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CONTINUITY AND THE LEGISLATIVE DESIGN

John F. Manning*

INTRODUCTION

More than half a century ago, Karl Llewellyn famously argued that the canons of construction are indeterminate and that judges invoke them to justify decisions in fact made on other grounds.¹ Llewellyn's critique had a devastating impact, in part, because he supported his claim by aligning twenty-eight "Thrusts" against twenty-eight "Parries."² Because each canon thus seemed to have an equally potent counterpart, Llewellyn deemed it a "foolish pretense" for courts to attempt to apply "a set of mutually contradictory *correct* rules on How to Construe Statutes."³

Although a number of important scholars still accept Llewellyn's insight,⁴ academic opinion across a rather wide spectrum now seems to view Llewellyn's critique as overdone. Essential to this shift is the recognition that the canons could not, and do not purport to, produce mechanical answers to interpretive questions. Thus, proponents now emphasize that much like any other interpretive practice, a canon's utility will depend on the interpreter's capacity, at times, to identify how members of a linguistic community would ordinarily use that canon in context.⁵ Moreover, even if Llewellyn was correct to say

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1 See 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, 399 (1950). As Cass Sunstein accurately wrote nearly four decades later, "[a]lmost no one has had a favorable word to say about the canons in many years." Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 452 (1989).

2 Llewellyn, *supra* note 1, at 401–06.

3 *Id.* at 399.

4 See, e.g., Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 547–48 (1992); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 805–14 (1983).

5 See Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 651 (1992):

that many of the traditional canons contradicted one another, important recent scholarship has suggested that courts (or, indeed, legislatures) could rationalize the system to permit more predictable application.⁶

The renewed ideal of a meaningful system of canons ties into important strategic goals of competing schools of thought about statutory interpretation. Because modern formalists (*qua* textualists) doubt that intent or purpose gleaned from the legislative history offers a reliable way to resolve statutory indefiniteness,⁷ they want clear and predictable background rules to help legislators and interpreters

[W]hile it is true that no meta-rule or formal model is available to instruct judges in picking and choosing among canons, in the same way that people who do not know the rules of grammar can employ grammatically correct language when speaking English, it seems plausible that judges can select among canons in a sensible and coherent fashion even in the absence of known rules to guide them.

Id.

6 See, e.g., William N. Eskridge, Jr. & Philip N. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 66 (1994) (contending that "the Supreme Court is itself aware of [Llewellyn's basic] criticism and can therefore be expected to counteract its force"); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2148-49 (2002) (arguing that Congress could adopt a code of statutory interpretation and "ameliorate the problem of conflicting canons by enacting priority rules"); Sunstein, *supra* note 1, at 461 (arguing that judges should endeavor affirmatively "to identify norms on which participants in the legal culture might agree . . . and to generate principles under which conflicting norms might be reconciled"). In several recent cases, the Court has begun to develop sub-rules to clarify when certain canons of construction apply. See, e.g., *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) ("[T]he canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.") (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)); *Chevron U.S.A. v. Echazabal*, 536 U.S. 73, 81 (2002) ("The canon depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which is abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded."); *Landgraft v. USI Film Prods., Inc.*, 511 U.S. 244, 263-80 (1994) (concluding that the constitutionally-inspired maxim disfavoring retroactive liability takes priority over the more conventional maxim that a federal court should apply the law in effect at the time it renders its decision).

7 See, e.g., John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 684-89 (1997) (describing the textualist position); see also Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547-48 (1983) (using the insights of public choice theory to explain the indeterminacy of actual legislative intent); Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 244 (1992) (same).

decode textual cues.⁸ Modern pragmatists share the formalists' doubts about intent and purpose as organizing principles but have less faith in the statutory text.⁹ Given the inevitability of (some) meaningful statutory indeterminacy, they want judges to devise rules of construction that will produce socially and institutionally beneficial outcomes.¹⁰

In a characteristically thoughtful article entitled *Continuity and Change in Statutory Interpretation*, David Shapiro has joined issue by offering a measured analysis that does not align him obviously with either major camp.¹¹ Starting from the (previously discussed) assumption that the canons are (or can be) intelligible in context, Professor Shapiro attributes a unifying theme to a broad array of familiar and frequently used canons.¹² In particular, he notes that some

8 Modern textualists accept Wittgenstein's premise that words lack intrinsic meaning and that effective communication depends on a community's shared linguistic practices and understandings. See *Cont'l Can. Co. v. Chi. Truck Drivers*, 916 F.2d 1154, 1157 (7th Cir. 1990) (Easterbrook, J.) ("You don't have to be Ludwig Wittgenstein or Hans-Georg Gadamer to know that successful communication depends on meanings shared by interpretive communities."); see also LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* §§ 134–142 (G.E.M. Anscombe trans., 3d ed. 1953) (emphasizing the use of words in linguistic interactions within the relevant community). As Jeremy Waldron thus explains, effective legislation necessarily "depends on language, on the shared conventions that constitute a language, and on the reciprocity of intentions that conventions comprise." Jeremy Waldron, *Legislators' Intentions and Unintentional Legislation*, in *LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY* 329, 339 (Andrei Marmor ed., 1995) [hereinafter *LAW AND INTERPRETATION*].

9 See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 *STAN. L. REV.* 321, 325–45 (1990) (arguing that all three foundational philosophies suffer defects in legitimacy and determinacy); Sunstein, *supra* note 1, at 416–37 (considering the limits of the traditional philosophies).

10 For example, Professor Sunstein believes that to make up for deficiencies in the traditional methods, judges should develop maxims of construction that serve the same function as contract default rules—"off-the-rack" provisions that enable judges to address ambiguity or absurdity when conventional methods come up short. See Sunstein, *supra* note 1, at 453–54.

11 David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 *N.Y.U. L. REV.* 921 (1992).

12 Professor Shapiro does not, of course, contend that every traditional canon of construction has a pro-continuity bias. A number of the canons identified by Llewellyn—mainly those described as "Parries"—suggest the possibility of broad judicial construction. For example, Llewellyn's first "Parry" provides that "[t]o effectuate its purpose a statute may be implemented beyond its text." Llewellyn, *supra* note 1, at 401. In a similar vein, the very next one states that "[s]uch acts will be liberally construed if their nature is remedial." *Id.* It is beyond the scope of this Essay to examine whether and to what extent the more dynamic canons can co-exist with the pro-continuity canons that serve as Professor Shapiro's focus. Nor do I consider whether the body of traditional canons, taken as a whole, have a pro- or anti-continuity bias. For

of the most salient linguistic canons (such as *expressio unius est exclusio alterius*) and substantive canons (such as the rule of lenity) perform a cautionary function; they direct interpreters to favor continuity rather than change in cases of doubt.

This tendency, Professor Shapiro adds, produces a number of desirable institutional and substantive effects: If "change is news but continuity is not," then a legislature wishing to change the status quo would presumably feel it necessary to be explicit about "what is being changed."¹³ If so, continuity canons may offer a more accurate sense of legislative purpose. Such canons, moreover, often serve important process values. For instance, by disfavoring inexplicit changes in the legal baseline, canons like the rule of lenity serve interests in notice derived from the Due Process Clause.¹⁴ More generally, cautionary canons promote legislative accountability by requiring the legislature to show that it has "faced the problem and decided that change is appropriate."¹⁵ A growing number of (concededly idiosyncratic) substantive canons, moreover, intensify that requirement by requiring particularly clear policy expression when a statute otherwise threatens to intrude upon constitutional values such as federalism or the separation of powers.¹⁶

Professor Shapiro's praise of continuity has an oddly countercultural ring to it. As he notes, some of the canons' most forceful critics have long maintained that the traditional maxims of close construction—the ones that he favors—constrict legislative authority, stifle judicial creativity, and straightjacket the law's adaptability.¹⁷ More than a century-and-a-half ago, Francis Lieber lamented that canons requiring the narrow construction of British statutes had compelled Parliament to enact pathologically detailed legislation; only then could legislators overcome an apparent judicial antipathy to legislative innovation.¹⁸ Frederick Pollock similarly complained that many rules of

purposes of evaluating Professor Shapiro's contribution to the debate, it suffices to note that he has identified a definite pro-continuity bias in a number of significant and frequently invoked canons and that he has taken the unusual step (in modern interpretation scholarship) of defending that tendency.

