supposed to be objective, they are only as useful as they are accurate. A rule telling judges that “*may* is mandatory, and *shall* is permissive,” would qualify as a descriptive canon (because it purports to describe how people use language), but it would be an inaccurate, worse-than-useless one.

In recent years, lawyers and linguists have questioned whether certain well-known descriptive canons accurately capture how people use language. A particular focus of criticism has been the series-qualifier canon, which purports to describe how postpositive modifiers normally attach to antecedents.<sup>131</sup> There may be reasons to doubt the empirical validity of other canons as well.<sup>132</sup> These empirical concerns are worth taking seriously. They also serve as a useful reminder that litigants must do their homework when they rely on a canon of construction because not all descriptive canons apply in all situations, and some descriptive canons might be so misguided that they should never be cited at all.

### E. *What Is the Role of Stare Decisis?*

Textualism does not always mesh neatly with stare decisis. Textualism teaches that the text of a law *is* the law. But the doctrine of stare decisis suggests that judicial precedent is also law—perhaps even a higher law.<sup>133</sup> Robust versions of stare decisis, such as the one currently favored by the U.S. Supreme Court, allow judges to adhere to their past interpretation of enacted text even if the judge realizes that the prior interpretation is objectively wrong.<sup>134</sup> This incongruity is what led Justice Scalia to declare that “stare decisis is not part of my [textualist] philosophy; it is a pragmatic exception to it.”<sup>135</sup> Justice Thomas, meanwhile, believes the exception is unwarranted: “If a prior decision demonstrably erred in interpreting such a law,” he has written, “judges should exercise the judicial power—not perpetuate a usurpation of the legislative

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131. See *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1174 (2021) (Alito, J., concurring in the judgment).

132. Judges often disagree about the semantic weight that should be attached to a statute’s title. Compare, e.g., *Yates v. United States*, 574 U.S. 528, 552 (2015) (Alito, J., concurring in the judgment), with *id.* at 558–59 (Kagan, J., dissenting). See also Tobias A. Dorsey, *Some Reflections on Yates and the Statutes We Threw Away*, 18 GREEN BAG 2D 377, 379, 386–90 (2015) (noting that all parties and all the Justices in *Yates* overlooked a federal law that prohibits courts from assigning interpretive weight to a statute’s title); *Ex parte N.G.*, 321 So. 3d 655, 661 (Ala. 2020) (Mitchell, J., dissenting) (making a similar point with respect to Alabama’s statutory prohibition on assigning interpretive value to titles and headings). To give another example, I recently questioned whether courts’ heavy reliance on the prior-construction canon is appropriate and noted some circumstances in which that canon “may not be justified” as an empirical matter. *Ex parte Mobile Pub. Libr.*, No. SC-2022-0450, 2022 WL 4007503, at \*2 n.3 (Ala. Sept. 2, 2022) (Mitchell, J., concurring specially).

133. See James Cleith Phillips, *Is Stare Decisis Inconsistent with the Original Meaning of the Constitution?: Exploring the Theoretical and Empirical Possibilities*, 91 NOTRE DAME L. REV. 115, 115 (2016).

134. Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 11 (2011).

135. SCALIA, *supra* note 5, at 140 (emphasis omitted).

power—and correct the error. A contrary rule would permit judges to ‘substitute their own pleasure’ for the law.”<sup>136</sup>

My experience indicates that, in practice, the Supreme Court of Alabama tends to adhere more closely to Justice Thomas’s approach to stare decisis, though we have not said so explicitly. Just last year, we overruled multiple precedents because litigants demonstrated that those precedents were “not supported by the text,”<sup>137</sup> “not plausible” readings of the text,<sup>138</sup> or impermissibly “substitut[e] our [court’s] judgment for that of the Legislature.”<sup>139</sup> Even so, some of our older decisions describe stare decisis as a doctrine of “great[] potency” and have indicated that our court may choose to prioritize its own precedents over enacted text if it wishes.<sup>140</sup> These conflicting approaches have not been reconciled, so the key questions about the limits of stare decisis—“Is the doctrine legitimate with respect to cases interpreting statutory and constitutional text?<sup>141</sup> And if so, in what circumstances?”—call out for definitive resolution.

### CONCLUSION

In this Essay, I have provided an overview of textualism and done my best to explain how textualist principles have been applied by the Supreme Court of Alabama. But for any questions this Essay may have answered, many more remain. I have flagged some of these open questions in Part III, above, but that section is not exhaustive. By thinking carefully about such questions and proposing sensible answers to them, practitioners and scholars can help courts refine legal interpretation in Alabama.

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136. *Gamble v. United States*, 139 S. Ct. 1960, 1985 (2019) (Thomas, J., concurring) (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)).

137. *Ex parte Pinkard*, No. 1200658, 2022 WL 1721483, at \*5 (Ala. May 27, 2022).

138. *Ex parte State*, No. 1210198, 2022 WL 4115310, at \*6 (Ala. Sept. 9, 2022).

139. *Id.* (quoting *Ex parte Carlton*, 867 So. 2d 332, 338 (Ala. 2003)).

140. *Hexcel Decatur, Inc. v. Vickers*, 908 So. 2d 237, 241 (Ala. 2005); *see, e.g., id.* at 242 (refusing to consider whether prior precedent was erroneous because “[i]n a contest between the dictionary and the doctrine of stare decisis, the latter clearly wins” (alteration in original) (quoting *Hibbs v. Winn*, 542 U.S. 88, 113 (2004) (Stevens, J., concurring))).

141. A more robust version of stare decisis may be appropriate in common law cases, because “the common law included ‘established customs,’” and common-law judges were required to issue judgments “according to the known . . . customs of the land.” *Gamble*, 139 S. Ct. at 1982–83 (Thomas, J., concurring) (internal alteration marks omitted) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*68–69). In other words, judges in common-law cases generally were expected to adhere to longstanding precedents because those precedents helped form the law the judges were tasked with applying. *Id.* at 1983 (Thomas, J., concurring). But even “the common law did not view precedent as unyielding when it was ‘most evidently contrary to reason’ or ‘divine law.’” *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*69–70).

