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**NINO'S NIGHTMARE: LEGAL PROCESS THEORY AS A
JURISPRUDENCE OF TOGGLING BETWEEN FACTS AND NORMS**

WILLIAM N. ESKRIDGE, JR.*

INTRODUCTION

The year 1957–58 was the *annus mirabilis* of Anglo-American jurisprudence. In 1957, H.L.A. Hart, the Regius Professor of Jurisprudence at Oxford, delivered the Holmes Lectures at the Harvard Law School, which were published in the law review in February 1958 and, later, as *The Concept of Law* (1961), still the leading articulation of the philosophy of legal positivism.¹ Also in 1958, Professors Henry M. Hart Jr. and Albert M. Sacks finalized the “tentative draft” of their materials on *The Legal Process*; these materials, now available in print, set forth a purpose-based version of legal positivism.² In a law review exchange with H.L.A. Hart, also published in February 1958,³ and then in *The Morality of Law* (1964), Professor Lon Fuller pressed the purpose theory of law away from positivism and toward a theory of law that integrated it with morality.⁴

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1. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) [hereinafter Hart, *Law and Morals*]; see also H.L.A. HART, *THE CONCEPT OF LAW* (1994) [hereinafter HART, *CONCEPT OF LAW*]. See generally H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* (1983) (collection of positivist and other jurisprudence essays by Professor Hart).

2. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* iii–vi (tent. ed. 1958) (subsequently edited and published by William N. Eskridge, Jr. & Philip P. Frickey, 1994) (subsequent citations will be to the published edition).

3. Lon L. Fuller, *Positivism and the Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958) [hereinafter Fuller, *A Reply*].

4. LON L. FULLER, *THE MORALITY OF LAW* (1964) (subsequent book elaborating on the procedure-based natural law theory that appeared in Fuller’s *Harvard Law Review* article) (2d ed. 1964) (subsequent citations will be to the second edition).

A commonly overlooked feature of these classics is their strong focus on statutory interpretation as the primary locus for jurisprudential theory.⁵ The published versions of Hart's Holmes Lectures used as their main example a hypothetical ordinance barring "vehicles" from municipal parks.⁶ Hart and Sacks' *The Legal Process* opened with two statutory problems, namely, "The Case of the Spoiled Cantaloupes"⁷ and "The Case of the Spoiled Heir."⁸ The centerpiece of their materials was the lengthy chapter on statutory interpretation.⁹ Fuller's reply to Hart focused on the proper application of the "no vehicles in the park" and of German statutes used to prosecute Nazi sympathizers after World War II.¹⁰

A universally overlooked feature of this remarkable year is that it was also the intellectual and professional birthing time for today's leading exponents of these competing jurisprudential theories. That is, in 1957, just after the Holmes Lectures had been delivered, Ronald Dworkin graduated from the Harvard Law School. At the end of the summer, Antonin Scalia entered it and was a student when H.L.A. Hart and Lon Fuller engaged in their jurisprudential debate in the pages of the *Harvard Law Review* (which Scalia joined as an editor in the summer of 1958), and when his teachers Henry Hart and Albert Sacks completed the tentative edition of their legal process materials. Stephen Breyer matriculated at the law school in 1961, the year H.L.A. Hart published *The Concept of Law* (the book version of the Holmes Lectures), and graduated in 1964, the year Lon Fuller published *The Morality of Law* (his book-length response to Hart). Today, Nino Scalia is the most notable public official who embraces the (Hartian) legal positivist approach to law; Steve Breyer is the most prominent exponent of the legal process approach; and Ronnie Dworkin is the great theorist of what is often called a natural law approach to law but what I shall term a normativist approach. Each has written classic accounts, aimed at relatively large audiences, defending their different jurisprudential

5. This feature would not have been overlooked by the authors themselves. H.L.A. Hart was a visiting professor at Harvard Law in 1956–57 and participated with Henry Hart, Al Sacks, Lon Fuller, Herbert Wechsler, and Julius Stone (the latter two also visiting professors) in a legal philosophy seminar that focused on discretion in statutory cases in that academic year. William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in HART & SACKS, *supra* note 2, at c–cii (describing the seminar's attendees and some of the papers presented).

6. HART, *CONCEPT OF LAW*, *supra* note 1, at 123–29; Hart, *Law and Morals*, *supra* note 1, at 607–11.

7. HART & SACKS, *supra* note 2, at 10–68.

8. *Id.* at 68–102.

9. *Id.* at 1111–1382 ("Chapter 7. The Role of the Courts in the Interpretation of Statutes").

10. Fuller, *A Reply*, *supra* note 3, at 661–69.

commitments, and each book has brought jurisprudence to bear on the proper method for judges to follow when interpreting statutes.¹¹

This year (2012–13) is the fifty-fifth anniversary of this *annus mirabilis* in American jurisprudence. I want to use the occasion of the Childress Lecture to illustrate the different perspectives developed by these four scholars (Oxford's Hart and Harvard's Hart, Sacks, and Fuller) and deepened by their intellectual successors—the Supreme Court's Scalia and Breyer and Yale's, Oxford's, and New York University's Dworkin.

The thesis of this Lecture, however, is that American judging in the famous “hard cases” suggests that these different jurisprudential approaches to statutes (what Julius Cohen calls “legisprudence”¹²) interact in interesting and productive ways. The public face of judging in this country is positivism, where law's authority is not contingent upon any connection to morals and is determined, instead, by reference to social facts.¹³ Judging, by this account, is driven by a methodology dictated by social convention: what traditionally has been the practice of judges interpreting the law? Interestingly, positivists do not agree about which statutory interpretation methodology actually does reflect established practice and social convention, but positivist jurisprudence does claim to follow a method(s) that reflects and entrenches the predictability and objectivity of the rule of law.¹⁴

Ironically, even jurists, such as Justice Scalia, who see themselves as thoroughgoing positivists, ultimately justify their theories of statutory interpretation by reference to normative rather than descriptive sources. Thus, Scalia believes that his textualist jurisprudence is justified by reference to social practice as well as the original meaning of Article III's grant of “judicial

11. STEPHEN BREYER, *ACTIVE LIBERTY* (2005) (advancing a legal process purpose-of-the-statute theory and discussing an array of statutory cases that divided the Supreme Court in recent years); RONALD DWORKIN, *LAW'S EMPIRE* 15–29 (1986) (advancing a normativist theory of law as integrity and focusing on two statutory cases, one involving the spoiled heir introduced to legal education by Hart and Sacks, and the other involving the halting of a multi-million dollar dam because of statutory protection for the endangered snail darter); ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 18–23 (1997) (advancing a positivist theory and focusing on only one case, where he argues that the Supreme Court misinterpreted an 1892 immigration statute when it exempted a Christian minister from its plain language). Each of these authors has published more recent books consistent with the themes developed in these earlier classics. See STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW* (2010) [hereinafter BREYER, *DEMOCRACY*]; RONALD DWORKIN, *FREEDOM'S LAW: A MORAL READING OF THE AMERICAN CONSTITUTION* (1996); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012); see also Ronald Dworkin, *Response*, in *EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN* 291 (Scott Hershovitz ed., 2006).

12. Julius Cohen, *Towards Realism in Legisprudence*, 59 *YALE L.J.* 886 (1950).

13. JOSEPH RAZ, *Legal Positivism and the Sources of Law*, in *THE AUTHORITY OF LAW* 37, 45–46 (1979).

14. See sources discussed *infra* note 30.

Power” to the Supreme Court and inferior federal courts, but he has never adduced evidence supporting that belief, and the evidence strongly runs in other directions.¹⁵ In his most recent book, he deemphasizes the positivist criterion for proper methodology and makes his case in an openly normative fashion: textualism, he maintains, is the only methodology that yields predictability in the application of statutes to new factual circumstances.¹⁶ Consistent with his deployment of both positivist and normative jurisprudence to justify his textualist methodology, Justice Scalia applies his methodology by moving back and forth between positivist description and normativist prescription.¹⁷

I call this phenomenon “jurisprudential toggling.”¹⁸ That self-professed positivists toggle between descriptive and prescriptive reasons *both* when they justify their theories of statutory interpretation *and* when they apply those theories, is a huge problem for positivist jurisprudence such as that espoused by Justice Scalia because positivists claim that law operates only by reference to social facts and conventions and is not characterized by normative evaluation.¹⁹ The phenomenon of toggling reveals law to be more complicated than they claim.

But jurisprudential toggling of this sort also provides an account of self-professed normativist jurisprudences, most notably that of Professor Dworkin. Dworkin maintains that the grounds of law are normative: What is the best justification for the rules that we have created?²⁰ Given those grounds of law, Dworkin maintains that the appropriate theory of statutory interpretation ought

15. See William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 998, 1083–87 (2001) (demonstrating that the original meaning of “judicial Power,” at the time of the framing, was not strictly textual and was more consistent with pragmatic and purposive methods); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 678–81 (1990) (demonstrating that the constitutional structure is inconsistent with Scalia’s new textualist approach).