13 Shapiro, *supra* note 11, at 942.

14 *See id.* at 943.

15 *Id.* at 944.

16 *See id.* at 945–46.

17 *Id.* at 949–50.

18 As Lieber wrote:

The British spirit of civil liberty, induced the English judges to adhere strictly to the law, to its exact expressions. This again induced the law-makers to be, in their phraseology, as explicit and minute as possible, which causes such a tautology and endless repetition in the statutes of that country, that even so

construction “cannot well be accounted for except on the theory that Parliament generally changes the law for the worse, and that the business of the judges is to keep the mischief of its interference within the narrowest possible bounds.”¹⁹ To this day, such concerns about the canons’ anti-legislation bias abound in statutory interpretation scholarship.²⁰ Indeed, as I discuss below, a number of the most prominent anti-formalist theories of statutory interpretation rest, at least in part, on the premise that rules of construction should foster the interpreter’s power to adapt statutory texts to problems that the legislature did not foresee, whether or not those problems come within the purview of the statute’s conventional or expected meaning.²¹

A brief essay does not permit full consideration of the many complex questions raised by Professor Shapiro’s thoughtful article. Accordingly, I will focus my attention on the essence of what divides his writing from more typical statutory interpretation scholarship—the desirability *vel non* of putting a thumb on the scale of continuity rather than change in the interpretation of statutes. I will examine this question, moreover, in the circumscribed but important context of federal legislation. Perhaps because Professor Shapiro’s article examines interpretation in general rather than *federal* statutes, his analy-

eminent a statesman as Sir Robert Peel, declared in parliament, that he “contemplates no task with so much distaste, as the reading through an ordinary act of parliament.” Men have at length found out, that little or nothing is gained by attempting to speak with absolute clearness, and endless specifications, but that human speech is clearer, the less we endeavor to supply by words and specifications, that interpretation which common sense must give to human words.

FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS, OR PRINCIPLES OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS, WITH REMARKS ON PRECEDENTS AND AUTHORITIES* 30 (Boston, Charles C. Little & James Brown 1839).

19 FREDERICK POLLOCK, *ESSAYS IN JURISPRUDENCE AND ETHICS* 85 (London, MacMillan 1882).

20 See, e.g., JAMES WILLARD HURST, *DEALING WITH STATUTES* 41–42 (1982) (“Especially in older decisions one senses that sometimes judges . . . invoked such rules of construction because they regarded the growth of statute law as an intrusion on their importance and their superior professional skill in building policy.”); Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 *VAND. L. REV.* 561, 562 (1992) (arguing “that canons have actually been abused as part of the judiciary’s systematic attempt to frustrate legislative policy preferences”); Sunstein, *supra* note 1, at 408 (noting that canons such as the one requiring narrow construction of statutes in derogation of the common law historically “treated regulatory statutes as foreign substances”); Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 *HARV. L. REV.* 892, 911 (1982) (arguing that “doctrines like *expressio unius* . . . result in limits on the reach of regulatory legislation into the marketplace and into private contract rights”).

21 See *infra* text accompanying notes 56–64.

sis does not specifically consider whether the legislative process prescribed by Article I, Section 7 of the Constitution has anything distinctive to say about interpretive preferences for continuity or change.²² As I have argued in earlier writing, I believe that the design of interpretive rules should attempt to further rather than detract from the goals implicit in the constitutional structure.²³ Starting from that assumption here, I will suggest that the structural values associated with the bicameralism and presentment requirements of Article I, Section 7 dovetail nicely with Professor Shapiro's insight about the canons. To enact a statute, lawmakers must overcome tremendous inertia by securing the assent of three institutions that answer to different constituencies. This design feature, moreover, places a clear emphasis on caution, consensus, and deliberation. Although sufficiently manifest in the design itself, the resulting pro-continuity bias also finds support in many writings contemporaneous with the Constitution's adoption and in important judicial decisions rendered since.²⁴ At least at the federal level, therefore, Shapiro's continuity canons fit well with the background assumptions of the legislative process.

Of course, that fact alone does not justify retention of the canons Professor Shapiro admires. The validity of a particular rule of interpretation cannot be measured by the fact that it promotes continuity rather than change. That criterion is too general ever to be decisive on its own. But the pro-continuity emphasis of the constitutional structure may well undermine the central criticism of anti-legislative bias that detractors direct at many traditional canons. By calling into question that prominent argument against such interpretive norms, Professor Shapiro's article casts critical light upon a frequently assumed but often undefended pro-legislation bias in the statutory interpretation debate.

Part I of this Essay starts by describing Professor Shapiro's contention that many of the most important canons of construction have a normatively desirable bias in favor of the status quo. It then contrasts that insight with the more dominant academic preference for rules of construction that promote dynamic statutory interpretation. Part II examines ways in which, at least at the federal level, the constitutional

22 See U.S. CONST. art. I, § 7.

23 See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 636–37 (1996); John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. 685, 690–92 (1999).

24 See *infra* text accompanying notes 77–90.

structure reinforces Professor Shapiro's normative preference for continuity rather than change.

I. PROFESSOR SHAPIRO'S INSIGHT

Professor Shapiro's central claim is that many of the most prominent canons of construction reflect a unifying theme of favoring continuity rather than change (in cases of doubt) and that this tendency, on balance, has positive effects. Indeed, because he detects a similar bias in a range of linguistic and substantive canons, Professor Shapiro is able to identify a rather diverse array of normative benefits—including the promotion of legislative supremacy, the fostering of deliberation, the provision of fair notice to litigants, and the protection of specified constitutional values such as federalism. Although it is unnecessary to retrace all of the careful steps in Professor Shapiro's analysis, a few brief examples will give the reader a sense of his important contribution.

A. *Continuity Canons*

Professor Shapiro begins by noting that two important linguistic canons—*expressio unius est exclusio alterius* (the specification of one thing excludes others) and *eiusdem generis* (read a general phrase in light of related specific items)—place a mild constraint on legislatively induced change. It is worth emphasizing, at the outset, that Professor Shapiro regards the linguistic canons as only a *mild* constraint because he properly perceives them as aids to construction, not as mechanical determinants of meaning.²⁵ Like any linguistic convention, canons have meaning only to the extent that a linguistic community has developed shared (and often unarticulated) practices and understandings about their effect in sufficiently repetitive contexts.²⁶ For

25 See Shapiro, *supra* note 11, at 928–29, 930–31.

26 See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2396–98 (2003) (discussing certain premises of modern language theory). Building on Wittgenstein's insights, much language theory presupposes that communication is intelligible by virtue of a community's shared conventions for understanding words and phrases in context. See, e.g., KENT GREENAWALT, *LAW AND OBJECTIVITY* 72 (1992) (noting that "social practice" can lend determinacy to rule-following); Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, in *LAW AND INTERPRETATION*, *supra* note 8, at 203, 222 ("Meaning is not radically indeterminate; instead, meaning is public—fixed by public behaviour, beliefs, and understandings. There is no reason to assume that such conventions cannot fix the meaning of terms determinately."); Christopher L. Kutz, Note, *Just Disagreement: Indeterminacy and Rationality in the Rule of Law*, 103 YALE L.J. 997, 1010 (1994) (noting that under Wittgenstein's premises, "the correctness of a particular use of a word . . . expresses the natural tendencies of a

example, as Shapiro notes, the *expressio unius* canon does not apply simply because a statute specifies something; rather, its force depends on whether a reasonable speaker would draw a negative implication from reading the relevant text in context.²⁷ Or as the Court recently put it, “the canon . . . does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an ‘associated group or series,’ justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.”²⁸