## APPENDIX

Canon Title	Definition from <i>Reading Law</i>	Does Alabama follow this canon?	Relevant Authority
<b>Interpretation Principle</b>	Every application of a text to particular circumstances entails interpretation. <sup>142</sup>	No. Alabama's plain-meaning rule holds that if a text is sufficiently "plain," then there is no room for judicial construction.	"When the language is clear, there is no room for judicial construction . . ." <i>Craft v. McCoy</i> , 312 So. 3d 32, 37 (Ala. 2020) (quoting <i>Water Works &amp; Sewer Bd. of Selma v. Randolph</i> , 833 So. 2d 604, 607 (Ala. 2002)). "If the language of a statute is not 'plain' or is ambiguous, then—and only then—may a court construe or interpret it to determine the legislature's intent." <i>Deutsche Bank Nat'l Tr. Co. v. Walker Cnty.</i> , 292 So. 3d 317, 326 (Ala. 2019). "A statute or portion thereof is ambiguous when it is capable of being understood by reasonably well-informed persons in either of two or more senses . . ." <i>S&amp;S Distrib. Co. v. Town of New Hope</i> , 334 So. 2d 905, 907 (Ala. 1976) (quoting <i>State ex rel. Neelsen v. Lucas</i> , 128 N.W.2d 425, 428 (Wis. 1964)).
<b>Supremacy-of-Text Principle</b>	The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means. <sup>143</sup>	Yes.	"The intention of the Legislature, to which effect must be given, is that expressed in the statute, and the courts will not inquire into the motives which influenced the Legislature or individual members in voting for its passage . . ." <i>State v. \$223,405.86</i> , 203 So. 3d 816, 831 (Ala. 2016) (emphasis omitted) (quoting <i>James v. Todd</i> , 103 So. 2d 19, 28 (Ala. 1957)). "The intention of the Legislature must be ascertained from the words of the section." <i>Standard Oil Co. v. State</i> , 59 So. 667, 667 (Ala. 1912).
<b>Principle of Interrelating Canons</b>	No canon of interpretation is absolute. Each may be overcome by the strength of differing principles that point in other directions. <sup>144</sup>	For the most part, yes. However, there are some canons (such as the plain-meaning rule, <i>see supra</i> Subpart III.A) that the Court has described in more absolute terms.	"[A rule of interpretation] is merely one of construction, and is not one of universal application." <i>State ex rel. Tyson v. Houghton</i> , 38 So. 761, 763 (Ala. 1905).
<b>Presumption Against Ineffectiveness</b>	A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored. <sup>145</sup>	Yes.	"A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored." <i>State ex rel. Allison v. Farris</i> , 194 So. 3d 214, 219 (Ala. 2015) (plurality opinion) (quoting ANTONIN SCALIA & BRYAN A. GARNER, <i>READING LAW</i> 63 (2012)). "[I]t is presumed that the legislature does not enact meaningless, vain or futile statutes." <i>Druid City Hosp. Bd. v. Epperson</i> , 378 So. 2d 696, 699 (Ala. 1979). "Where one interpretation of a statute would defeat its purpose that interpretation will be rejected if any other reasonable interpretation can be given it." <i>Id.</i> at 699.

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142. SCALIA & GARNER, *supra* note 1, at 53.

143. *Id.* at 56.

144. *Id.* at 59.

145. *Id.* at 63.

<b>Presumption of Validity</b>	An interpretation that validates outweighs one that invalidates. <sup>146</sup>	Yes.	“Rather than nullify the section on the ground of uncertainty, the court will seek out and adopt any reasonable construction of which it is susceptible . . . .” <i>Standard Oil Co. v. State</i> , 59 So. 667, 667 (Ala. 1912). “A fundamental rule of statutory construction is, ‘If a statute is susceptible of two constructions, one of which is workable and fair and the other unworkable and unjust the court will assume that the legislature intended that which is workable and fair.’” <i>Ex parte Hayes</i> , 405 So. 2d 366, 370 (Ala. 1981) (quoting <i>State v. Calumet &amp; Hecla Consol. Copper Co.</i> , 66 So. 2d 726, 731 (Ala. 1953)).
<b>Ordinary-Meaning Canon</b>	Words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense. <sup>147</sup>	Yes.	“Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says.” <i>IMED Corp. v. Sys. Eng’g Assocs. Corp.</i> , 602 So. 2d 344, 346 (Ala. 1992). “[W]hen a term is not defined in a statute, the commonly accepted definition of the term should be applied.” <i>Russell v. Sedinger</i> , 350 So. 3d 311, 315 (Ala. 2021) (quoting <i>Bean Dredging, L.L.C. v. Ala. Dep’t of Revenue</i> , 855 So. 2d 513, 517 (Ala. 2003)).
<b>Fixed-Meaning Canon</b>	Words must be given the meaning they had when the text was adopted. <sup>148</sup>	Yes.	“The Constitution is a document of the people. Words or terms used in that document must be given their ordinary meaning common to understanding at the time of its adoption by the people.” <i>McGee v. Borom</i> , 341 So. 2d 141, 143 (Ala. 1976). “The court knows nothing of the intention of an act, except from the words in which it is expressed, applied to <i>the facts existing at the time</i> , the meaning of the law being the law itself.” <i>Maxwell v. State</i> , 7 So. 824, 827 (Ala. 1890) (emphasis added).
<b>Omitted-Case Canon</b>	Nothing is to be added to what the text states or reasonably implies ( <i>casus omisus pro omisso habendus est</i> ). That is, a matter not covered is to be treated as not covered. <sup>149</sup>	Yes.	“[W]hen determining legislative intent from the language used in a statute, a court may explain the language, but it may not detract from or add to the statute.” <i>Craft v. McCoy</i> , 312 So. 3d 32, 37 (Ala. 2020) (quoting <i>Water Works &amp; Sewer Bd. v. Randolph</i> , 833 So. 2d 604, 607 (Ala. 2002)). “The judiciary will not add that which the Legislature chose to omit.” <i>Ex parte Coleman</i> , 145 So. 3d 751, 758 (Ala. 2013) (quoting <i>Ex parte Jackson</i> , 614 So. 2d 405, 407 (Ala. 1993)). “Courts, however, may not interpret statutes to compensate for omissions. ‘[I]t is not the office of the court to insert in a statute that which has been omitted . . . what the legislature omits, the courts cannot supply.’” <i>Ex parte Christopher</i> , 145 So. 3d 60, 66 (Ala. 2013) (quoting <i>Pace v. Armstrong World Indus., Inc.</i> , 578 So. 2d 281, 284 (Ala. 1991)).
<b>General-Terms Canon</b>	General terms are to be given their general meaning ( <i>generalia verba sumi generaliter intelligenda</i> ). <sup>150</sup>	Yes.	“[B]road terms [must be] given effect as expressed . . . . Such is the nature of our statute. We cannot engraft into it features left out by the legislature.” <i>Gardner v. Gardner</i> , 34 So. 2d 157, 160 (Ala. 1948).