16. SCALIA & GARNER, *supra* note 11, at xxviii–xxix; see also *id.* at 377–78 (summing up the case against legislative history—in purely normative terms—as freeing judges of “legal” constraints and turning them loose to impose their own values upon statutes).

17. See Jane S. Schacter, *Text or Consequences?*, 76 BROOK. L. REV. 1007, 1011 (2011) (demonstrating that Justice Scalia’s commitment to objective rules alternates with his equally heartfelt insistence that judges avoid absurd or even unreasonable interpretations).

18. As I understand it, toggling on a computer is alternating back and forth between two functions (e.g., *italics* and normal font) by pressing one or more keys. Jurisprudential toggling, as I am using the term, is alternating back and forth between two jurisprudential forms, i.e., the positivist focus on social facts and conventions and the normativist focus on norms and political morality. Cf. William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 769 (1991) (discussing the related notion that facts and norms are interconnected).

19. HART, CONCEPT OF LAW, *supra* note 1, at 134–35.

20. DWORKIN, LAW’S EMPIRE, *supra* note 11, at 310–12.

to be what he calls “law as integrity”: Which interpretation helps the statute become the best regulatory regime that it can be, under the circumstances of our culture and its history?²¹ Notice that Dworkin’s meta-theory and his methodological theory are openly normative but also in practice dependent on facts and conventions.

That both positivist and normativist legisprudences toggle between facts/description and norms/prescription might dissolve the theoretical divide between the primary schools of jurisprudence. This is, perhaps, a point of limited interest. Of broader interest is the idea that judging always involves a dialectic between finding/description and inventing/prescription. In the space of this Article, I cannot prove that hard statutory cases inevitably involve such a jurisprudential dialectic, but I can demonstrate the interesting operation of this idea in the famous Case of the Spotted Owl, *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.²²

The issue in the case was this: Did the Department of Interior have authority under the Endangered Species Act of 1973 to prohibit landowners from harming the spotted owl and other endangered species by destroying their essential habitat in the process of farming, timber-cutting, and developing their properties? Justice Stevens’s opinion for the Court and Justice Scalia’s dissenting opinion both toggled between a positivist reliance on conventional canons for deciding statutory cases and a normativist reliance on political morality. Although Justice Scalia is, both generally and in this particular case, most insistent that statutory interpretation needs to be purely a matter of applying preexisting facts and conventions, the normative features are especially salient in his opinion. That is why I have entitled this paper as “Nino’s Nightmare.”

So Hartian positivists such as Justice Scalia are unable to purge larger normative commitments from their deployment of conventional sources of statutory meaning. Normativists such as Professor Dworkin celebrate political morality in statutory cases but need to bind their theory to the actual rather than idealized political history of our society. I shall further argue, in Part III, that the legal process school, founded by Professors Hart and Sacks and currently featuring Justice Breyer, consciously embraces the fact-norm toggle as the core of its jurisprudence and its theory of statutory interpretation. Legal process thinkers ground their meta-level analysis in the proposition that law serves social purposes that are both instrumental (e.g., solving collective action problems and creating economic and social structures for the population) and normative (e.g., creating conditions for social cooperation and ensuring fairness).

21. *Id.* at 338–39.

22. 515 U.S. 687 (1995). Justice Stevens wrote for the Court, with Justice Scalia vigorously dissenting.

In parallel fashion, but less explicitly, the Hart and Sacks theory of statutory interpretation toggles between facts and norms. By their account, the judge should choose the interpretation that best carries out the statutory purpose, unless it imposes upon the words a meaning they will not bear or contravenes our polity's larger normative commitments.²³ Their purposive theory, as applied in cases like *Sweet Home*, toggles between factual inquiries and evaluative inquiries. Factual: What was the legislative purpose? Can the words of the statute "bear" the best-fits-purpose option? Normative: In assigning purpose, the judge must assume "reasonable" legislators. Does the best-fits-purpose option contravene the polity's larger normative commitments? How do different rules create different purposive regimes or transform old regimes?

As illustrated in his dissent in the Case of the Spotted Owl, Justice Scalia, the out-of-the-closet positivist who laces his opinions with normative thinking, is also at heart a legal process jurist. Ultimately, I do not consider legal process theory to be an escape from Nino's Nightmare (or Ronnie's Nightmare either), for I shall maintain that legal process theory is distinctive because it embraces the jurisprudence of toggling. The exemplar of legisprudential toggling is Justice Breyer, who joined the majority opinion in *Sweet Home*.

As the Spotted Owl Case also illustrates, legal process theory also rests importantly upon institutional toggling, between courts and agencies. This is perhaps its most important contribution to legisprudence, namely, the idea that agencies and not courts are the engines for statutory interpretation in the modern regulatory state, with agencies enjoying primacy over the instrumental features of statutory application, and courts serving as a normative check on agencies when they contravene our polity's larger democratic and substantive commitments.

I. POSITIVIST LEGISPRUDENCE AND THE PROBLEM OF CLOSETED NORMS

Although few American judges and lawyers are learned in jurisprudence, most of them have a general understanding of legal positivism, especially this well-known precept: "The fact that a policy would be just, wise, efficient, or prudent is never sufficient reason for thinking that it is actually the law, and the fact that it is unjust, unwise, inefficient or imprudent is never sufficient reason for doubting it."²⁴ This is a widely accepted norm in our legal culture, yet I shall now argue that the positivist judge in the hard cases finds it natural to invest statutory meaning with her or his interpretation of the moral or

23. HART & SACKS, *supra* note 2, at 1374.

24. Leslie Green, *Legal Positivism*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2009), available at <http://plato.stanford.edu/entries/legal-positivism>.

normative context of the statute, and then to justify such judgments based upon conventional sources.

Professor H.L.A. Hart's theory of legal positivism starts with the proposition that every legal system has a "rule of recognition"—a convention that determines which rules are, and which rules are not, part of the legal system.²⁵ In developed legal systems, the rule of recognition typically operates by identifying "some general characteristic" that other rules must possess to be legally valid, such as "the fact of their having been enacted by a specific body, or their long customary practice, or their relation to judicial decisions."²⁶ Where there is more than one such characteristic, the rule makes "provision . . . for their possible conflict by their arrangement in an order of superiority, as by the common subordination of custom or precedent to statute, the latter being a 'superior source' of law."²⁷

According to positivists, the content of the rule of recognition is a matter of social convention. Thus, "[t]o state for a particular society what the criteria of law are, and the hierarchy in which these criteria stand to each other, is to describe the standards that recognized officials [in the society] . . . accept."²⁸ Acknowledging that the rule of recognition alone would not settle every legal dispute, Hart saw a central role for judges who would make "authoritative determinations" regarding the "particular acts, things, and circumstances" that qualify "as instances of the general classifications which the law makes."²⁹

The goal of the judge is to discover the existing meaning of the law, based on traditional, socially accepted legal materials such as text, structure, history, precedent, and so forth. Although they start with the same meta-theory, different positivist theorists derive from practice and convention a range of different methodologies for statutory interpretation.³⁰ For example, Justices

25. HART, CONCEPT OF LAW, *supra* note 1, at 91, 92–93 (a legal system consists of "a union for primary rules of obligation," together with "secondary rules" such as the rule of recognition); see Scott J. Shapiro, *What Is the Rule of Recognition (and Does It Exist)?*, in THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 235, 237–38 (Matthew D. Adler & Kenneth Einar Himma eds., 2009) (the rule of recognition is a "rule about rules").

26. HART, CONCEPT OF LAW, *supra* note 1, at 92.

27. *Id.* at 92–93.

28. Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 624 (1987); see HART, CONCEPT OF LAW, *supra* note 1, at 113 (arguing that for a legal system to exist, "its rules of recognition specifying the criteria of legal validity . . . must be effectively accepted as common public standards of official behaviour by its officials."); RAZ, *supra* note 13, at 37 (articulating a similarly positivist legal order, where law rests upon factual judgments and not moral ones); SCOTT J. SHAPIRO, LEGALITY 27–30 (2011) (describing positivist evaluation of the legitimacy of legal interpretation as resting entirely upon a sociological inquiry into whether the interpretation follows accepted practice).