Starting from that basic understanding of the linguistic canons, Shapiro next contends that both the *expressio unius* and *eiusdem generis* canons are apt to favor continuity rather than change.²⁹ Although ultimately an empirical question,³⁰ the intuition seems amply

community of users”). Of course, an important strain of critical legal scholarship has suggested that a baseline problem of linguistic indeterminacy makes rule-following impossible. See, e.g., Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 19 (1984) (explaining that rules “generally do not determine the scope of their own application”); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 822–23 (1983) (contending that a direction “to follow the rules tells us nothing of substance” and that the socialization of judges more accurately predicts judicial outcomes). Consideration of this broader question is beyond the scope of this Essay.

27 See Shapiro, *supra* note 11, at 928–29.

28 *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)). As one commentator has put it, the canon “properly applies only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference.” EARL T. CRAWFORD, *THE CONSTRUCTION OF STATUTES* 337 (1940) (quoting *State ex rel. Curtis v. De Corps*, 134 Ohio 295, 299 (Ohio 1938)).

29 See Shapiro, *supra* note 11, at 927–31.

30 For example, the *expressio unius* canon will have varying effects on the status quo, depending on the context in which it is applied. For instance, when a statute establishes a new form of authority and takes pains to particularize the way it should be exercised, the Court has traditionally treated the resulting specification as exclusive. See, e.g., *Nat’l R.R. Passenger Corp. v. Nat’l Ass’n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (“Since the Act creates a public cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances, this maxim would clearly compel the conclusion that the remedies created in § 307(a) are . . . exclusive”); *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929) (“When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.”). In those circumstances, the *expressio unius* canon doubtless constrains change. At the same time, when an instrument enumerates exceptions to a power or prohibition created elsewhere in the same document, the Court typically treats the enumeration as exhaustive. See, e.g., *United States v. Brockamp*, 519 U.S. 347, 352 (1997) (“[The statute’s] detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together, indicate to us that Congress did not intend

justifiable in the following respect. In slightly inconsistent ways, both maxims tend to limit judicial capacities to read a statutory text expansively. *Expressio unius* discourages judges from extending a statute through common law reasoning to cases that fall within the *ratio legis* but not the terms of a statute. *Ejusdem generis*, on the other hand, directs judges to employ common law reasoning to limit an otherwise open-ended catch-all phrase in light of the underlying logic of the more specific items with which it is listed in a statute.

Consider the following example of the constraints that the *expressio unius* canon places on judicial authority. A provision of the Civil Rights Act authorizes the prevailing plaintiff in specified classes of cases to recover a "reasonable attorney's fee" as part of costs.³¹ If the plaintiff wished to recover expert fees as part of the "attorney's fee," a court might initially find such a question debatable. After all, an expert fee is not literally an attorney's fee. But the term "attorney's fee," as used in the legal profession, might include not merely the attorney's billable hours, but also many other items that are essential to a representation—such as paralegal services, secretarial services, messengers, photocopying, Westlaw charges, and so forth.³² Moreover, if one were to examine the apparent purposes of such a fee shifting statute (to provide full recovery of litigation costs), it might well appear arbitrary to shift the other costs of legal representation but not the cost of experts needed to make the legal representation effec-

courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute [of limitations] . . ."); *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980) ("Where Congress explicitly enumerates exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."). Application of the canon to statutory exceptions may at times intensify a change in the legal status quo.

Although he acknowledges the *expressio unius* canon's potential double-edged effect, Professor Shapiro argues that applying it to statutory exemptions or provisos also promotes continuity. See Shapiro, *supra* note 11, at 928 n.33. In particular, he contends that "an exemption or proviso also constitutes a change in the law—whether it be the law resulting from a prior version of the statute or the law resulting from the very statute being enacted." *Id.* I agree with Professor Shapiro's assessment, subject to the following qualification: From the perspective of changes in private ordering, applying the *expressio unius* maxim to a statutory exemption or proviso may at times accentuate legislative alterations of the status quo. But if one views the matter from the perspective of a judge's authority to adapt a statutory text—whether an affirmative provision or an exception—to unforeseen circumstances, then the *expressio unius* canon generally does restrain legal change.

31 42 U.S.C. § 1988(b) (2000).

32 See *Missouri v. Jenkins*, 491 U.S. 274, 285–89 (1989) (holding that various items other than billable attorney hours, including paralegal fees, could be recovered as "traditional" elements of an attorney's fees).

tive.³³ Accordingly, as an initial cut, a court would surely have room to award expert fees as part of an "attorney's fee." If, however, numerous other fee-shifting statutes, enacted before and after the one in question, had explicitly provided for "attorney's fees" and "expert fees" as separate items of recovery, then the *expressio unius* principle might require a different outcome.³⁴ Under that maxim, "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" of particular statutory language.³⁵ Hence, judicial authority to read the Civil Rights Act's fee provision broadly in light of its underlying purpose will tend to be circumscribed if a court is prepared to credit negative implications.

A brief illustration of the *eiusdem generis* maxim shows a similar pro-continuity tendency—though one reached through quite different means. This canon functions to qualify the scope of an general provision in light of the specific ones with which it is associated.³⁶ To borrow one of Professor Shapiro's examples, if a statute excludes "dogs, cats, or other animals" from a public park, the canon generally would instruct courts not to bar police horses despite the breadth of the residual clause.³⁷ Why? As Professor Shapiro explains, the maxim presupposes that "a better understanding of the statutory objective may be gleaned from the specific examples" and that this overall "purpose" properly confines the otherwise broad textual meaning of the catch-all phrase.³⁸ From that vantage point, the purpose of the no-animals-in-the-park statute apparently was to bar common household pets.

33 See *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 107–08 (1991) (Stevens, J., dissenting) ("To allow reimbursement of these other categories of expenses, and yet not to include expert witness fees, is both arbitrary and contrary to the broad remedial purpose that inspired the fee-shifting provision of § 1988.").

34 Justice Scalia's opinion for the Court in *Casey* relied specifically on that disparity in denying the recovery of expert fees under Section 1988. See *id.* at 88–92.

35 *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

36 The *eiusdem generis* maxim provides that "when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration." *Norfolk & W. Ry. Co. v. Am. Train Dispatchers' Ass'n*, 499 U.S. 117, 129 (1991); see also, e.g., *Cleveland v. United States*, 329 U.S. 14, 18 (1946) ("Under the *eiusdem generis* rule of construction the general words are confined to the class and may not be used to enlarge it."); *Gooch v. United States*, 297 U.S. 124, 128 (1936) (noting that canon of *eiusdem generis* ordinarily "limits general terms which follow specific ones to matters similar to those specified").