146. *Id.* at 66.147. *Id.* at 69.148. *Id.* at 78.149. *Id.* at 93.150. *Id.* at 101.

<b>Negative-Implication Canon</b>	The expression of one thing implies the exclusion of others ( <i>expressio unius est exclusio alterius</i> ). <sup>151</sup>	Yes.	“It is a well established principle of statutory interpretation that “[t]he expression of one thing implies the exclusion of others.” <i>Martin v. Martin</i> , 329 So. 3d 1242, 1245 (Ala. 2020) (quoting ANTONIN SCALIA & BRYAN A. GARNER, <i>READING LAW</i> 107–11 (2012)).
<b>Mandatory/Permissive Canon</b>	Mandatory words impose a duty; permissive words grant discretion. <sup>152</sup>	Yes.	“The word ‘shall,’ when used in a statute, usually indicates that the requirement is mandatory.” <i>Ex parte Brashear</i> , 555 So. 2d 192, 194 (Ala. 1989). “Ordinarily, the use of the word ‘may’ indicates a discretionary or permissive act, rather than a mandatory act.” <i>Ex parte Mobile Cnty. Bd. of Sch. Comm’rs</i> , 61 So. 3d 292, 294 (Ala. Civ. App. 2010).
<b>Conjunctive/Disjunctive Canon</b>	<i>And</i> joins a conjunctive list, <i>or</i> a disjunctive list—but with negatives, plurals, and various specific wordings, there are nuances. <sup>153</sup>	Yes.	“[W]hile there may be circumstances which call for an interpretation of the words ‘and’ and ‘or,’ ordinarily these words are <i>not</i> interchangeable.” <i>Ex parte Uniroyal Tire Co.</i> , 779 So. 2d 227, 234 (Ala. 2000) (quoting 1A NORMAN J. SINGER, <i>SUTHERLAND STATUTORY CONSTRUCTION</i> § 21.14 (5th ed. 1993)), <i>overturned on other grounds by legislative action</i> .
<b>Subordinating/Superordinating Canon</b>	Subordinating language (signaled by <i>subject to</i> ) or superordinating language (signaled by <i>notwithstanding</i> or <i>despite</i> ) merely shows which provision prevails in the event of a clash—but does not necessarily denote a clash of provisions. <sup>154</sup>	Our search did not locate any precedent expressly discussing this canon.	Not applicable.
<b>Gender/Number Canon</b>	In the absence of a contrary indication, the masculine includes the feminine (and vice versa) and the singular includes the plural (and vice versa). <sup>155</sup>	Almost certainly yes. We do not have caselaw expressly discussing this canon, but the legislature has codified it via statute.	“Words used in this Code in the past or present tense include the future, as well as the past and present. Words used in the masculine gender include the feminine and neuter. The singular includes the plural, and the plural the singular. All words giving a joint authority to three or more persons or officers give such authority to a majority of such persons or officers, unless it is otherwise declared.” ALA. CODE § 1-1-2 (1975).
<b>Presumption of Nonexclusive “Include”</b>	The verb <i>to include</i> introduces examples, not an exhaustive list. <sup>156</sup>	Yes.	“In another context, this Court explained that the word “including” is <i>not to be regarded as limitational or restrictive</i> , but merely as a particular specification of something to be included or to constitute a part of some <i>other thing</i> .’ . . . “Including” is <i>not</i> a word of limitation, rather it is a word of <i>enlargement</i> , and in ordinary significance also may imply that <i>something else has been given beyond the general language which precedes it</i> .” <i>Bon Harbor, LLC v. United Bank</i> , 53 So. 3d 82, 93 (Ala. 2010) (cleaned up).

151. *Id.* at 107.152. *Id.* at 112.153. *Id.* at 116.154. *Id.* at 126.155. *Id.* at 129.156. *Id.* at 132.