29. HART, CONCEPT OF LAW, *supra* note 1, at 121.

30. Thus, Joseph Raz and Andrei Marmor derive from positivist premises the norm that the judge should implement "legislative intent." See ANDREI MARMOR, INTERPRETATION AND

Scalia and Stevens both present themselves as positivists, as each justifies his approach to statutory interpretation by reference to precedent and accepted conventions³¹—but they interpret precedent and convention to support different methodologies. For Scalia, convention requires that judges apply textual plain meanings without regard to legislative expectation; for Stevens, convention requires that judges seek out and apply legislative intent.³²

Most judges, lawyers, and law professors agree with H.L.A. Hart's view that "the life of the law" consists mainly of cases in which the application of the law is clear.³³ As an example, consider the duties imposed upon private landowners by the Endangered Species Act of 1973. Section 9(a)(1)(B) of the Act makes it an offense for any person to "take any [endangered] species within the United States or the territorial sea of the United States."³⁴ Section (19) of the Act tells us what Congress meant by this broad language: "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."³⁵ Thus, if a landowner

LEGAL THEORY 156 (1992); Joseph Raz, *Intention in Interpretation*, in THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 249, 258–60 (Robert P. George ed., 1996). Jeremy Waldron (like Justice Scalia) says the judge should focus instead on "plain meaning" and not legislative intent. See JEREMY WALDRON, LAW AND DISAGREEMENT 79 (1999). H.L.A. Hart did not take a firm position on this issue, but his Holmes Lectures do focus only on statutory text. Hart, *Law and Morals*, *supra* note 1, at 606–07. Fuller assumed that Hartian positivism was textualist. Fuller, *supra* note 3, at 662.

31. *Compare, e.g.,* Chisom v. Roemer, 501 U.S. 380, 403–04 (1991) (Stevens, J.) (focusing on legislative expectations, as the Court has traditionally done), *with id.* at 404 (Scalia, J., dissenting) (maintaining that the Court has a "regular method" of statutory interpretation that the Justices ought to follow in every case).

32. *Compare* Frank Easterbrook, *Foreword* to SCALIA & GARNER, *supra* note 11, at xxi, xxii–xxiv (advocating the benefits of a system of straightforward rules of interpretation that does not focus on legislative intent), John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1680 (2001) (citing to the separation of judicial and legislative branches within the Constitution as problematic in endorsing a faithful agency theory about judge interpretation), and SCALIA, *supra* note 11, at 23–25 (all supporting the new textualism as the methodology that best represents the conventions of statutory interpretation), *with* John Paul Stevens, *The Shakespeare Canon of Statutory Construction*, 140 U. PA. L. REV. 1373, 1374, 1376, 1379, 1381, 1983 (1992) (arguing that courts need to be guided by congressional assumptions as well as positive expectations in statutory cases). See also Diane L. Hughes, Note, *Justice Stevens's Approach to Statutory Interpretation*, 19 HARV. ENV'T L. REV. 493, 495, 497 (1995) (detailed analysis of Stevens's focus on congressional expectations and purposes, including the observation that Congress frequently overrode cases to implement Stevens's dissenting views).

33. HART, CONCEPT OF LAW, *supra* note 1, at 132; see also *id.* at 123 ("There will indeed be plain cases constantly recurring in similar contexts to which general expressions are clearly applicable."); *id.* at 124 (referring to "the great mass of ordinary cases" in which legal rules work "smoothly").

34. 16 U.S.C. § 1538(a)(1)(B) (2006) (emphasis added).

35. *Id.* § 1532(19).

shoots, ensnares, or traps a spotted owl (an endangered species), she would be in violation of the statute, based upon simple logic: to “shoot” an endangered species is by operation of § (19) to “take” that species, and § 9(a)(1)(B) says the law forbids anyone to “take” the species.

Based upon conventions of word use as well as logic, even imaginative harms to endangered animals would fall athwart the statutory command. So if a deranged landowner smacked a spotted owl with a shovel, she would likewise be in violation. While § (19) does not specifically mention smacking an animal with a shovel, and common parlance does not say that to smack an owl with a shovel is to “take” that owl, the definition of “take” in § (19) is broad enough to include her conduct. Thus, she surely “harmed” the animal by smacking it with a shovel, and in the process she probably also “pursued” and may even have “harassed” the poor animal. No reasonable judge—neither Scalia nor Stevens—would quarrel with this interpretation. These various applications yield a coherent regulatory regime of uncontroversial applications of a rule. This regime of relatively clear applications is binding on all of us, whether or not we agree with the normative aims of the statute or believe that the burdens it imposes on us all are worthwhile. This tidy array of objectively determinable, and predictable, applications of the statute constitutes what we call the rule of law.

H.L.A. Hart would characterize the foregoing cases as falling in the legal “core” of the statutory directive; falling within the “penumbra” rather than the core of the statute might be another variation.³⁶ Would the § 9(a)(1)(B) rule apply to a landowner who cut down the trees in a forest that was an important habitat and breeding area for the endangered owl species? Although “destroy habitat” is not listed as a definition of “take,” might this conduct be considered an example of “harm”? By destroying habitat, the landowner is “harming” the endangered species and particular animals—and indeed harming the species and many particular animals more than if he were to “pursue” or “capture” one of the animals of that species.³⁷ On the other hand, the verbs listed in the statutory definition of “take”—“harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect”—collectively might be read as various ways that a landowner would engage in purposeful conduct targeted at endangered animals. It would not be illogical to say that conduct, such as tree-clearing, that

36. Hart, *supra* note 1, at 607 (setting forth the core/penumbra dichotomy in the context of his discussion of the no-vehicles-in-the-park ordinance: “There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out. These cases will each have some features in common with the standard case; they will lack others or be accompanied by features not present in the standard case.”).

37. To be sure, § 9(a)(1)(B) might be read as focused on a particular animal and not on the entire species; one does not “take” an entire species, so much as one “takes” a particular animal, though denying habitat needed for breeding does “harm” specific animals as well as the species.

is not aimed at hurting endangered species and only does so incidentally, is not “harm” in the same way that shooting, trapping, or even smacking the animal with a shovel is. If so, tree-cutting that incidentally destroys habitat does not fall within the statutory meaning.

The destruction-of-habitat application might be an example of what H.L.A. Hart called the “hard case,” where strict legal argumentation does not provide a clear answer.³⁸ In hard cases, the judge must make new law interstitially, the way common law judges do for cases not covered by precedent or by clear reasoning from precedent.³⁹ Where the law runs out, the judge must make a policy choice, according to Hart and other leading positivist theorists.⁴⁰ Perhaps surprisingly, Justice Scalia agrees with Professor Hart on this score as well: especially where the statute is open-textured, the judge has no choice but to make law, interstitially.⁴¹ But if a judge is filling in the gaps of the law with policy judgments, is that not contrary to the positivist commitment to understanding law as conventional and not moral in application? The positivist answer to this quandary is that society has the option of vesting judges, like legislators, with discretion to fill in legal gaps, so long as that gap-filling role is justified by conventional guidelines established by social fact and not by the judge’s moral philosophy.⁴²

There is another angle for hard cases, however. Most of the (arguably) hard cases the Supreme Court faces are ones where an agency has interpreted

38. HART, CONCEPT OF LAW, *supra* note 1, at 273 (describing “hard cases” as ones “where the existing law fails to dictate any decision as the correct one”); JOSEPH RAZ, *Law and Value in Adjudication*, in THE AUTHORITY OF LAW, 180, 181 (1979) (describing “unregulated” disputes as ones that “do not have a correct legal answer”).

39. HART, CONCEPT OF LAW, *supra* note 1, at 272 (“If in such cases the judge is to reach a decision and is not, as Bentham once advocated, to disclaim jurisdiction or to refer the points not regulated by the existing law to the legislature to decide, he must exercise his *discretion* and *make* law for the case instead of merely applying already pre-existing settled law.”).

40. *Id.* at 272–73; RAZ, *Law and Value in Adjudication*, *supra* note 38, at 197; SHAPIRO, LEGALITY, *supra* note 28, at 248.

41. *E.g.*, *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) (recognizing a degree of “lawmaking” left to judges in cases of statutory interpretation, the extent of which depends on the “relative specificity or generality of [Congress’s] statutory commands”); see Miranda McGowan, *Do as I Do, Not as I Say: An Empirical Investigation of Justice Scalia’s Ordinary Meaning Method of Statutory Interpretation*, 78 MISS. L.J. 129, 150, 178 (2008).

42. See Hart, *supra* note 1, at 612 (positing that judges must make policy choices in the hard statutory cases, but indicating that judges make those choices by reference to the aims and purposes of the statute). Many academics, myself included, have too readily identified both Scalia and positivism as “formalist,” but if formalism entails the notion that judicial decision-making is always hemmed in with constraining rules of law, that is clearly not the view of either Professor Hart or Justice Scalia. See SHAPIRO, LEGALITY, *supra* note 28, at 247 (demonstrating that Hart was a landmark anti-formalist); Hart, *supra* note 1, at 608, 614–15 (Hart’s embrace of the realist critique of formalism).

the statute.⁴³ Where the agency's interpretation is contrary to the statute's proper legal meaning, the role of the positivist judge is to correct the agency and veto its erroneous construction. But where the agency interpretation really addresses a hard case, where the interpreter must make an interstitial policy judgment, Justices Stevens and Scalia both believe the judge should go along with any reasonable agency construction, though perhaps for somewhat different positivist reasons. Justice Stevens authored *Chevron U.S.A. v. Natural Resources Defense Council*, where the Court required judicial deference to the rules issued by agencies pursuant to congressional delegations of lawmaking authority.⁴⁴ Justice Scalia avidly supported *Chevron* as well.⁴⁵ Both Stevens and Scalia understand deference in jurisprudential (positivist) terms: in hard cases, agencies accountable to Congress and the President are the more legitimate institution to make policy judgments than Article III judges, who are not directly accountable to the electoral and political process.⁴⁶

We are now prepared to consider legal positivism in light of the issue in *Babbitt v. Sweet Home*. Recall that § 9(a)(1)(B) of the Endangered Species Act says no person can "take" an endangered species; "take" is defined in the statute to mean "harm" and many other activities. Implementing the statute and also having the force of law itself, the Department of Interior's 1975 regulation, as revised in 1981, defines "harm" in the statutory definition of "take" as any activity that "actually injures or kills" endangered species, including actions that "significantly disrupt essential behavioral patterns, which include, but are not limited to, breeding, feeding or sheltering; significant environmental modification or degradation"⁴⁷ Under that definition of harm, private landowners that disrupt breeding patterns by destroying significant habitat for an endangered species are in violation of § 9(a)(1)(B).

43. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1093–94 (2008) (reporting that 1,014 cases, more than half of the Court's workload, were statutory cases where an agency had delivered an interpretation available to the Court in the years 1984 through 2006).

44. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843–44 (1984); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 833 (2001).

45. *United States v. Mead Corp.*, 533 U.S. 218, 239–41 (2001) (Scalia, J., dissenting) (providing a ringing reaffirmation of *Chevron* and castigating the Court for departing from what Scalia considered the Court's established practice of applying deference broadly).

46. *Chevron*, 467 U.S. at 865–66 (Stevens, J., majority opinion); Frederick Liu, *Chevron as a Doctrine of Hard Cases* 28, 33–34 (Working Paper, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1878943.

47. *Endangered and Threatened Wildlife and Plants*, 50 Fed. Reg. 44,412, 44,416 (Sept. 26, 1975) (codified at 50 C.F.R. § 17.3 (1994)).

The question before the Supreme Court in *Sweet Home* was whether the statute trumped the Department's understanding of "harm." Under positivist premises, Justice Scalia would have deferred to the Department's understanding if he had considered this a hard or penumbral case where the (statutory) law runs out.⁴⁸ But he did not. Joined by Chief Justice William Rehnquist and Justice Clarence Thomas, Justice Scalia concluded in his dissent that the application of § 9's anti-take rule to farmers and ranchers who destroyed essential habitat was clearly beyond the legal meaning of the statute.⁴⁹ While six Justices went the other way and joined Justice Stevens's equally positivist opinion for the Court (which upheld the agency), this did not bother Justice Scalia in the least. He was certain that the standard conventional tools for discerning legal meaning all supported his somewhat narrower reading of the statutory language and that the majority Justices were simply wrong.

Justice Scalia's main point was that because "take" as a matter of both common law and common parlance involves aggressive activity targeted at a particular animal, the ordinary meaning of § 9(a)(1)(B) does not cover property development that only incidentally "harms" an endangered species, as through disruption of its habitat.⁵⁰ He further argued that his narrow understanding of "take" was more consistent with the way that precise term was used elsewhere in both the ESA and in other statutes.⁵¹ Indeed, Justice Scalia maintained that his interpretation better fits with the structure of the statute.⁵² These are all conventional sources for discerning statutory meaning, and so Scalia's dissent fit snugly within the positivist methodology.

Writing for the Court, Justice Stevens justified the Department's interpretation by invoking the same kinds of conventional sources that Justice Scalia had marshaled. Like Scalia, Stevens treated the Act itself as law under our nation's consensus-based rule of recognition; likewise, Stevens treated the agency rule as law pursuant to Congress's well-recognized power to delegate lawmaking authority to agencies, unless inconsistent with the statute.⁵³ And, also like Scalia, Stevens invoked those aids to interpretation that have been accepted within our polity, namely, text, structure, precedent, and so forth. Thus, in response to Justice Scalia's argument that the Department's

48. Because Congress has delegated lawmaking authority to the Department to implement § 9, there was "law" to apply in the Case of the Spotted Owl, namely the regulation. But the issue in the case was whether the meaning of the statute was inconsistent with the agency rule, and so a separate issue of law was what the statute meant.

49. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 714–36 (1995) (Scalia, J., dissenting).

50. *Id.* at 717–18.

51. *Id.* at 721–23 (invoking presumption of consistent usage).

52. *Id.* at 723–24 (invoking whole act canon).

53. *Id.* at 690–98 (Stevens, J., majority opinion).

application of the anti-take provision went beyond the common law usage of the term, Justice Stevens responded that ordinary and common law meanings are superseded when Congress has specifically defined the term, as it has in the ESA, and that the ordinary meaning of “harm” supported the Department.⁵⁴

Justice Scalia countered with a caveat that congressional definitions should be read narrowly when they are in derogation of established meanings and with an argument that “harm” should be read to be similar to the other verbs in the definition, all of which entail the targeting of a specific animal.⁵⁵ Justice Stevens replied that such a narrow reading of “harm” would render it statutory surplusage because a narrow reading of harm would simply duplicate the coverage of the other categories (trap, wound, harass, etc.).⁵⁶

Justice Stevens also pointed to legislative history contemplating that the anti-take provision of the endangered species bill would regulate habitat destruction by private parties—but Justice Scalia powerfully responded that the House and Senate sponsors of the legislation represented that the problem of habitat destruction would be solved by other provisions on the law.⁵⁷ Section 7(a) specifically barred federal agencies from supporting projects that threatened critical habitat for endangered species,⁵⁸ and § 5 authorized the Department to use the government’s eminent domain power to secure habitat needed by endangered species.⁵⁹ The legislative history invoked by Justice Scalia indicated that the original statutory scheme was probably inconsistent with the Department’s harm regulation.

Justice Stevens did not have a good response to the legislative history of the 1973 Act—but he found support in subsequent amendments to the statute.⁶⁰ After 1975, Congress rejected a number of bills seeking to override the

54. *Sweet Home*, 515 U.S. at 697–98, n.10 (invoking interpretive direction canon and ordinary meaning canon for definitional term “harm”).

55. *Id.* at 719–20 (Scalia, J., dissenting) (invoking *noscitur a sociis* canon).

56. *Id.* at 698 n.11 (Stevens, J., for the Court).

57. *Id.* at 727–28 (Scalia, J., dissenting) (quoting floor speeches by both the House and Senate sponsors of the bills that were the basis for the Endangered Species Act of 1973).

58. Endangered Species Act of 1973, 16 U.S.C. §§ 1536 (“Each Federal agency shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . .”).

59. *Id.* § 1534(a)(1)–(2) (“To carry out such a program, the appropriate Secretary—shall use the land acquisitions and other authority under the Fish and Wildlife Act of 1956 . . . [and] is authorized to acquire by purchase, donation, or otherwise, lands, waters, or interest therein, and such authority shall be in addition to any other land acquisition authority vested in him.”).

60. *Sweet Home*, 515 U.S. at 700–01 (Stevens, J., majority opinion) (referring to the amendment of 16 U.S.C. § 1539 in 1982, which allowed for limited circumstances in which a permit could be granted where the action at issue might normally violate the Act).

Department's broad interpretation.⁶¹ When Congress did act, in the Endangered Species Act Amendments of 1982, it amended § 10 of the statute to require the Department to exempt landowners from the anti-take provision if they could show that the habitat-protection rule denied them important use of their land and if they would follow a plan to minimize the deleterious effect on endangered species.⁶² The legislative history of the 1982 Amendments established that revised § 10 of the Endangered Species Act built upon, and implicitly ratified, the Department's anti-take interpretation.⁶³ Justice Scalia denounced the majority's reliance on the 1982 Amendments but had no response to Justice Stevens's argument that Congress in 1982 built upon and implicitly ratified the Department's earlier interpretation.

Both Justice Stevens, for the *Sweet Home* majority, and Justice Scalia, for the dissenters, presented their arguments in classic positivist terms. Each learned jurist made a detailed case for his interpretation of the Endangered Species Act, based upon conventional sources almost universally accepted within our legal culture—namely, ordinary meaning, deductions from the whole statute and even the larger U.S. Code, binding Supreme Court precedents, legislative history, the statutory purpose, and agency constructions. Of course, they reached different conclusions—but that is not too alarming: very often, the conventional sources will point in more than one direction. As H.L.A. Hart said, in the hard cases, the law will run out and the judge will have to exercise discretion to fill in the gap.⁶⁴

But what is strikingly odd about the debate in the Case of the Spotted Owl is that neither Stevens nor Scalia conceded that this was a “hard case.” To be sure, Justice Stevens came close. He noted that he had a lower standard to meet in affirming the agency: the Department's interpretation did not have to be one that the Court would have reached, but only a reasonable understanding within the range of interpretations permitted by the statutory text.⁶⁵ But as his majority opinion moved through the conventional sources, Justice Stevens seemed increasingly persuaded that the Department's interpretation was also

61. Brief for the Petitioners, at 31a–36a, *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995) (No. 94-859) (Solicitor General's brief, recounting congressional deliberations after the “harm” regulation was promulgated).

62. Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, 96 Stat. 1422–24 (1982) (codified as amended at 16 U.S.C. § 1539 (2006)).

63. *Sweet Home*, 515 U.S. at 700–01 (majority invoking whole act canon in indicating that when Congress added an administrative process providing relief for farmers and ranchers whose projects would incidentally harm the habitat of endangered species, Congress was relying on the Department's interpretation of “harm”); *id.* at 703 n.17 (Congress also relied on the Department's understanding when it amended the law in 1978).

64. *See supra* notes 41–43 and accompanying text.

65. *Sweet Home*, 515 U.S. at 700, 703–04, 708.

hardwired into the statute, especially after the 1982 Amendments.⁶⁶ For the majority, this was not a hard case; it appeared that the agency interpretation would have prevailed anyway. Justice Scalia unequivocally found this to be an easy case—but easy to reach the opposite conclusion: that the agency was dead wrong and that “take” did not entail untargeted habitat destruction.

It is odd enough that judges applying the same sources would have reached such diametrically opposed conclusions, and with no one willing to admit that this was a hard case and that interpreters were essentially making law. This oddity is even deeper. Based on the conventional sources alone, it seems to me that Justice Stevens was simply wrong about the 1973 Act: it prohibited habitat destruction for federally supported projects, as § 7(a) specifically said, but did not implicitly prohibit habitat destruction by private landowners under § 9(a).⁶⁷ Justice Scalia’s law clerk found the smoking gun, namely, the House and Senate sponsors’ explanation for the original structure of the Act. So good for Justice Scalia (and the law clerk)—except that, in my view, Justice Scalia was simply wrong about the 1982 Amendments. Based on the same kind of legislative materials Scalia used to explain the 1973 Act, Stevens cogently demonstrated that the 1982 Amendments built upon and meant to ratify the Department’s 1975 regulation.

This deepens the positivist mystery: not only did both Stevens and Scalia view this as an easy case from a positivist perspective, but considering only the conventional sources each Justice clearly got the decision wrong in an important respect. Not only was the case harder than any of the Justices conceded, but each side was blind to the easy features of the case that cut against the result for which each side voted. Something more was going on, and Justice Scalia, typically, suggested what it probably was.

In his new book, Scalia, who is in a good position to know, says that judges have a “tendency . . . to imbue authoritative legal texts with their policy preferences” and their personal moral philosophies.⁶⁸ Does that explain the

66. Compare *id.* at 697 (indicating that the agency view only had to be “reasonable” for the Court to go along with it), with *id.* at 701 (finding that Congress accepted the agency’s view in the 1982 Amendments).

67. The same quandary was apparent in the D.C. Circuit panel that decided *Sweet Home*. *Sweet Home Chapter of Cmty. for a Great Or. v. Babbitt*, 1 F.3d 1 (D.C. Cir. 1993). Initially, the panel went three different ways. Liberal Judge Mikva found the Department’s interpretation valid under both the 1973 Act and the Act as amended in 1982. *Id.* at 8–9 (Mikva, J., concurring). Conservative Judge Sentelle found the interpretation invalid under the Act as amended. *Id.* at 12 (Sentelle, J., dissenting). Moderately conservative Judge Williams found the interpretation inconsistent with the 1973 Act but saved by the 1982 Amendments. *Id.* at 11 (Williams, J., concurring). So only Judge Williams got the conventional sources right—yet he changed his vote on rehearing. See *Sweet Home Chapter of Cmty. for a Great Or. v. Babbitt*, 17 F.3d 1463, 1472 (D.C. Cir. 1994) (Williams, J., majority opinion) (invalidating the regulation, over the dissent of Judge Mikva) *rev’d*, 515 U.S. 687 (1995).

68. SCALIA & GARNER, *supra* note 11, at xxviii.

Justices' different interpretations in the Case of the Spotted Owl? Yes, it does—and the best evidence for that proposition comes in Justice Scalia's *Sweet Home* dissent. At the beginning of his dissenting opinion, Justice Scalia objected to the result reached by his colleagues—not on conventional legal grounds, but on grounds of political morality: “The Court’s holding that the hunting and killing prohibition incidentally preserves habitat on private lands imposes unfairness to the point of financial ruin—not just upon the rich, but upon *the simplest farmer* who finds his land *conscripted to national zoological use.*”⁶⁹ This anti-socialist barb was not merely a signal that the dissenters’ votes were motivated by something other than the conventional sources traditionally deployed in statutory cases, but was a précis of the political philosophy that provided the organizing framework for the dissenting opinion.

The baseline for Justice Scalia’s dissent is the political and moral philosophy of Sir William Blackstone, updated to understand the sagebrush rebellion of the 1990s, namely, the reaction by western ranchers and farmers to what they considered excessive federal interference with their control over their own property.⁷⁰ A natural law thinker who viewed the law in moral, liberty-loving terms, Blackstone also provided a synthesis of the common law of the eighteenth century, which assured well-nigh absolute protection for landowners to do anything with their property that did not tangibly harm other landowners.⁷¹ In the last generation, the sagebrush/property rights social movement objected that environmental regulations violated this Blackstonian norm.⁷² President Ronald Reagan (1981–89), who appointed Justice Scalia to the Court and elevated Justice Rehnquist (a second *Sweet Home* dissenter) to Chief Justice, endorsed the property rights social movement during his term in office and, consistent with the views of its leaders, supported the movement’s notion that excessive environmental regulation was not only inefficient and anti-libertarian, but amounted to a “taking” of private property.⁷³

69. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 714 (1995) (Scalia, J., dissenting) (emphasis supplied to highlight the charge of socialist oppression).

70. See generally Jonathan H. Adler, *Back to the Future of Conservation: Changing Perceptions of Property Rights and Environmental Protection*, 1 N.Y.U. J.L. & LIBERTY 987 (2005). On the origins and early activism of the property rights movement, see Nancie G. Marzulla, *Property Rights Movement: How It Began and Where It Is Headed*, in *A WOLF IN THE GARDEN: THE LAND RIGHTS MOVEMENT AND THE NEW ENVIRONMENTAL DEBATE* 39 (Philip D. Brick and R. McGregor Cawley eds., 1996).

71. 1 WILLIAM BLACKSTONE, *Commentaries on the Laws of England* *134–35 (1765) (providing an influential statement of the common law’s strong protection of property rights, grounded in natural law and resistant to regulation even when justified by the “general good of the whole community”).

72. Marzulla, *supra* note 70 (leading statement, by a property rights activist, of the origins and evolution of that social movement).

73. *Governmental Actions and Interference with Constitutionally Protected Property Rights*, 53 Fed. Reg. 8,859, 8,859, 8,861 (Mar. 18, 1988). See generally Nancie G. Marzulla, *State*

Now reconsider Justice Scalia's *Sweet Home* dissent, which assumes a great deal more coherence and cogency when viewed through the normative lens described above. Although Congress defined the statutory term "take" very broadly, Scalia read the legislative definition as narrowly as possible, to be consistent with the common law (neo-Blackstonian) understanding of "take."⁷⁴ The legislative purpose to protect habitat was clearly and broadly stated on the face of the statute, but Justice Scalia narrowed that purpose by a reading of the statutory structure that reflected a Blackstonian preference for highly limited government: presumptively, landowners can use their property as they like, consistent with state common law of property and without "feudal" restrictions from federal bureaucrats.⁷⁵ Under Justice Scalia's common law assumptions, moreover, the broad regulatory ambit of the 1975 "harm" regulation was inconsistent with Scalia's view that excessive regulation required compensation under the Fifth Amendment.⁷⁶

Read against the Blackstonian baseline, the 1982 Amendments represented a natural safety valve for property owners, and not a ratification of agency overreaching. Scalia would have been willing to read revised § 10 of the statute to be a legislative "ratification" of the agency's socialistic "harm" regulation only if there had been an exceptionally clear statement to that effect, which Congress did not provide.⁷⁷ Responding to the Court's reliance on legislative reports to read the 1982 Amendments more broadly, Justice Scalia closed his dissenting opinion with the view that the nation would be imperiled if members of Congress actually read and relied on the excessively detailed

Private Property Rights Initiatives as a Response to "Environmental Takings", 46 S.C. L. REV. 613 (1995).

74. *Sweet Home*, 515 U.S. at 717–20 (Scalia, J., dissenting) (making this point and citing Blackstone).

75. Blackstone, *supra* note 71, at *134–35. Responding to the environmental movement's demand that costs to the environment justified federal regulation of land use during the Bush 41 Administration, the property rights social movement specifically claimed that the new regulations represented a "new feudalism," where land was encumbered by restrictions preventing efficient owners from putting land to its best use. John McLaughry, *The New Feudalism*, 5 ENVTL. L. 675, 676–78 (1975); Bruce Yandle, *Escaping Environmental Feudalism*, 15 HARV. J.L. & PUB. POL'Y 517, 517 (1992).

76. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992) (Scalia, J.) (expanding upon the Court's Fifth Amendment "takings" law and suggesting, in dictum, that state regulations of property that went beyond the old common law of nuisance abatement might trigger just compensation requirements as regulatory takings); see also BLACKSTONE, *supra* note 71, at 134–35 (recognizing power of eminent domain, but only with full compensation, only by explicit legislative action, and only with the utmost "caution" in the exercise of this exceptional power).

77. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 729–30 (1995) (Scalia, J., dissenting). For earlier cases where Justice Scalia required a clear statement, or even a super-clear statement, from Congress before he was willing to displace state property rules with federal policies, see *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (Scalia, J.) and *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (Scalia, J., plurality opinion).

stuff in these committee reports.⁷⁸ In short, Sir William Blackstone trumped the members of the Senate and House Conference Committee that crafted the 1982 Legislative Compromise.

Justice Scalia made his dissenting case by toggling between his Blackstonian normative baseline and his conventional arguments. The conventional arguments, by themselves, were not decisive but become so when considered in light of the Blackstonian baseline. From Scalia's point of view, the agency had the burden of demonstrating that Congress in either 1973 or 1982 had affirmatively trumped state property rights with the agency's intrusive regime; this was a burden the agency could not carry with general understandings about what "harm" might mean or the presumed "assumptions" of the 1982 Amendments.

Likewise, Justice Stevens, for the majority, toggled between facts and norms, albeit without the colorful language deployed by the dissenters. And, of course, his toggling involved a different norm. Thus, Stevens anchored his interpretation upon the "green property" norm, the modern regulatory notion that landowners have, since 1970, been on notice that they cannot impose costs on the environment without expecting regulatory pushback.⁷⁹ Rather than just blandly ruling that the statute was ambiguous enough to include the Department's "harm" regulation, Justice Stevens brigaded that interpretation with immense legal support. It resulted in Justice Stevens's clinching argument that Congress encoded the Department's interpretation into revised § 10(a)—that the Department could not easily have changed its "harm" regulation after 1995.⁸⁰ And his insistence, against the weight of the evidence, that the Department's regulation was consistent with the 1973 Act can best be explained by the majority's unsupported assumption that the landmark environmental statutes adopted between 1969 and 1978 transformed the public culture in this country and entrenched the green property idea.⁸¹

The jurisprudential toggling that both majority and dissenting Justices did in the Case of the Spotted Owl suggests several dilemmas for positivism as a persuasive account of American statutory jurisprudence. As Scott Shapiro has demonstrated, Hartian positivism is an anti-formalist approach to statutory

78. *Sweet Home*, 515 U.S. at 730–31 (Scalia, J., dissenting).

79. See PHILIP SHABECOFF, A FIERCE GREEN FIRE: THE AMERICAN ENVIRONMENTAL MOVEMENT 129–35 (1993); J. Peter Byrne, Green Property, 7 CONST. COMMENT. 239, 243 (1990); Terry W. Frazier, *The Green Alternative to Classical Liberal Property Theory*, 20 VT. L. REV. 299, 316, 362 (1995); David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 HARV. ENVTL. L. REV. 311, 314 (1988).

80. *Sweet Home*, 515 U.S. at 701–02.

81. On the normative transformation surrounding these environmental super-statutes, see WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 256, 263–64, 282–85, 294, 300–01 (2010).

interpretation, for it concedes and even celebrates the realist insight that the law runs out in a lot of cases, and judges then fill gaps in the law with policy judgments.⁸² This entails a lot of lawmaking discretion by nonelected, tenured-for-life federal judges and justices. What social fact or practice authorizes this degree of discretionary judicial authority? Neither Hart nor Scalia nor Shapiro nor any other legal positivist has, to my knowledge, demonstrated a social practice sanctioning or even tolerating this view of judging, and in recent decades there seems to be a strong social norm against any admission of Hartian discretion.⁸³

Indeed, the behavior of the Justices in the Case of the Spotted Owl illustrates and confirms this strong social norm. The issue in the case was one of great public moment—and all nine Justices made every effort to indicate that there was law to apply and that judges or administrators were not making policy that had not been endorsed by Congress. The closeting of competing understandings of political morality in *Sweet Home* is testimony to the power of the social understanding that there are legally determinable answers in most cases involving major statutory issues. In short, judges in our society are pressured to turn hard cases into easy cases and at least pretend that the law has not run out. Therefore, at least in the United States, it is not clear that the social consensus foundation for Hartian positivism has been established; the burden of course is on the defenders, who may or may not be able to carry it.

Put aside the thorny question of whether the social foundation for hard cases exists in American political culture and focus on the dispute about the meaning of the Endangered Species Act in *Sweet Home*. For none of the Justices did the application of law ultimately depend on the conventions that are widely accepted in our legal and political culture. All of the Justices thought there was a right answer in the case; they reached different right answers, and I have tried to demonstrate that not a single Justice mounts a persuasive case based only on conventional legal criteria. Both majority and dissenting opinions rested, at bottom, on competing political philosophies. In short, the application of law depended upon the normative framework through which judges and agencies pick and choose among conventional sources and

82. SHAPIRO, LEGALITY, *supra* note 28, at 246–48.

83. For an ambitious historical statement against the Hartian assumption as an explanation of our traditions, see John Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 5, 78–79, 85–86, (2001) (describing the tradition, throughout American history and especially during the founding era, as demanding that judges be nothing more than “faithful agents” of the legislature). For a counter-narrative demonstrating greater public tolerance for normative judicial engagement with statutes, see William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 991–93 (2001).

calibrate their selected canons to fit with the moral philosophy, rather than vice-versa.⁸⁴

The Case of the Spotted Owl is already a statutory interpretation classic because of the intense debate between Justices Stevens and Scalia, each brandishing dozens of conventional sources of statutory meaning. Accordingly, *Sweet Home* is one of the statutory interpretation anchors for the legal positivist canon—yet the debate within the Court toggles intensely between factual arguments and normative baselines. *Sweet Home* is far from idiosyncratic in this regard. In most, perhaps all, of the hard statutory cases, judges toggle between conventional sources and competing—often closeted—normative visions.⁸⁵ In my view, neither the conventional sources nor the normative philosophies do all the work for the clashing opinions.⁸⁶ At the risk of mixing metaphors, facts and norms are like two blades in a scissors, each working with the other to do the cutting.

The problem of closeted norms seems to me most severe for those positivist theories maintaining that law and legal interpretation must operate exclusively by reference to social facts and conventions, which exclude norms and morality.⁸⁷ The pervasiveness of norms is particularly inconsistent with Justice Scalia's presentation of positivist statutory interpretation, which is why I called this lecture "Nino's Nightmare." The problem also afflicts positivist theories which maintain that law and legal interpretation may operate by reference to social facts and conventions that include moral precepts.⁸⁸ There is no generally accepted convention in American social or legal culture that says judges should impose their moral vision upon statutes in hard cases, and there is certainly no convention that says judges should separate easy from hard cases based upon their moral evaluation of the different interpretations. So the

84. While the conventional legal sources are not completely manipulable, in the hard cases, there will be enough variety of legal sources for either side to have conventional materials to work with and mold into a line of argument that its partisans find persuasive.

85. For other classic examples, see, for instance, *Ricci v. DeStefano*, 557 U.S. 557, 584, 625–26 (2009), and *Johnson v. Transportation Agency, Santa Clara County, California*, 480 U.S. 616, 629, n.7, 671 (1987) (affirmative action); *Gonzales v. Oregon*, 546 U.S. 243, 255–56, 278, 302 (2006) (preemption of state death with dignity law); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132, 159, 163, 181 (2000) (tobacco regulation); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15, 132–33, 140 (2001) (arbitration of labor disputes).

86. However strongly Scalia is attached to the Blackstonian baseline in cases like *Sweet Home*, he would probably have deferred to the agency if the conventional sources had been more conclusively supportive of the agency.

87. These theories are considered an "exclusive" version of legal positivism. See RAZ, *supra* note 13, at 37–52; SHAPIRO, LEGALITY, *supra* note 28, at 267–73.

88. These theories are considered an "inclusive" version of legal positivism. Jules L. Coleman, *The Architecture of Jurisprudence*, 121 YALE L.J. 2, 53–59 (2011); see also ANTHONY SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE 269–94 (1998) (arguing for an inclusive legal positivism).

nonconventional but overwhelming force of norms and morality in cases like *Sweet Home* poses a challenge to all the leading positivist theories of statutory interpretation.