37 See Shapiro, *supra* note 11, at 930.

38 See *id.*

The contrast between the two maxims strongly illustrates Shapiro's continuity claim. In the attorney's fee case, an interpreter might have taken the specification of "expert fees" in addition to "attorney's fees" in other statutes as evidence of a general congressional policy to provide full recovery of litigation expenses. On that account, it would have been possible to invoke that settled policy preference to give a more expansive reading of the ambiguous phrase "attorney's fee" in the Civil Rights Act. Instead, the *expressio unius maxim* highlighted the semantic distinction between that fee statute and others, thereby imposing a constraint on judicial power. Conversely, in the no-animals-in-the-park example, the semantic meaning of the catch-all phrase would seem to reach police horses. Nonetheless, the *eiusdem generis maxim* counsels against reading the prohibition "as broadly as each word, taken in isolation, might suggest."³⁹ Each maxim thus assigns somewhat a different priority to statutory language and purpose, but both display a common tendency to promote continuity and limit change.

Professor Shapiro sees similar trends in many of the substantive canons. The substantive canons he addresses require less discussion because a pro-continuity bias is so evident in their design. The rule of lenity, for example, instructs that "penal laws are to be construed strictly."⁴⁰ Accordingly, the Court has made clear that a criminal statute does not apply unless it unambiguously reaches the charged conduct.⁴¹ In addition, the canon requiring narrow construction of statutes in derogation of the common law explicitly directs courts to resolve doubts against changes in the legal status quo.⁴² And in more

39 *Id.*

40 *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.). For Professor Shapiro's discussion of lenity, see Shapiro, *supra* note 11, at 935–36.

41 See, e.g., *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994) (noting that the rule of lenity requires that "ambiguous criminal statute[s] . . . be construed in favor of the accused"); *United States v. Granderson*, 511 U.S. 39, 54 (1994) ("In these circumstances—where text, structure, and history fail to establish that the Government's position is unambiguously correct—we apply the rule of lenity and resolve the ambiguity in [the accused's] favor."); *Rewis v. United States*, 401 U.S. 808, 812 (1971) (emphasizing that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity").

42 See Shapiro, *supra* note 11, at 936–37; see also *Norfolk Redev. & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35–36 (1983) ("It is a well-established principle of statutory construction that '[t]he common law . . . ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose.'") (quoting *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 623 (1813)); *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 304–05 (1959) ("'[N]o statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law

recent years, the Court has devised an array of "clear statement rules" that favor the status quo by requiring a clear expression of legislative intent before judges will construe a statute to intrude upon constitutional values such as federalism or the separation of powers.⁴³ Although the foregoing substantive canons vary in strictness, all of them operate in the same basic way: They constrain change by insisting upon unusual clarity of expression, which raises the cost of legislative agreement upon policies that conflict with the identified substantive goals.

B. *Continuity as a Virtue*

Professor Shapiro regards the canons' pro-continuity bias as valuable in several respects. In characteristic fashion, Professor Shapiro's assessment of the canons is thoroughly undogmatic. Rather, in carefully measured analysis, he identifies some advantages, general and specific, that flow from the overall tendency he perceives. Again, rather than rehearse his analysis in full, I attempt here to give a flavor of Professor Shapiro's insightful contribution.

First, he argues that by favoring the status quo, the canons—particularly the linguistic canons—have the virtue of capturing legislative purpose.⁴⁴ Building on a strain of modern language theory,⁴⁵ Shapiro

which it does not fairly express.'") (quoting *Shaw v. R.R. Co.*, 101 U.S. 557, 565 (1879)). At times the Court has framed the presumption in milder terms. As the Court recently put it, "where a common-law principle is well established, . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'" *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)).

43 See Shapiro, *supra* note 11, at 940–41; see also *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (requiring a clear statement of legislative intent to invade the fundamental state prerogatives through which "a State defines itself as a sovereign"); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute."). For thoughtful consideration of this growing phenomenon, see, for example, William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 596–98 (1992) (discussing recent Courts' uses of constitutionally-inspired clear statement rules); Bradford C. Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 551–65 (1998) (discussing clear statement canons).

44 See Shapiro, *supra* note 11, at 941–43.

45 Recent legal scholarship has systematically defended the canons in terms of the insights of linguistic pragmatics—a branch of linguistics that purports to explain the way people use language in conversational settings. See, e.g., Geoffrey P. Miller,

emphasizes that legislative drafters typically will not have “a casual or even a wholly ‘neutral’ attitude towards change.”⁴⁶ Rather, as he explains:

[I]n a cooperative setting, a speaker wishing to use language efficiently and effectively will communicate as much as is necessary for purposes of the exchange, but no more. Thus, in a world in which change is news but continuity is not, a speaker who is issuing an order or prohibition is likely to focus on what is being changed and to expect the listener to understand that, so far as this communication is concerned, all else remains the same. . . . [T]his theory of communication suggests that a speaker is more likely to be correctly understood if serious doubts are resolved against a change in existing rules or practices.⁴⁷

Hence, for example, a legislator voting for a statute requiring the vaccination of cats born after a certain date would presumably be surprised to learn that a public health officer or judge had extended its reach to cats born before the specified date or to dogs of any vintage.⁴⁸

In other respects, Professor Shapiro argues that the pro-continuity canons serve both process and substantive values, often inspired if not required by the Constitution. The rule of lenity, for example, protects the public’s right to fair notice and even-handed

Pragmatics and the Maxims of Interpretation, 1990 WIS. L. REV. 1179, 1224 (arguing that “many traditional maxims of statutory interpretation embody legitimate valid inferences of legislative intent”); M.B.W. Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, 46 U. PITT. L. REV. 373 (1985). In particular, Paul Grice argues that conversations are typically cooperative and that the norms of communication should reflect that premise. See PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 26 (1989). He has deduced several maxims to implement this “Cooperative Principle.” *Id.* These common sense norms of conversation include: “Make your conversation as informative as is required” (quantity); “[t]ry to make your contribution one that is true” (quality); “[b]e relevant” (relation); and “[a]void obscurity of expression” (manner). *Id.* at 27–28. Professors Miller and Sinclair have relied on Grice’s insights to explain a number of the canons. For example, they argue that the *expressio unius* canon reflects the idea that speakers in a cooperative setting ordinarily try to make their contribution as informative as necessary for purposes of the exchange. See Miller, *supra*, at 1196–97; Sinclair, *supra*, at 415–19.

In prior work, I questioned the use of Grice’s linguistic insights to justify particular norms of statutory interpretation—specifically, the canon authorizing courts to avoid absurdity in the teeth of an otherwise clear text. See Manning, *supra* note 26, at 2463 n.274. The broader applicability (if any) of Grice’s maxims to the design of interpretive rules is beyond this Essay’s scope.

46 Shapiro, *supra* note 11, at 942.

47 *Id.*

48 See *id.* at 928.

treatment by the government—values embodied, of course, in the Due Process Clause.⁴⁹ All of the pro-continuity canons, he adds, will enhance democratic accountability because “they increase the likelihood that a statute will not change existing arrangements and understandings unless the legislature—the politically accountable body—has faced the problem and decided that change is appropriate.”⁵⁰

Finally, he emphasizes that particular continuity canons can also protect substantive values: The requirement of narrow construction of statutes in derogation of common law of course tends to protect private interests in liberty and property against unconsidered legislative change.⁵¹ And because the Court’s various constitutionally inspired “clear statement rules” raise the cost of agreement for legislation that threatens specified constitutional values,⁵² they afford indirect protection for certain hard-to-define but important principles emanating from both the individual rights and structural portions of the Constitution.⁵³

This is not the occasion to examine these contentions in detail. Although it is possible of course to criticize aspects (indeed, quite important aspects) of the specific canons that Professor Shapiro admires,⁵⁴ the more interesting point is that he sees value added in their

49 *Id.* at 943–45. As the Court has explained:

Vague laws offend several important [due process] values. First because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) (citations omitted).

50 Shapiro, *supra* note 11, at 944.

51 *Id.* at 945.