<b>Unintelligibility Canon</b>	An unintelligible text is inoperative. <sup>157</sup>	Yes.	“[W]hen the language of an act appears on its face to have a meaning, but it is impossible to give it any precise or intelligible application in the circumstances under which it was intended to operate, it is simply void.” <i>Standard Oil Co. v. State</i> , 59 So. 667, 667 (Ala. 1912) (quoting 26 THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 656 (1896)).
<b>Grammar Canon</b>	Words are to be given the meaning that proper grammar and usage would assign them. <sup>158</sup>	Yes.	“Primarily, a statute is to be interpreted according to the ordinary meaning of its words and the proper grammatical effect of their arrangement in the act.” <i>Powers v. State</i> , 29 So. 784, 785 (Ala. 1901) (quotations omitted).
<b>Last-Antecedent Canon</b>	A pronoun, relative pronoun, or demonstrative adjective generally refers to the nearest reasonable antecedent. <sup>159</sup>	Yes.	“We appreciate [that the last antecedent canon is a] general rule of statutory construction; however, we also note . . . that the doctrine is only an aid to construction and ‘will not be adhered to where extension to a more remote antecedent is clearly required by a consideration of the entire act.’” <i>White v. Knight</i> , 424 So. 2d 566, 567–68 (Ala. 1982) (quoting 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.33 (4th ed. 1973)).
<b>Series-Qualifier Canon</b>	When there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series. <sup>160</sup>	Most likely. This canon has been expressly endorsed in plurality opinions; it has also been applied without discussion in binding precedent.	“When there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series.” <i>Blankenship v. Kennedy</i> , 320 So. 3d 565, 568 (Ala. 2020) (plurality opinion) (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 147)); <i>see also, e.g., Ex parte State ex rel. Atty Gen.</i> , 93 So. 382, 383 (Ala. 1922) (holding that the word “intoxicating” in a prohibition on “intoxicating bitters and beverages” applied to both bitters and beverages).
<b>Nearest-Reasonable-Referent Canon</b>	When the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent. <sup>161</sup>	Most likely. Our search did not reveal a case expressly endorsing this canon in a majority opinion, but the canon has been endorsed in a plurality opinion. Moreover, the nearest-reasonable-referent canon is similar in scope and justification to the last antecedent canon, which the court has endorsed in a majority opinion. ( <i>see supra</i> )	“Normally, a postpositive phrase is best read to modify only ‘the nearest reasonable referent.’” <i>Stiff v. Equivest Fin., LLC</i> , No. 1200264, 2022 WL 570455, at *3 (Ala. Feb. 25, 2022) (plurality opinion) (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 152).
<b>Proviso Canon</b>	A proviso conditions the principal matter that it qualifies—almost always the matter immediately preceding. <sup>162</sup>	Yes.	“The general effect of provisos is to restrict the operative effect of statutory language.” <i>Pace v. Armstrong World Indus., Inc.</i> , 578 So. 2d 281, 284 (Ala. 1991).

157. *Id.* at 134.158. *Id.* at 140.159. *Id.* at 144.160. *Id.* at 147.161. *Id.* at 152.162. *Id.* at 154.

<b>Scope-of-Subparts Canon</b>	Material within an indented subpart relates only to that subpart; material contained in unindented text relates to all the following or preceding indented subparts. <sup>163</sup>	Our search did not locate any precedent expressly discussing this canon.	Not applicable.
<b>Punctuation Canon</b>	Punctuation is a permissible indicator of meaning. <sup>164</sup>	Yes, though our court seems to give this canon much less weight than other jurisdictions do.	“[P]unctuation marks may, in proper cases, be regarded as aids in arriving at the correct meaning of statements in a statute, but in <i>construing</i> statutes, punctuation cannot be accorded a controlling influence. Courts do not hesitate to repunctuate, when it is necessary to arrive at the true meaning.” <i>Deutsche Bank Nat’l Tr. Co. v. Walker Cnty.</i> , 292 So. 3d 317, 327 (Ala. 2019) (quoting <i>Cook v. State</i> , 20 So. 360, 361 (Ala. 1896)).
<b>Whole-Text Canon</b>	The text must be construed as a whole. <sup>165</sup>	Yes.	“Statutes are to be considered as a whole, and every word given effect if possible.” <i>Ex parte Besbears</i> , 669 So. 2d 148, 150 (Ala. 1995). “When interpreting a statute, this Court must read the statute as a whole because statutory language depends on context . . . .” <i>Bean Dredging, L.L.C. v. Ala. Dep’t of Revenue</i> , 855 So. 2d 513, 517 (Ala. 2003). “[O]ur rules of statutory construction direct us to look at the statute as a whole to determine the meaning of certain language that is, when viewed in isolation, susceptible to multiple reasonable interpretations.” <i>Ex parte Alfa Fin. Corp.</i> , 762 So. 2d 850, 853 (Ala. 1999).
<b>Presumption of Consistent Usage</b>	A word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning. <sup>166</sup>	Yes.	“As a basic canon of statutory construction, we presume that a difference in wording, especially in provisions within similar statutes, reflects a difference in meaning.” <i>Ex parte Smiths Water &amp; Sewer Auth.</i> , 982 So. 2d 484, 488 (Ala. 2007). “[W]here there is a ‘material alteration in the language used in the different clauses, it is to be inferred’ that the alterations were not inadvertent.” <i>Id.</i> (quoting <i>House v. Cullman Cnty.</i> , 593 So. 2d 69, 75 (Ala. 1992)).
<b>Surplusage Canon</b>	If possible, every word and every provision is to be given effect. None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence. <sup>167</sup>	Yes.	“[W]e must examine the statute as a whole and, if possible, give effect to each section.” <i>City of Pinson v. Utils. Bd. of Oneonta</i> , 986 So. 2d 367, 371 (Ala. 2007) (quoting <i>Ex parte Exxon Mobil Corp.</i> , 926 So. 2d 303, 309 (Ala. 2005)). “Some effect must be allowed to every word, or phrase, and such interpretation adopted, if reasonable, that no word or phrase will be repugnant to any other provision, or be unnecessary and superfluous. Says Lord Coke: ‘The good expositor makes every sentence have its operation to suppress all the mischiefs; he gives effect to every word in the statute; he does not construe it so that anything should be vain and superfluous, nor yet makes exposition against express words.’” <i>Hatcher v. Diggs</i> , 76 Ala. 189, 193 (1884).

163. *Id.* at 156.164. *Id.* at 161.165. *Id.* at 167.166. *Id.* at 170.167. *Id.* at 174.