II. NORMATIVISM AND THE PROBLEM OF INCONVENIENT FACTS

Perhaps inspired in part by H.L.A. Hart's Holmes Lectures, Ronald Dworkin (who was a third-year law student at the time of those lectures) has devoted his career to jurisprudence, and with great success. He succeeded Hart as the Professor of Jurisprudence at Oxford and as the leading Anglo-American jurist. Professor Dworkin also is the leading critic of Hart's positivism and is the successor of Lon Fuller (his law school professor) as the leading exponent of what most jurists call a "natural law" theory.⁸⁹ I do not follow that usage. Classic natural law theory, such as that espoused by St. Thomas Aquinas and his successors, maintains that immoral law is no law whatsoever and that valid law must be applied according to the objective morality that is the basis for such laws.⁹⁰ Unlike the classic natural lawyers, Dworkin (like Fuller) emphasizes the norms and principles integral with our legal traditions, not external to it.⁹¹ For this reason, I prefer the term *normativism* to refer to theorists who maintain that the operation of law depends upon normative judgments apart from those marked by conventions. Such a term is broad enough to include the interpretations of both Thomas Aquinas and Ronald Dworkin.

However his jurisprudence is labeled, Professor Dworkin would understand the debate in the Case of the Spotted Owl very differently than most positivists view it. Justices Stevens and Scalia both present their debate as an "empirical" disagreement about what the Hartian sources of law require in this case. As I have demonstrated above, the debate is actually more deeply normative—what Dworkin would call a "theoretical" disagreement about the "grounds" of law.⁹² To resolve the case against the agency, Scalia interprets the "grounds" of law to be substantially Blackstonian: the old common law of property, preserved largely at the state level, is the starting point for law; statutory disturbances to the old common law rules are to be enforced to the letter, but not one article or comma beyond what the statute explicitly

89. For such an assessment, see, e.g., SHAPIRO, *supra* note 28, at 284–295.

90. II THOMAS AQUINAS, *SUMMA THEOLOGICA* at Q. XC, art. ii (1485) (various sources of law, emphasizing the eternal law which is the basis for just and right human laws).

91. DWORKIN, *supra* note 11, at 225–75 (rejecting the positivist "plain fact view" of law and advancing "law as integrity" as an internally superior understanding of what law is).

92. *Id.* at 3–15. As an example of a theoretical disagreement, Dworkin invokes the earlier ESA case, *TVA v. Hill*. See *id.* at 20–23. In my view, the debate in *Sweet Home* is a much cleaner example of theoretical disagreement than *TVA v. Hill*.

requires.⁹³ To resolve the case in favor of the agency, Stevens interprets the “grounds” of law to be substantially Rooseveltian: statutory norms have replaced the common law as the legal baseline, and environmental statutes are to be applied liberally to achieve their purposes of non-degradation and renewal.⁹⁴

Professor Dworkin would have smiled when he read Scalia’s opening barb that the “simplest farmer” ought not be “conscripted for national zoological use,” for it brings his point out into the open. While it is ridiculous to view the debate as one pitting common law liberty for the yeoman farmer against socialist central planners, Scalia’s barb, followed by his relentlessly Blackstonian focus, suggests that even the Court’s most uber-positivist judge understood the Case of the Spotted Owl to be not just an interpretation of the statute, but also an interpretation of what Dworkin calls the “grounds” of law.⁹⁵

Dworkin’s smile would have faded as he waded (or skimmed) through the many pages of legal analysis in *Sweet Home*. Exhausting themselves by trading canons of statutory construction and references to legislative history, Stevens and Scalia would have provided a more illuminating debate if they had pursued the larger project suggested by Scalia’s barb. According to Dworkin, that debate should have asked the larger question: Is the Department’s coercive application of the statute to restrict the liberties of the Sweet Home plaintiffs morally *justified* by past political decisions?⁹⁶ Scalia’s indignant dissent suggests that he strongly believed the coercion was not justified; Stevens’s increasingly passionate majority opinion suggests that he considered the coercion amply justified.

What Professor Dworkin calls “law as integrity” presupposes a different inquiry than that pursued by positivist theories. As with Hartian theory, Dworkinian theory operates at two levels. At the meta-level, Dworkin “supposes that law’s constraints benefit society not just by providing predictability or procedural fairness, or in some other instrumental way, but by securing a kind of equality among citizens that makes their community more genuine and improves its moral justification for exercising the political power it does.”⁹⁷ Dworkin maintains that his meta-theory is superior to the positivist meta-theory. Dworkin’s defense rests upon his conception of a legitimate and good political community.⁹⁸ What creates a political community is not an

93. *See supra* text accompanying notes 72–81.

94. *See supra* text accompanying notes 82–84.

95. DWORKIN, *supra* note 11, at 4–7; *see also* SHAPIRO, LEGALITY, *supra* note 28, at 284–87, 295–304 (providing a useful explication of Dworkin’s deployment of this terminology).

96. DWORKIN, *supra* note 11, at 96–97.

97. *Id.* at 95–96.

98. *Id.* at 167–216 (setting forth the idea that the notion of community can be personified, and that such personification allows a community to strive for ideals rooted in integrity).

abstract (and largely meaningless) social contract that may have been established in a bygone era, but instead the shared and interconnected lives that we lead and that are enriched by our shared history. In a “true community,” he argues, “legitimacy—the right of a political community to treat its members as having obligations in virtue of collective community decisions—is to be found not in the hard terrain of contracts or duties of justice or obligations of fair play that might hold among strangers . . . but in the more fertile ground of fraternity, community, and their attendant obligations.”⁹⁹

Professor Dworkin then contrasts his understanding of community from the one he attributes to positivists. Thus, he distinguishes between a *rulebook community* and a *community of principle*.¹⁰⁰ Reflecting positivist jurisprudence, the former “supposes that members of a political community accept a general commitment to obey rules established in a certain way that is special to that community.”¹⁰¹ The latter “insists that people are members of a genuine political community only when they accept that their fates are linked in the following strong way: they accept that they are governed by common principles, not just by rules hammered out in political compromise.”¹⁰² Law in both kinds of community rests upon shared understandings—but in Dworkin’s preferred community of principle the shared understandings are normative rather than just procedural. Furthermore, of course, Dworkin assumes that everyone would rather live in a community of principle (where we are connected and happy) than in a rulebook community (how boring).

Having made a brilliant argument in support of his meta-theory, Professor Dworkin then sets forth the implications of the meta-theory for interpretive methodology. In statutory interpretation, law as integrity requires the judge as a “creative . . . partner continuing to develop, in what he believes is the best way, the statutory scheme Congress began. He will ask himself which reading of the act . . . shows the political history including and surrounding that statute in the better light.”¹⁰³ Following Fuller quite closely, Dworkin also insists that his judge “interprets not just the statute’s text but its life, the process that begins before it becomes law and extends far beyond that moment.”¹⁰⁴

99. *Id.* at 206.

100. *Id.* at 209–10 (rulebook community, associated with convention-based theories of law, including positivist theories) and 211–15 (community of principle, associated with law as integrity).

101. DWORKIN, *supra* note 11, at 210.

102. *Id.* at 211.

103. *Id.* at 313. Dworkin proceeded to apply law as integrity to an exegesis of the Endangered Species Act and its application to the Case of the TVA Dam, which he would have exempted from the plain meaning of the statute. *Id.* at 337–47.

104. *Id.* at 348 (paraphrasing LON FULLER, *LAW IN QUEST OF ITSELF* 8–10 (1940), in saying that statutes, like stories, change over time and enjoy a “process of becoming”).

Consider the application of law as integrity to the Case of the Spotted Owl. Arising out of the environmental movement and its endorsement of the biodiversity norm, the Endangered Species Act of 1973 is, by Dworkin's account, our nation's bipartisan commitment to a policy of species conservation.¹⁰⁵ With due respect to the continuing Blackstonian features of our post-New Deal legal commitments (for example, the continued respect for private property), Dworkin would sharply dispute Scalia's eagerness to read the statute narrowly. The biodiversity purpose of the law should be broadly applied, not because a canon of construction says so or even because Dworkin and his fellow readers of the *New York Review of Books* believe that purpose is in the long term interest of the world and of the nation. It should be broadly construed because that is the best reading of our public commitments and our history.

To be sure, law as integrity would credit Scalia with making some serious points. As enacted in 1973, the Endangered Species Act seems to protect habitat primarily, and perhaps exclusively, through the § 5 authorization for government acquisition of habitat through eminent domain¹⁰⁶ and through the § 7(a) prohibition against federal agency projects that deprive endangered species of critical habitat.¹⁰⁷ Section 9(a) (the provision prohibiting "taking" of an endangered species)¹⁰⁸ might be read to augment the habitat protections of §§ 5 and 7, but is that the *best* reading, consistent with our nation's historic commitments to private property? Surely, the American public was not focused on this detail, and to the extent members of Congress were focused on it, they seem to have assumed that §§ 5 and 7 would address the habitat problem, as Scalia's legislative history indicated.