52 As Colin Diver has explained, the costs of framing any legal rule “usually rise with increases in a rule’s transparency since objective regulatory line-drawing increases the risk of misspecification and sharpens the focus of value conflicts.” Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 73 (1983).

53 See Shapiro, *supra* note 11, at 945–46.

54 Two examples will suffice. First, some have questioned whether the *expressio unius* canon, in fact, accurately captures legislative directions. See, e.g., Posner, *supra* note 4, at 813 (arguing that the *expressio unius* canon rests on a counterfactual assumption of “legislative omniscience, because it would make sense only if all omissions in legislative drafting were deliberate”); Sunstein, *supra* note 1, at 455 (observing that the omission of an item from a statutory list “may reflect inadvertence, inability to reach consensus, or a decision to delegate the decision to the courts,

common tendency to promote continuity. Although some of the virtues associated with that tendency have recently been acknowledged in other important work,⁵⁵ praise of continuity goes very much against the grain of modern thinking in statutory interpretation. Far more prevalent than Professor Shapiro's theme is the insistent premise that statutory interpretation should be "dynamic,"⁵⁶ that it should be "nautical" rather than "archaeological,"⁵⁷ that American judges should act as the legislature's partners rather than its agents,⁵⁸ and so forth. Indeed, an important strain of the American interpretive tradition calls upon judges to treat statutes not as a series of specific rules, but as starting points for common law reasoning.⁵⁹

rather than an implicit negative legislative decision on the subject"). Second, some scholars now believe that the constitutional avoidance canon and clear statement rules disserve legislative supremacy by authorizing willful misconstructions of the underlying statutes. See, e.g., JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 105 (1997) (arguing that willful misconstruction of a statute is more likely than outright constitutional invalidation to embed a result that the House, Senate, and President would not have agreed upon *ex ante*); Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 74 (noting that "it is by no means clear that a strained interpretation of a federal statute that avoids a constitutional question is any less a judicial intrusion than the judicial invalidation on constitutional grounds of a less strained interpretation of the same statute"). Full consideration of the merits and demerits of the particular canons is for another day.

55 See, e.g., Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 319–20, 338–40 (2000) (arguing that certain canons serve to heighten the incentives for legislative caution and deliberation when important values are at stake).

56 See generally WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994).

57 T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 21–22 (1988).

58 See, e.g., Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 19 (1998) ("Students of constitutional law are familiar with an alternative conception of democracy in which courts play a vital role as partners with, rather than mere servants of, the legislature."); see also RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 1–38 (1996) (elaborating on the partnership theory).

59 See, e.g., GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 7 (1982) (proposing "a new relationship between courts and statutes, a relationship that would enable us to retain legislative initiative in lawmaking, characteristic of the twentieth century, while restoring to courts their common law function of seeing to it that the law is kept up to date"); RONALD DWORKIN, *LAW'S EMPIRE* 313 (1986) (arguing that the ideal judge "will use much the same techniques of interpretation to read statutes that he uses to decide common-law cases" and "will see his own role as fundamentally the creative one of a partner continuing to develop, in what he believes is the best way, the statutory scheme Congress began"); Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 13, 15 (1936) (rejecting the "illusion that in interpreting [statutes] our only task is to discover the legislative will" and calling upon

By liberating judges from the confines of textually expressed rules or particular legislative expectations, such philosophies obviously amplify judicial power to read statutes in ways that facilitate legal change rather than continuity. Underlying such positions is almost always an implicit, if not explicit, premise that legislatures could not deal adequately with the complexities of the modern society if they could not call upon the judiciary for rather extensive creative assistance.⁶⁰ Indeed, supporters of dynamic statutory interpretation seem to take as a given the notion that legislatures lack the time, resources, or political will to update statutes to deal with unforeseen and unprovided-for cases.⁶¹ Accordingly, if judges lacked adequate power to

judges to "treat a statute much more as we treat a judicial precedent, as both a declaration and a source of law, and as a premise for legal reasoning").

60 As my colleague Peter Strauss has put it:

Legislation will inevitably be imprecise, requiring both interpretation and gap-filling; pretending otherwise increases its costs. Courts are better suited than legislatures for the classic common law function of continually inventing coherence out of the materials of the law. With statutes the dominant form of law, and especially as they become more numerous, problems of aging statutory judgment will inevitably arise and need to be resolved before legislative attention can be directed to them. In the long run, finally, successful government must be a cooperative enterprise in its everyday affairs

Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 442-43 (footnote omitted); see also, e.g., CALABRESI, *supra* note 59, at 64-65 (arguing that judges should have common law authority to "sunset[]" obsolete statutes, in part, because law reform is frequently doomed "by powerfully placed legislative minority or even just by the desire on the part of legislators to avoid a fuss"); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1530 (1987) ("Both public choice theory and institutional process theory suggest that the legislature . . . will be [marked by] . . . failure to enact or update public interest laws, avoidance of hard choices, and favoritism directed at power groups. These biases may be ameliorated by treating judges as representatives charged with interpreting statutes dynamically."); James McCauley Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213, 219 (1934) (arguing that judges should revert to the more flexible common law method of equitable interpretation, in part, because "civilization is achieving a complexity that outstrips [the legislature's] effort to embrace its multitudinous activities by rules, while the traditional attitude of the courts toward the legislative process insists upon confining that process to the making of rules").

61 For example, in support of his contention that judges in our system should act as relational agents rather than faithful agents of the legislature, Professor Eskridge builds upon Lieber's hypothetical command to "fetch five pounds of soupmeat." See William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 327 (1989). In particular, he analogizes the legislature to a head of household who has engaged an agent because the principal "is a busy and important person and is often absent from the household on business." *Id.* For that reason, the agent (the analogue to a judge) must have the power to adjust "even the simplest order" to account for

adapt statutes to such circumstances (even if beyond the statute's originally contemplated reach), then the law would ossify and fail of its purpose. So powerful is the modern commitment to dynamism that it is concomitantly claimed as a virtue by some important proponents of all the traditional interpretive philosophies—textualism,⁶² intentionalism,⁶³ and purposivism.⁶⁴

changed circumstances, unforeseen conflicts between specific directives and general aims, and the like. See *id.* at 327–30.

62 As Jerry Mashaw has explained:

[T]he exclusion of legislative history is more likely to increase the flexibility of statutes than to render them static or rigid. After all, inquiry is directed necessarily away from pre-statutory history and toward later text including administrative decisions, judicial decisions, and later statutes. Suppressing the working documents, or *travaux préparatoires*, of codes or constitutions is a common technique for ensuring that texts have a long, useful life. Thus were the records of our own Constitutional Convention suppressed, as were the working documents respecting most Western civil codes.

Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 836 (1991).

63 In an influential article, then-Judge Breyer relied on a somewhat different kind of dynamism argument to support reliance on legislative history; he argued, in particular, that such reliance facilitates the enactment of new legislation. See Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 859 (1992). In this vein, he analyzed the insertion of an important colloquy into the legislative history of the Urban Mass Transportation Act of 1964. See *id.* at 856–58. In the relevant colloquy, Senators favorable to the bill reassured skeptical Senators that the statute would not preempt state labor policies. *Id.* at 857. In defending judicial reliance on that colloquy as evidence of legislative intent, then-Judge Breyer lamented the anti-legislation consequences of a regime that refused to credit such legislative history:

Suppose, in 1964, that the employers, unions, and states had thought that committee testimony, report language, floor statements, and the like could not influence a later judicial interpretation of the law's text. How would the states and employers have obtained the preemption assurance that they sought and that the unions were willing to give? They might have tried to write a statutory provision that embodied appropriate "preemption" language. But, one can easily imagine that time, the complexity and length of the overall bill, and the difficulty of foreseeing future circumstances (including how courts would interpret "anti-preemption" language) might have made it impossible for the groups to agree on statutory language. It was easier, however, for them to agree about floor statements or report language about an "intent." This language is more general in form, and would not bind courts in cases where it made no sense to do so.