<b>Harmonious-Reading Canon</b>	The provisions of a text should be interpreted in a way that renders them compatible, not contradictory. <sup>168</sup>	Yes.	“Where possible, statutes should be resolved in favor of each other to form one harmonious plan and give uniformity to the law.” <i>League of Women Voters v. Renfro</i> , 290 So. 2d 167, 169 (Ala. 1974).
<b>General/Specific Canon</b>	If there is a conflict between a general provision and a specific provision, the specific provision prevails. <sup>169</sup>	Yes.	“Even if a conflict between those statutes existed, a statutory provision relating to a specific subject is understood to act as an exception to a provision relating to general subjects.” <i>State Farm Mut. Auto. Ins. Co. v. Brown</i> , 894 So. 2d 643, 649–50 (Ala. 2004). “[T]he law general must yield to the law special[.]” <i>Winston v. Moseley</i> , 2 Stew. 137, 142 (Ala. 1829).
<b>Irreconcilability Canon</b>	If a text contains truly irreconcilable provisions at the same level of generality, neither provision should be given effect. <sup>170</sup>	Yes.	“If, however, we were driven to . . . declare that the different clauses of the proviso [were] inconsistent with each other, [we would hold that they] were ineffectual for uncertainty, rather than extend the statute beyond what seems to have been the manifest intention.” <i>Upson v. Austin</i> , 4 Ala. 124, 128 (1842).
<b>Predicate-Act Canon</b>	Authorization of an act also authorizes a necessary predicate act. <sup>171</sup>	Yes.	“When a [provision of law] gives a general power or enjoins a duty, it also gives by implication, every particular power necessary for the exercise of the one, or the performance of the other.” <i>Riley v. Cornerstone Cmty. Outreach, Inc.</i> , 57 So. 3d 704, 720 (Ala. 2010) (quoting <i>State ex rel. Stubbs v. Dawson</i> , 199 P. 360, 363 (Kan. 1911)).
<b>Associated-Words Canon</b>	Associated words bear on one another’s meaning. <sup>172</sup>	Yes.	“[ <i>Noscitur a sociis</i> ] provides that ‘where general and specific words which are capable of an analogous meaning are associated one with the other, they take color from each other, so that the general words are restricted to a sense analogous to that of the less general.’” <i>Ex parte Emerald Mountain Expressway Bridge, L.L.C.</i> , 856 So. 2d 834, 842–43 (Ala. 2003) (quoting <i>Winner v. Marion Cnty. Comm’n</i> , 415 So. 2d 1061, 1064 (Ala. 1982)).
<b>Ejusdem Generis Canon</b>	Where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned. <sup>173</sup>	Yes.	“The <i>ejusdem generis</i> rule of statutory construction provides that where general words or phrases follow or precede a specific list of classes of persons or things, the general word or phrase is interpreted to be of the same nature or class as those named in the specific list.” <i>Ex parte Mitchell</i> , 989 So. 2d 1083, 1091 (Ala. 2008).
<b>Distributive-Phrasing Canon</b>	Distributive phrasing applies each expression to its appropriate referent ( <i>reddendo singula singulis</i> ). <sup>174</sup>	Our search did not locate any precedent expressly discussing this canon.	Not applicable.
<b>Prefatory-Materials Canon</b>	A preamble, purpose clause, or recital is a permissible indicator of meaning. <sup>175</sup>	Yes.	“We can also look at the title or preamble of the act.” <i>City of Bessemer v. McClain</i> , 957 So. 2d 1061, 1075 (Ala. 2006).

168. *Id.* at 180.169. *Id.* at 183.170. *Id.* at 189.171. *Id.* at 192.172. *Id.* at 195.173. *Id.* at 199.174. *Id.* at 214.175. *Id.* at 217.

<b>Title-and-Headings Canon</b>	The title and headings are permissible indicators of meaning. <sup>176</sup>	Disputed. The Alabama Code does not permit consideration of statutory titles and headings, but our court has some caselaw apparently authorizing their consideration despite that prohibition.	<p>“We can also look at the title or preamble of the act.” <i>City of Bessemer v. McClain</i>, 957 So. 2d 1061, 1075 (Ala. 2006).</p> <p>“[T]he title of a statute does not override the plain meaning of the words contained in that statute . . . .” <i>Ex parte Ankrom</i>, 152 So. 3d 397, 417 (Ala. 2013).</p> <p>“Normally, titles and headings within a statutory framework are permissible indicators of meaning. . . . But § 1-1-14(a) states: ‘The classification and organization of the titles, chapters, articles, divisions, subdivisions and sections of this Code, and the headings thereto, are made for the purpose of convenient reference and orderly arrangement, and no implication, inference or presumption of a legislative construction shall be drawn therefrom.’” <i>Ex parte N.G.</i>, 321 So. 3d 655, 661 (Ala. 2020) (Mitchell, J., dissenting) (citing ANTONIN SCALIA &amp; BRYAN GARNER, <i>READING LAW</i> 221 (2012)).</p>
<b>Interpretive-Direction Canon</b>	Definition sections and interpretation clauses are to be carefully followed. <sup>177</sup>	Yes.	<p>“[T]he term ‘deliberate’ should be defined based on the statutory definition of ‘deliberation’ found in the Act.” <i>Casey v. Beeker</i>, 321 So. 3d 662, 666 (Ala. 2020).</p>
<b>Absurdity Doctrine</b>	A provision may be either disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve. <sup>178</sup>	Yes.	<p>“[A] sensible construction must be given to the act and any general terms used in the statute should be so limited in their application as not to lead to an absurd consequence.” <i>Trailway Oil Co. v. City of Mobile</i>, 122 So. 2d 757, 761 (Ala. 1960).</p> <p>“A fundamental rule of statutory construction is, ‘If a statute is susceptible of two constructions, one of which is workable and fair and the other unworkable and unjust the court will assume that the legislature intended that which is workable and fair.’” <i>Ex parte Hayes</i>, 405 So. 2d 366, 370 (Ala. 1981) (quoting <i>State v. Calumet &amp; Hecla Consol. Copper Co.</i>, 66 So. 2d 726, 731 (Ala. 1953)).</p>

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176. *Id.* at 221.

177. *Id.* at 225.

178. *Id.* at 234.

<p><b>Constitutional-Doubt Canon</b></p>	<p>A statute should be interpreted in a way that avoids placing its constitutionality in doubt.<sup>179</sup></p>	<p>Yes.</p>	<p>“It is the duty of the court to construe a statute so as to make it harmonize with the constitution if this can be done without doing violence to the terms of the statute and the ordinary canons of construction.” <i>Magee v. Boyd</i>, 175 So. 3d 79, 107 (Ala. 2015) (quoting <i>Ex parte Jenkins</i>, 723 So. 2d 649, 658 (Ala. 1998)).</p> <p>“Where the validity of a statute is assailed and there are two possible interpretations, by one of which the statute would be unconstitutional and by the other would be valid, the courts should adopt the construction which would uphold it. . . . Or, as otherwise stated, it is the duty of the courts to adopt the construction of a statute to bring it into harmony with the constitution, if its language will permit.” <i>Id.</i> (quoting <i>Ala. State Fed’n of Lab. v. McAdory</i>, 18 So. 2d 810, 815 (Ala. 1944)).</p>
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179. *Id.* at 247.

<p><b>Related-Statutes Canon</b></p>	<p>Statutes <i>in pari materia</i> are to be interpreted together as though they were one law.<sup>180</sup></p>	<p>Yes.</p>	<p>“[J]ust as statutes dealing with the same subject are <i>in pari materia</i> and should be construed together, . . . parts of the same statute are <i>in pari materia</i> and each part is entitled to equal weight.” <i>Craft v. McCoy</i>, 312 So. 3d 32, 37 (Ala. 2020) (quoting <i>Darks Dairy, Inc. v. Ala. Dairy Comm’n</i>, 367 So. 2d 1378, 1381 (Ala. 1979)).</p> <p>“[T]he principle of <i>in pari materia</i> does not require that the statutes being analyzed share an <i>identical</i> subject matter. To the contrary, this Court has indicated that the subject matter of the statutes being analyzed need only be ‘related,’ ‘similar,’ or the ‘same general[ly].’” <i>Ex parte Terex USA, L.L.C.</i>, 260 So. 3d 813, 821 (Ala. 2018) (quoting <i>James v. McKinney</i>, 729 So. 2d 264, 267 (Ala. 1998)).</p> <p>“[S]tatutes must be construed <i>in pari materia</i> in light of their application to the same general subject matter . . . . Our obligation is to construe [the] provisions ‘in favor of each other to form one harmonious plan,’ if it is possible to do so.” <i>Bandy v. City of Birmingham</i>, 73 So. 3d 1233, 1242 (Ala. 2011) (quoting <i>Opinion of the Justs. No. 334</i>, 599 So. 2d 1166, 1168 (Ala. 1992)).</p>
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180. *Id.* at 252.

<b>Reenactment Canon</b>	If the legislature amends or reenacts a provision other than by way of a consolidating statute or restyling project, a significant change in language is presumed to entail a change in meaning. <sup>181</sup>	Yes.	“When the Legislature employs different language in a subsequent statute in the same connection, the courts will presume a change of the law is intended.” <i>Louisville &amp; N.R. Co. v. W. Union Tel. Co.</i> , 71 So. 118, 123 (Ala. 1915). “[T]he insertion of [new words] must have had some purpose other than mere redundancy; the legislature must have intended some change in the meaning of the phrase.” <i>State v. Bay Towing &amp; Dredging Co.</i> , 90 So. 2d 743, 749 (Ala. 1956). “The change in language effected by the 1988 amendment reflects the Legislature’s intent to change the [meaning].” <i>Se. Enters., Inc. v. Byrd</i> , 720 So. 2d 873, 875 (Ala. 1998).
<b>Presumption Against Retroactivity</b>	A statute presumptively has no retroactive application. <sup>182</sup>	Yes.	“The judiciary generally disdains retroactive application of laws because such application usually injects undue disharmony and chaos in the application of law to a given fact situation; therefore, the courts will generally indulge every presumption in favor of prospective application unless the legislature’s intent to the contrary is clearly and explicitly expressed.” <i>Lee v. Lee</i> , 382 So. 2d 508, 509 (Ala. 1980).
<b>Pending-Action Canon</b>	When statutory law is altered during the pendency of a lawsuit, the courts at every level must apply the new law unless doing so would violate the presumption against retroactivity. <sup>183</sup>	Yes.	“The general rule is that a case pending on appeal will be subject to any change in the substantive law.” <i>Ala. State Docks Terminal Ry. v. Lyles</i> , 797 So. 2d 432, 438 (Ala. 2001).

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181. *Id.* at 256.

182. *Id.* at 261.

183. *Id.* at 266.