It is possible, then, that if the relevant groups, institutions, and individuals involved in the process did not believe courts would look to legislative history, they might not have agreed on the legislation.

Id. at 860.

Accordingly, by counting the canons' pro-continuity bias as a virtue, Professor Shapiro has made a decidedly countercultural intervention in the statutory interpretation debate. By my lights, his doing so has added a welcome perspective. Certainly, as Professor Shapiro would be quick to acknowledge, a pro-continuity bias cannot alone justify any given canon of construction; no one would say that the *expressio unius* canon or the rule of lenity should be retained simply because it favors the status quo. Nor could a bias against continuity alone negate the legitimacy of an otherwise legitimate canon. Neither principle (pro- or anti-continuity) operates at a sufficiently specific level of generality to justify any particular interpretive practice.⁶⁵ Rather, the legitimacy of any given canon, in my view, will depend on a variety of factors—its degree of acceptance over time,⁶⁶ its accuracy

64 See William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 728–29 (1991):

Legal process theory argued that judges should interpret statutes by choosing the interpretation most consonant with the statutes' purposes. This approach is an inherently dynamic alternative to one based upon the legislature's original intent: because society, law, and the nature of the problem change over time, effecting the statute's purpose might lead to statutory developments not contemplated or even rejected by the statutory drafters.

Id. (footnote omitted).

65 In effect, the underlying principle is too general to do any work. To see why this is so, consider a pro-deliberation principle. Certainly, most believe that deliberation is a good thing, and the design of the U.S. Constitution seems to favor deliberative democracy. But imagine if one tried to decide for or against a canon of construction based solely on the criterion that it "promotes deliberation." Such a criterion, at least as stated at that level of generality, has no obvious stopping point. Thus, a pro-deliberation norm might support a canon favoring randomly selected misinterpretations of statutes on the ground that the practice would promote further deliberation. Cf. Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1751–52 (2002) (making a similar point about the use of decision cost theory to design structural norms).

66 The Court presumes that Congress legislates against a backdrop of firmly established legal conventions applied by the Court. See, e.g., *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) (noting the presumption that "that Congress legislates with knowledge of our basic rules of statutory construction"); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 699 (1979) (finding it "not only appropriate but also realistic to presume that Congress was thoroughly familiar with . . . unusually important precedents" and that Congress "expect[s] its enactment[s] to be interpreted in conformity with them"). As Justice Scalia has argued, background rules of interpretation thus may acquire legitimacy from longstanding use:

Once they have been long indulged, [canons] acquire a sort of prescriptive validity, since the legislature presumably has them in mind when it chooses its language—as would be the case, for example, if the Supreme Court were to announce and regularly act upon the proposition that "is" shall be interpreted to mean "is not."

and predictability as a determinant of social meaning,⁶⁷ its consistency with the background premises of the constitutional structure,⁶⁸ and the like. Accordingly, pro- or anti-continuity biases perhaps represent either normatively attractive or unattractive side-effects of canons whose particular legitimacy must derive from other sources.

Nonetheless, that premise does not make the question of continuity and change irrelevant to evaluating the canons. Professor Shapiro's contribution has resonance for the following reason: At least where federal statutes are concerned, it makes it more difficult to criticize a canon based on its pro-continuity bias or, conversely, to urge courts to embrace a new canon based on its propensity to facilitate departures from the status quo. Given the premises underlying the process of bicameralism and presentment, relying on anti-continuity arguments simply ignores the built-in bias of a cumbersome legislative process that emphasizes multiple checks, consensus, and deliberation. In other words, in our system it is quite suspect to suggest that an otherwise acceptable canon should be abandoned, in whole or in part, because it promotes legal continuity rather than change.

II. CONTINUITY AND THE CONSTITUTIONAL STRUCTURE

At the outset, I must say a few words about why I believe that the background constitutional structure is even relevant here. As I have emphasized in previous work, I start from the assumption that the rules of interpretation necessarily reflect broader questions about con-

Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 583 (1990).

67 Compare Miller, *supra* note 45, at 1196–97 (arguing that the expressio unius canon is justified by the theory of linguistic pragmatics), and Sinclair, *supra* note 45, at 415–19 (same), with Posner, *supra* note 4, at 813 (arguing that the expressio unius canon rests on unrealistic assumptions about legislative omniscience).

68 For example, one might argue that the canon disfavoring interpretations in derogation of the common law is an obsolete reflection of the fact that the judicial and legislative powers in England were less distinct than they are in the United States. Cf. John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 36–52 (2001) (discussing conflation of legislative and judicial powers and functions in English law). As a general practice, that canon may have less legitimacy in a system of separated powers, where the federal courts lack the independent common lawmaking power enjoyed by their English ancestors. See, e.g., *Texas Indus. v. Radcliff Materials*, 451 U.S. 630, 641 (1981) (indicating that the federal courts have common law powers only in limited enclaves involving “the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases”) (citations omitted); *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 (1981) (“[I]t remains true that federal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers.”).

stitutional structure.⁶⁹ The Constitution prescribes no explicit rules of statutory construction,⁷⁰ and Congress has prescribed only a few idiosyncratic ones.⁷¹ The judiciary, therefore, must construct most such norms for itself. Because rules of interpretation necessarily define the relationship between the legislature and judiciary, I believe that courts should attempt to design them to make sense rather than nonsense of the surrounding constitutional structure.⁷² In the absence of any constitutional elaboration on the content of the "the judicial Power" "to say what the law is,"⁷³ one should perhaps aspire to a theory of the law declaration function that accounts for the apparent structural aims of a carefully designed and elaborately specified law-making process.⁷⁴ Starting from that assumption, several considera-

69 See sources cited *supra* note 23.

70 The Ninth, Tenth, and Eleventh Amendments supply specialized rules of construction. See U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); *id.* amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *id.* amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any foreign State."). They do not speak to the problem of deciphering statutory texts.

71 See, e.g., 1 U.S.C. § 108 (2000) ("Whenever an Act is repealed, which repealed a former Act, such former Act shall not thereby be revived, unless it shall be expressly so provided."); *id.* § 109 ("The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide . . .").

72 Cf. Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1686 (1988) ("Any theory of statutory interpretation is at base a theory about constitutional law. It must at the very least assume a set of legitimate institutional roles and legitimate institutional procedures that inform interpretation."); Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 593-94 (1995) ("To carry out its [interpretive] task, the court must adopt—at least implicitly—a theory about its own role by defining the goal and methodology of the interpretive enterprise and by taking an institutional stance in relation to the legislature.").

73 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

74 This analysis merely reflects the widely accepted idea that in construing open-ended grants of constitutional power, it is appropriate and, indeed, desirable to read the particular (but ultimately indefinite) clauses in light of the overall constitutional structure. See CHARLES L. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 8-23 (1969) (examining the use of structural inference in constitutional adjudication). In particular, many aspects of the constitutional structure are open-ended, and the document defines the three branches' respective powers in relation to one another. Accordingly, interpretation of the rather vague terms of the Vesting Clauses lends itself to analysis based on structure and relationship. See, e.g., *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 217-18 (1997) (relying on the separation of legislative and judicial powers to infer the inviolable finality of court judgments as an attribute

tions suggest that if one were to consider such tendencies in the design of interpretive canons, a preference for continuity rather than change would seem to be more consistent with the premises of our constitutional structure.⁷⁵

Although this is not the occasion for a full consideration of the original meaning or subsequent interpretation of the Constitution's lawmaking provisions, it suffices to note that Article I, Section 7 reflects an obvious design to filter and moderate society's legislative policymaking impulses. That provision of course conditions legislation on bicameralism and presentment. A statute must pass both Houses of Congress and then be presented to the President for his or her approval or veto; if vetoed, it must secure the assent of two-thirds of each

of "the judicial Power"); *Loving v. United States*, 517 U.S. 748, 757–58 (1996) (ascribing the nondelegation doctrine to the process of bicameralism and presentment). When used properly, such analysis unobjectionably reads an ambiguous provision in light of related portions of the same text. See Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 13 n.72 (1975) ("[T]he traditional method of 'interpreting' textual provisions is hardly inconsistent with taking into account structural considerations. The former are often simply the textual embodiment of the latter.").