<b>Extraterritoriality Canon</b>	A statute presumptively has no extraterritorial application. <sup>184</sup>	Yes. Our court may even apply this canon more strictly than other jurisdictions do.	“[T]his Court appears to follow the general rule of statutory construction that, in order to have extraterritorial effect, a statute must explicitly provide for that effect.” <i>Ex parte Old Republic Sur. Co.</i> , 733 So. 2d 881, 884 (Ala. 1999).
<b>Artificial-Person Canon</b>	The word <i>person</i> includes corporations and other entities, but not the sovereign. <sup>185</sup>	Yes.	“The word ‘person’ includes a corporation as well as a natural person.” ALA. CODE § 1-1-1(1) (1975). “The word person as used in the statutes has been declared to include a corporation as well as a natural person.” <i>Calhoun Cnty. v. Brandon</i> , 187 So. 868, 870 (Ala. 1939). “It has been declared by this and the United States Courts that a county is included in the statutes of Alabama which refer to the rights of a ‘person’ or ‘persons.’” <i>Id.</i>
<b>Repealability Canon</b>	The legislature cannot derogate from its own authority or the authority of its successors. <sup>186</sup>	Yes.	“The principle is well established that neither the State or any inferior legislative body can alienate, surrender or abridge its right or ability to function in the future.” <i>Garrett v. Colbert Cnty. Bd. of Educ.</i> , 50 So. 2d 275, 279 (Ala. 1950). “While under section 89 of the Constitution a city cannot enact an ordinance inconsistent with a state law, there is and can be no legislative restriction on its own power to make an enactment inconsistent with an act previously passed by it.” <i>Van Sandt v. Bell</i> , 71 So. 2d 529, 531 (Ala. 1954).
<b>Presumption Against Waiver of Sovereign Immunity</b>	A statute does not waive sovereign immunity—and a federal statute does not eliminate state sovereign immunity—unless that disposition is unequivocally clear. <sup>187</sup>	Yes.	“There are only two conditions under which a state may be made a defendant in a federal court: 1) if the state has consented to be sued, by waiving its immunity or 2) if Congress has expressed a clear and unmistakable intent to make the state subject to suit, pursuant to Congress’s right to enforce the 13th, 14th, and 15th Amendments to the United States Constitution.” <i>Ala. State Docks Terminal Ry. v. Lyles</i> , 797 So. 2d 432, 436 (Ala. 2001).
<b>Presumption Against Federal Preemption</b>	A federal statute is presumed to supplement rather than displace state law. <sup>188</sup>	Yes.	“[T]here is a presumption against preemption.” <i>Dixon v. Hot Shot Exp., Inc.</i> , 44 So. 3d 1082, 1088 (Ala. 2010).

184. *Id.* at 268.185. *Id.* at 273.186. *Id.* at 278.187. *Id.* at 281.188. *Id.* at 290.

<b>Penalty/Illegality Canon</b>	A statute that penalizes an act makes it unlawful. <sup>189</sup>	Yes.	<p>“[A]ll contracts which are made in violation of a penal statute are as absolutely void as if the law had in so many words declared that they should be so.” <i>W. Union Tel. Co. v. Young</i>, 36 So. 374, 375 (Ala. 1903) (quoting <i>Youngblood v. Birmingham Tr. &amp; Sav. Co.</i>, 12 So. 579, 581 (Ala. 1892)).</p> <p>“It is not necessary that a statute should impose a penalty for doing or omitting to do something in order to make a contract void which is opposed to its operation. It is sufficient if the law prohibits the doing of the act . . . .” <i>Id.</i> (quoting <i>McGehee v. Lindsay</i>, 6 Ala. 16, 21 (1844)).</p> <p>“It is an established rule of law, supported by uniform authority, that, when a statute goes no further even than to impose a penalty for the doing of an act, a contract founded on such act as a consideration is void . . . .” <i>Dudley v. Collier</i>, 6 So. 304, 305 (Ala. 1889).</p>
<b>Rule of Lenity</b>	Ambiguity in a statute defining a crime or imposing a penalty should be resolved in the defendant’s favor. <sup>190</sup>	Yes.	<p>“A basic rule of review in criminal cases is that <i>criminal statutes are to be strictly construed in favor of those persons sought to be subjected to their operation, i.e., defendants.</i>” <i>Ex parte Bertram</i>, 884 So. 2d 889, 891 (Ala. 2003) (citing <i>Shenber v. State</i>, 38 Ala. App. 573 (1956)).</p> <p>“[Penal] statutes are to reach no further in meaning than their words.” <i>Fuller v. State</i>, 60 So. 2d 202, 205 (Ala. 1952).</p> <p>“One who commits an act which does not come within the words of a penal statute, according to the general and popular understanding of them, when they are not used technically, is not to be punished thereby merely because the act contravenes the policy of the statute.” <i>Id.</i> (quoting <i>Young v. State</i>, 58 Ala. 358, 359 (1877)).</p>
<b>Mens Rea Canon</b>	A statute creating a criminal offense whose elements are similar to those of a common-law crime will be presumed to require a culpable state of mind ( <i>mens rea</i> ) in its commission. All statutory offenses imposing substantial punishment will be presumed to require at least awareness of committing the act. <sup>191</sup>	Yes.	<p>“Although no culpable mental state is expressly designated in a statute defining an offense, an appropriate culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such culpable mental state. A statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, states a crime of mental culpability.” <i>Ex parte Phillips</i>, 771 So. 2d 1066, 1069 (Ala. 2000) (emphasis omitted) (quoting ALA. CODE § 13A-2-4(b) (1975)).</p>
<b>Presumption Against Implied Right of Action</b>	A statute’s mere prohibition of a certain act does not imply creation of a private right of action for its violation. The creation of such a right must be either express or clearly implied from the text of the statute. <sup>192</sup>	Yes.	<p>“One claiming a private right of action within a statutory scheme must show clear evidence of a legislative intent to impose civil liability for a violation of the statute.” <i>Am. Auto. Ins. Co. v. McDonald</i>, 812 So. 2d 309, 311 (Ala. 2001).</p>

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189. *Id.* at 295.

190. *Id.* at 296.

191. *Id.* at 303.

192. *Id.* at 313.

<b>Presumption Against Change in Common Law</b>	A statute will be construed to alter the common law only when that disposition is clear. <sup>193</sup>	Yes.	“A statute which is an innovation on the common law will not be extended further than is required by the letter of the statute.” <i>State v. Grant</i> , No. 1210198, 2022 WL 4115310, at *4 (Ala. Sept. 9, 2022) (quoting <i>Pappas v. City of Eufaula</i> , 210 So. 2d 802, 804 (Ala. 1968)).
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193. *Id.* at 318.