75 As I have explained in greater detail in earlier writing, the goals implicit in the design of the legislative process do not *necessarily* determine how judges should approach the task of interpretation. See Manning, *supra* note 68, at 71–74. For example, a conclusion that the process is designed to promote continuity rather than change does not logically compel the conclusion that judges should interpret the end-product of the legislative process to provide more of the same. See *id.* at 73–74. Indeed, to do so may entail double-counting the value of continuity.

Nonetheless, although perhaps not decisive, Article I, Section 7's protection of continuity does seem relevant to evaluating interpretive norms. If the legislative process is calculated to emphasize caution and consensus in the framing of legislation, it is surely strange to condemn canons of interpretation because they reinforce those very effects. By the same token, to favor new canons because they make it easier for judges or administrators to amplify legislative changes in the status quo may allow an end run around constitutional safeguards intended to moderate legislative change in the first place. In other words, the values embodied in the legislative process might amount to little if those who implement legislation do not take them into account in the design of interpretive rules.

One additional point bears mention: In previous work, I argued that Article I, Section 7's emphasis upon legislative compromise has a more direct effect upon interpretive norms. See *id.* at 74–78. In particular, because the design of that process gives political minorities the right to insist upon compromise as the price of assent, judges and administrators undermine that protection when they adjust the lines of a clear statutory text to make it more coherent with its perceived background purpose. See *id.* at 77–78. If correct, that argument may collaterally reinforce continuity by denying the judiciary authority to adapt clear texts to unforeseen situations lying outside the boundaries of the original compromise.

House.⁷⁶ By dividing legislative power among three distinct institutions, that cumbersome process serves several mutually reinforcing interests, all of which tend to favor continuity rather than change.

First, by establishing a cumbersome legislative process involving multiple actors the bicameralism and presentment requirements make that process more difficult for any faction to commandeer for purposes contrary to the public good.⁷⁷ To pass legislation, three sets of relatively independent decisionmakers—selected at different times and by different constituencies—must agree upon a course of action. Hence, each institution involved in the process acts as a failsafe mechanism against the ill motivated decisions of the other two.⁷⁸ Madison thus said of bicameralism:

76 U.S. CONST. art. I, § 7.

77 See *INS v. Chadha*, 462 U.S. 919, 951 (1983) (noting that bicameralism addressed the “fear that special interests could be favored at the expense of public needs”); see also Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1249 (1989) (“The Framers created two antidotes to factionalism in Congress: bicameralism and presentment. Bicameralism forces a potential faction to capture both Houses of Congress simultaneously. Presentment gives the president—the politically accountable entity least susceptible to capture by factions—a voice in the legislative process.”). Madison defined a faction as “a number of citizens, whether amounting to a majority or minority of the whole, who are united or actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.” *THE FEDERALIST* NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

Because the discussion that follows invokes sources such as *The Federalist*, I should note that I have previously contended that interpreters should not treat such materials from the ratifying debates as *authoritative* evidence of the Constitution’s original meaning. See John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1350–54 (1998). Simply put, modern interpreters have no basis to assume that a constitutionally sufficient number of ratifiers had access to or agreed with the contents of those essays. *Id.* At the same time, to the extent that it supplies a persuasive explanation of the text, structure, or history of the Constitution, *The Federalist* may offer modern interpreters an informed, contemporaneous source of analysis. *Id.* at 1354–60. Borrowing from another context, I have thus contended that modern interpreters should give *The Federalist* whatever weight is warranted by “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Id.* at 1360 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). To the extent that I invoke sources such as *The Federalist* to support structural inferences, I do so only insofar as they persuasively describe the purposes immanent in the constitutional design. Cf. Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 875 (1930) (noting that “the purpose of many entities may be . . . something which is evident in the character of the thing itself”).

78 See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 559–60 (1969). For a specific discussion of the ways in which bicameralism and

[A] senate, as a second branch of the legislative assembly, distinct from and dividing power with the first, must be in all cases a salutary check on the government. It doubles the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one, would otherwise be sufficient.⁷⁹

Similarly, the veto not only enabled the President to defend against legislative encroachments, but also provided "a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good which may happen to influence a majority of that body."⁸⁰

presentment operate to constrain interest group influence, see Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 247-49 (1986). A similar cautionary impulse of course is also evident in the more basic design of the separation of powers. To be sure, the decision to separate the legislative, executive, and judicial powers among three relatively independent branches was historically associated with many diverse purposes. See, e.g., W.B. GWYN, *THE MEANING OF THE SEPARATION OF POWERS* 127-28 (1965) (discussing the multiple purposes historically associated with the separation of powers); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 432-38 (1987) (discussing the core purposes of the separation of powers); Paul R. Verkuil, *Separation of Powers, The Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 303-04 (1989) (same). Still, it is difficult to deny that such separation, in part, relied on inertia as a brake upon government excess; each branch acts as a failsafe against bad decisionmaking by the others. As Montesquieu put it, when power is divided between multiple institutions, "they will be forced to move in concert" to overcome the natural state of "rest or inaction." CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* bk. XI, ch. 6, at 164 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748). Simply put, if a legislature misbehaves, the effect of its laws may be defeated or mitigated by independent executors or judges who may lack similar predispositions. See, e.g., *THE FEDERALIST* NO. 78, *supra* note 77, at 470 (Alexander Hamilton) (arguing that courts would be "of vast importance in mitigating the severity and confining the operation of [unjust and partial] laws"). Hence, an important premise of our governmental structure is that liberty is more secure if change is hard to come by without broad governmental consensus.

79 *THE FEDERALIST* NO. 62, *supra* note 77, at 378-79 (James Madison); see also *id.* NO. 73, at 443 (Alexander Hamilton) (deeming it "far less probable that culpable views of any kind should infect all the parts of the government at the same moment and in relation to the same object than that they should by turns govern and mislead every one of them"); 1 *THE WORKS OF JAMES WILSON* 291-92 (Robert G. McCloskey ed., 1967) ("When a single legislature is determined to depart from the principles of the constitution—and its uncontrollable power may prompt the determination—there is no constitutional authority to arrest its progress. . . . Far different will the case be, when the legislature consists of two branches.").

80 *THE FEDERALIST* NO. 73, *supra* note 77, at 443 (Alexander Hamilton); see also 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 882, at

Second, Article I, Section 7 also operates to constrain the influence of faction through another relevant mechanism: According to modern political science, bicameralism and presentment effectively require a supermajority for a statute's enactment.⁸¹ This characteristic diminishes any majority faction's prospects for legislative dominance by giving political minorities extraordinary power to block legislation.⁸² In so doing, bicameralism and presentment ensure that the legislature may not alter the legal status quo unless a rather broad segment of society (rather than a bare majority) assents to such a change.⁸³

Third, bicameralism and presentment also rely on the calming effects of deliberation. As Hamilton wrote:

348 (Boston, Hilliard, Gray & Co, 1833) ("[T]he [veto] power . . . establishes a salutary check upon the legislative body, calculated to preserve the community against the effects of faction, precipitancy, unconstitutional legislation, and temporary excitements, as well as political hostility.") (citation omitted).

81 See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 233-48 (1962). Cass Sunstein has suggested another means by which bicameralism and presentment might constrain factions: By dividing decisionmaking power, bicameralism and presentment help counteract the polarizing tendency of group deliberation. See Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 110-11 (2000).

82 See Manning, *supra* note 68, at 74-78. Indeed, by requiring equal representation of the states in the Senate, the Constitution affords specific protection to the minority consisting of small-state residents. See U.S. CONST. art. I, § 3; see also *id.* art. V (providing that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate"). For an important discussion of this feature's implications for lawmaking, see Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1371-72 (2001).

83 This tendency is reinforced by Congress's internal rules of procedure, which create numerous and diverse procedural hurdles to the enactment of legislation. As Professors Shepsle and Weingast note:

The Rules Committee in the House may refuse to grant a rule for a committee bill, thereby scuttling it. The Speaker may use his power to schedule legislation and to control debate in ways detrimental to the prospects of a committee bill. A small group of senators in the U.S. Senate may engage in filibuster and other forms of obstruction. Any individual senator may refuse unanimous consent to procedures that would expedite passage of a committee bill. In short, veto groups are pervasive in legislatures

Kenneth A. Shepsle & Barry R. Weingast, *The Institutional Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85, 89 (1987); see also Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 64 (1988) (emphasizing that bills must "run the gamut of the process," which involves "committees, fighting for time on the floor, compromise because other members want some unrelated objective, passage, exposure to veto, and so on").

The oftener the measure is brought under examination, the greater the diversity of situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation or of those missteps which proceed from the contagion of some common passion or interest.⁸⁴

Conversely, as the post-revolutionary experience with state governments had demonstrated, society potentially had much to fear from the effects of momentary passions upon lawmaking.⁸⁵ Hence, the constitutional structure was designed to produce "conflicts, confusion, and discordance" as a means to "assure full, vigorous, and open debates on the great issues affecting the people."⁸⁶

84 THE FEDERALIST NO. 73, *supra* note 77, at 443 (Alexander Hamilton); *see also* 1 THE WORKS OF JAMES WILSON, *supra* note 79, at 294 ("In planning, forming, and arranging laws, deliberation is always becoming, and always useful."). The anticipated calming effect of bicameralism is nicely captured in an analogy attributed to George Washington:

There is a tradition that, on his return from France, Jefferson called Washington to account at the breakfast-table for having agreed to a second chamber. "Why," asked Washington, "did you pour that coffee into your saucer?" "To cool it," quoth Jefferson. "Even so," said Washington, "we pour legislation into the senatorial saucer to cool it."

3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 359 (Max Farrand ed., 1966).

85 *See* WOOD, *supra* note 78, at 404–09 (discussing the perceived abuses associated with state legislatures in the period leading up to the Philadelphia Convention); *see also, e.g.*, THE FEDERALIST NO. 62, *supra* note 77, at 379 (James Madison) ("The necessity of a senate is not less indicated by the propensity of all single and numerous legislatures to the impulse of sudden and violent passions Examples . . . might be cited without number; and from proceedings within the United States, as well as from the history of other nations."); 4 THE WORKS OF JOHN ADAMS 195 (Charles Francis Adams ed., Boston, Charles C. Little & James Brown 1851) ("A single assembly is liable to all the vices, follies, and frailties of an individual; subject to fits of humor, starts of passion, flights of enthusiasm, partialities, or prejudice, and consequently productive of hasty results and absurd judgments.") (noting Adams's influential 1776 pamphlet, *Thoughts on Government*).

86 *Bowsher v. Synar*, 478 U.S. 714, 722 (1986); *see also INS v. Chadha*, 462 U.S. 919, 951 (1983) ("The division of the Congress into two bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings."); *The Pocket Veto Cases*, 279 U.S. 655, 678 (1929):

[It is an] essential . . . part of the constitutional provisions, guarding against ill-considered and unwise legislation, that the President, on his part, should have the full time allowed him for determining whether he should approve or disapprove a bill, and if disapproved, for adequately formulating the objections that should be considered by Congress

Id. Of course, the Court has made clear that the validity of legislation does not require actual legislative discussion or debate. *See U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

Certainly, these considerations do not bespeak an anti-continuity bias. If anything, the opposite inference seems amply supported. By design, the protections afforded by Article I, Section 7 raise the price and increase the cumbersomeness of lawmaking, safeguarding liberty through a deliberate sacrifice of governmental efficiency. At least some important Federalists, moreover, recognized as much. They acknowledged that "this complicated check on legislation may in some instances be injurious as well as beneficial,"⁸⁷ and that "the power of preventing bad laws includes that of preventing good laws."⁸⁸ However, judging from the cumbersome lawmaking structure prescribed by Article I, Section 7, the dangers of ill advised governmental action must have appeared more salient than the risks of inaction. Madison thus contended that "the facility and excess of law-making," and not the converse, "seem to be the diseases to which our governments are most liable."⁸⁹ And for Hamilton, "[t]he injury which may possibly be done by defeating a few good laws will be amply compensated by preventing a number of bad ones."⁹⁰ In short, the tradeoff manifest in constitutional structure did not go unnoticed in the debate over the Constitution; rather, it was expressly conceded, if not endorsed, by some of the document's strongest defenders.

Let me be clear about the limited conclusion that I believe one can draw from all of this. As I have said, I do not think it possible to read the constitutional structure to mean that any particular canon should be adopted or retained because it favors continuity. But given the structural considerations just discussed, if either bias were justified in designing interpretive norms (all else being equal), it would be one that favored continuity rather than change. If one were an officer of an enterprise whose watchwords were caution, consensus, and deliberation, then it might seem appropriate for him or her to use implemental rules of thumb that reflected the enterprise's look-before-you-leap attitude. And it would surely be odd for such an agent to adopt self-consciously an adventurous attitude toward the implementation of the company's established business plan. More important, it seems apparent that the pro-continuity canons embraced by Professor Shapiro should not be susceptible to criticism merely because they favor the status quo in cases of doubt. For most of the past century, one of legal academia's most intriguing projects has been to reform the traditional maxims of interpretation to free the judiciary's adaptive spirit

87 THE FEDERALIST NO. 62, *supra* note 77, at 378 (James Madison).

88 *Id.* NO. 73, at 443 (Alexander Hamilton).

89 *Id.* NO. 62, at 378 (James Madison).

90 *Id.* NO. 73, at 444 (Alexander Hamilton).

from the constraints of legal technicalities. To the extent that this project rests on a background antipathy to interpretive practices that favor the status quo in cases of doubt, it reflects a manner of thinking very different from that which is embodied in the structural constitution.

CONCLUSION

David Shapiro's *Continuity and Change in Statutory Interpretation* makes an important contribution to legal scholarship. Its carefully measured prose contains an often-overlooked but crucial insight: Many of the most prominent canons of interpretation operate as a brake on statutory change in the status quo, and this tendency is on balance a good thing. His defense of continuity rather than change is presented in a typically undogmatic fashion. In that spirit, it corresponds with a very important and, by modern standards, counterintuitive point about the nature of the legislative process, at least at the federal level. Under the U.S. Constitution, lawmaking is cumbersome. It is that way, moreover, by design; bicameralism and presentment emphasize caution, consensus, and deliberation. In so doing, the federal legislative process privileges continuity over change. Even if that pro-continuity bias does not ultimately present a sufficient reason for embracing or retaining any given canon of construction, it surely presents a powerful answer to those who would abandon traditional rules of construction because they reflect a similar bias.