<p><b>Canon of Imputed Common-Law Meaning</b></p>	<p>A statute that uses a common-law term, without defining it, adopts its common-law meaning.<sup>194</sup></p>	<p>Yes. As our caselaw makes clear, this canon derives from the general presumption against change in the common law (see <i>supra</i>).</p>	<p>“Statutes in derogation or modification of the common law . . . are presumed not to alter the common law in any way not expressly declared.” <i>Arnold v. State</i>, 353 So. 2d 524, 526 (Ala.1977); <i>see also Dennis v. State</i>, 111 So. 2d 21, 24 (Ala. 1959) (noting “a rule of statutory construction that statutes should be construed in reference to the principles of the common law”); <i>Weaver v. Hollis</i>, 22 So. 2d 525, 528 (Ala. 1945) (noting that statutes must be read “in the light of the common law”); <i>Standard Oil Co. v. City of Birmingham</i>, 79 So. 489, 490 (Ala. 1918) (“[C]ommon-law words [are to be construed] according to their common-law meaning . . . .”); <i>Cook v. Meyer Bros.</i>, 73 Ala. 580, 583 (1883) (“[T]he common law prevails, save so far as it is expressly or by necessary implication changed by the statute.”); 2B NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 50:3 (7th ed. 2010) (noting that statutes “should not be considered to make any innovation upon common law which the statute does not fairly express”); 3A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 69:9 (7th ed. 2010) (“Where a term is not statutorily defined, courts presume the legislature retained the common-law meaning.”); ANTONIN SCALIA &amp; BRYAN A. GARNER, <i>READING LAW</i> 320 (2012) (“The age-old principle is that words undefined in a statute are to be interpreted and applied according to their common-law meanings.”); <i>Ex parte Christopher</i>, 145 So. 3d 60, 65 (Ala. 2013).</p>
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194. *Id.* at 320.

<p><b>Prior-Construction Canon</b></p>	<p>If a statute uses words or phrases that have already received an authoritative construction by the jurisdiction's court of last resort, or even uniform construction by inferior courts or a responsible administrative agency, they are to be understood according to that construction.<sup>195</sup></p>	<p>Yes.</p>	<p>“We believe it is pertinent to point out that there exists, and has long existed, in this state, a principle that when the legislature readopts a code section, or incorporates it into a subsequent Code, prior decisions of this court permeate the statute, and it is presumed that the legislature deliberately adopted the statute with knowledge of this court's interpretation thereof.” <i>Jones v. Conradi</i>, 673 So. 2d 389, 392 (Ala. 1995) (quoting <i>Edgehill Corp. v. Hutchens</i>, 213 So. 2d 225, 227–28 (Ala. 1968)).</p> <p>“It is a familiar rule that where a statute has been construed, and is reenacted without material change, such construction must be accepted as a part of the statute.” <i>Hamm v. Harrigan</i>, 178 So. 2d 529, 540 (Ala. 1965), <i>supplemented</i>, 179 So. 2d 154 (Ala. 1965).</p> <p>“The applicable rule is that the re-enactment, or the amendment of a non-material part, of a statute which has been judicially construed is an adoption of the construction.” <i>Williams v. Williams</i>, 158 So. 2d 901, 904 (Ala. 1963).</p>
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195. *Id.* at 322.

<b>Presumption Against Implied Repeal</b>	Repeals by implication are disfavored—“very much disfavored.” But a provision that flatly contradicts an earlier-enacted provision repeals it. <sup>196</sup>	Yes.	<p>“Repeal by implication is admittedly not a favored rule of statutory construction. . . .” <i>Fletcher v. Tuscaloosa Fed. San. &amp; Loan Ass’n</i>, 314 So. 2d 51, 54 (Ala. 1975).</p> <p>“[I]mplied repeal is disfavored when the earlier act is specific and the subsequent act is general.” <i>Gulf State Park Auth. v. Gulf Beach Hotel, Inc.</i>, 22 So. 3d 432, 442 (Ala. 2009) (quoting <i>Marks v. Tenbrunsel</i>, 910 So. 2d 1255, 1262 (Ala. 2005)).</p> <p>“Repeal by implication is not favored. It is only when two laws are so repugnant to or in conflict with each other that it must be presumed that the Legislature intended that the latter should repeal the former.” <i>City of Birmingham v. S. Express Co.</i>, 51 So. 159, 162 (Ala. 1909).</p>
<b>Repeal-of-Repealer Canon</b>	The repeal or expiration of a repealing statute does not reinstate the original statute. <sup>197</sup>	Yes. However, our court has held that this principle does not apply when the repealing statute is repealed before it takes effect.	<p>“[A]rticle IV, section 45 of the Constitution of Alabama of 1901 [provides]:</p> <p>‘[N]o law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only; but so much thereof as is revived, amended, extended, or conferred, shall be re-enacted and published at length.’” <i>Op. of the Justs.</i>, 357 So. 2d 145, 146 (Ala. 1978) (advisory opinion).</p> <p>“[But] ‘where the repealing act is repealed before it takes effect, its repeal does not affect the original act in any way, it never having actually become inoperative.’ Thus, under this rule, an act which repeals a portion or all of a repealing act before its effective date would not [impermissibly] [‘revive’] the original act because the original act had never ceased to exist.” <i>Id.</i> at 147 (citations omitted).</p>

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196. *Id.* at 327.

197. *Id.* at 334.

<b>Desuetude Canon</b>	A statute is not repealed by nonuse or desuetude. <sup>198</sup>	Yes.	“Desuetude is a civil law doctrine rendering a statute abrogated solely by reason of its long and continued nonuse. This doctrine has never become an accepted part of the common law . . . . Thus, we must reject the notion that mere nonenforcement of the truck weight statute over a period of time repeals that statute.” <i>Dep’t of Pub. Safety v. Freeman Ready-Mix Co.</i> , 295 So. 2d 242, 247 (Ala. 1974).
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198. *Id.* at 336.