Additionally, law as integrity would ask this fundamental question: Did the nation's shared commitment to the biodiversity principle justify the fundamental shift in legal rules applicable to farmers and ranchers using and developing their property? If "take" (and "harm") were construed to regulate only targeted harms to particular endangered animals, as the plaintiffs in *Sweet Home* urged, there would be minimal disruption to private property rights. But if "take" (and "harm") were construed to regulate habitat disruption as well, like the agency said, then property law would be fundamentally altered. Law as integrity, as I read it, ought to require more democratic deliberation before

105. See DWORKIN, *supra* note 11, at 339 (drawing from the discussion of *TVA v. Hill*, which was an application of the Endangered Species Act, as was *Sweet Home*). Complementing Dworkin's account are the facts that the statute was proposed by Republican President Richard Nixon, was enacted by virtually unanimous bipartisan majorities in a Democratic Congress, and was implemented broadly by the Interior Department of Nixon's GOP successor, President Gerald Ford.

106. 16 U.S.C. § 1534(a).

107. *Id.* § 1536(a).

108. *Id.* § 1538.

endorsing such a fundamental shift in the balance of two important principles (the old principle that property owners have great freedom to use their land and the new principle of preserving biodiversity).

Like Justice Stevens did in *Sweet Home*, however, the Dworkinian interpreter would then examine the continuing deliberations, once Congress and the public became aware that a habitat-preservation rule could often be very costly. In 1978, and responding to *TVA v. Hill*, Congress addressed this concern in the context of § 7(a) by creating an executive department committee to exempt federal projects when habitat protection would be too expensive.¹⁰⁹ And in the 1982 Amendments, Congress addressed the same concern in the context of section 9(a) by directing the Department to exempt private projects that had the incidental (unintended) effect of harming habitat.¹¹⁰ In both statutory responses, farmers and ranchers raised their concerns, and in the 1982 Amendments their congressional partisans agreed to retain the Department's "harm" regulation but soften it with the expanded exemption in § 10(a).¹¹¹

In the end, law as integrity, as applied by Professor Dworkin, would probably agree with the Supreme Court in *Sweet Home*, but through a somewhat different reasoning process—one where the normative debate would have been uncloseted and robust. Immediately, I should add that a good case for Justice Scalia's dissent can be constructed by reference to the methods of integrity, and indeed I believe that his dissent can and should be read through the lens of integrity. To be sure, this would make Nino's Nightmare even more frightening than I earlier posited. Imagine his horror if Justice Scalia dreamed that he was morphing into Ronald Dworkin as he read his *Sweet Home* dissent to a hushed, and increasingly shocked, courtroom.

Statutory interpretation, according to law as integrity, requires much more than an interpreter's engagement with conventional legal sources; it also insists upon an interpretation of the statute's ongoing history in a way that makes it the best statute it can be, and it also seems to entail a meta-interpretation of the nation's political history, putting that history in its best light.¹¹² Frankly, this seems like a very hard task, which is, apparently, why Dworkin calls his law as

109. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 7, 92 Stat. 3759 (codified as amended at 16 U.S.C. § 1536(o) (1978)) (exempts from § 9 federal habitat-threatening projects (like the TVA dam) if they are granted an exemption from § 7(a)'s rules for federal projects through a new procedure Congress created in 1978).

110. Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, 96 Stat. 1418 (codified at 16 U.S.C. § 1536 (1982)).

111. 16 U.S.C. § 1539(a) ("The Secretary may permit, under such terms and conditions as he shall prescribe—any taking otherwise prohibited by 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.").

112. See SHAPIRO, *supra* note 28, 304–06 (highlighting the notion of meta-interpretation as central to the Dworkinian enterprise).

integrity judge “Hercules.”¹¹³ And it seems like an impossible task to hand off to judges and expect them to reach agreement, which creates problems for Dworkin’s famous neo-formalist position that, contrary to Hart, there are always “right answers” in law.¹¹⁴ Even if you put a gun to the head of Justice Scalia and required him to think and write just like Professor Dworkin as a matter of methodology, I have little doubt that Nino-Hercules would retain his strong opinion that the agency was wrong, while Ronnie-Hercules would say that it was right. Under law as integrity, either version of Hercules could make excellent arguments supporting the proposition that the community of principle supports his interpretation.

More fundamentally, Nino-Hercules might reject the preference for a community of principle over a rulebook community that undergirds Dworkin’s meta-theory. Dworkin finds it self-evident that the community of principle is more consistent with American traditions than a rulebook community is.¹¹⁵ Note, however, that this proposition involves factual investigation that Professor Dworkin does not even attempt. This is a big problem. Specifically, if the community of principle entails judicial opinions along the lines outlined by Dworkin, I think it much harder to justify by reference to American tradition, even under a meta-analysis that seeks to make it the best it can be. I doubt that American traditions would tolerate judges who put on the philosophical airs of Ronnie-Hercules.¹¹⁶ Even Chief Justice John Marshall, the greatest statutory as well as constitutional interpreter in our nation’s history, dared not pretend to be Hercules and declined to brigade his judicial opinions with explicit political philosophy.¹¹⁷ Scalia’s notion that judging

113. See DWORKIN, *supra* note 11. A name choice I have always found baffling. In Greek mythology, Hercules was very strong but not very smart, and certainly not the polymath genius a Dworkinian judge needs to be. So I’d have expected Hercules to have been a Dworkinian foil, the obtuse jurist who “strong-arms” desired meaning out of statutes, rather than a Dworkinian idol. If I were searching Greek mythology for a wise integrity-ridden judge, I’d choose the brainy Athena rather than the muscle-headed Hercules.

114. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22–34 (1978); George C. Christie, *Dworkin’s “Empire”*, 1987 DUKE L.J. 157 (1987) (reviewing RONALD DWORKIN, *LAW’S EMPIRE* (1986)). Christie suggests that Dworkin repeatedly fudges on the one-right-answer position at various points of *Law’s Empire*. *Id.* at 184.

115. DWORKIN, *supra* note 11, at 211–16.

116. For an elaborate historical exegesis of America’s founding era and beyond, see SHAPIRO, *LEGALITY*, *supra* note 28, at 313–29, which concludes from that history that “any conception of law that requires for its implementation a great deal of philosophical competence, moral rectitude, and political homogeneity will clash irredeemably with such a legal structure” as our nation has created. *Id.* at 329; accord, Jeremy Waldron, *Planning for Legality*, 109 MICH. L. REV. 883, 899–902 (2011) (reviewing Scott SHAPIRO, *LEGALITY* (2010)).

117. William N. Eskridge, Jr., *All About Words*, 101 COLUM. L. REV. 990, 995–97 (2001) (analysis of Marshall’s early statutory interpretation opinions, where the Chief Justice applied

ought to be presented as a simpler process of discovery rather than a complicated process of construction¹¹⁸ is one that is probably more congenial to American popular traditions and is more consistent with the assumptions of the legislative process, as reported by Professors Abbe Gluck and Lisa Bressman.¹¹⁹

Indeed, Nino-Hercules would object to Ronnie-Hercules's insistence that there must be a hard binary choice between a rulebook community and a community of principle. Instead, there is a third way of understanding of American political traditions, namely, a *community of ordered liberty*. Many thoughtful scholars and citizens maintain that the principle that Americans have held most dear, from the founding of the nation, is the principle of liberty.¹²⁰ Among the fundamental liberties our country has protected is the freedom we have to be secure in our own homes and properties; "ordered liberty" reminds us that security entails regulation of property and conduct in the interest of society.¹²¹ A community of ordered liberty entails associational depth, but the associations within which we flourish are private ones and the role of government is to provide protection and structure for such private flourishing.¹²²

statutes in light of broader legal context, especially the law of nations, but did virtually no political theorizing).

118. Justice Scalia made exactly this move in *James B. Beam Distilling Co. v. Georgia*, where he explained Article III's "judicial Power" in practice:

That is the power 'to say what the law is,' *Marbury v. Madison*, 1 Cranch 137, 177 (1803), not the power to change it. I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law. But they make it *as judges make it*, which is to say *as though* they were 'finding' it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be.

501 U.S. 529, 549 (1991) (Scalia, J., concurring) (plurality opinion). Justice Scalia's concurrence was joined by Justices Marshall and Blackmun.

119. See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside: An Empirical Study of Legislative Drafting, Delegation, and the Canons*, STAN. L. REV. (forthcoming 2013) (draft summer 2012, discussed and quoted with permission) (congressional drafters assume a much simpler approach to judging than Dworkin's Hercules represents).

120. See, e.g., DAVID WOMERSLEY, *LIBERTY AND AMERICAN EXPERIENCE IN THE EIGHTEENTH CENTURY* (2006) (a collection of essays, including a splendid one from Professor Gordon Wood, demonstrating the strong libertarian commitments of the founding generation).

121. See, e.g., JAMES E. FLEMING & LINDA C. MCLAIN, *ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES* (2013); JOHN RAWLS, *POLITICAL LIBERALISM* 4–7 (2005).

122. See F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 133–61 (1960) (detailing the necessity of order that society creates and how that necessity manifests itself as "abstract rules" we call law); F.A. HAYEK, *LEGISLATION AND LIBERTY: RULES AND ORDER* 112–13 (1973) (discussing the purpose of law in the context of philosophy and how we understand order); see also AMARTYA SEN, *THE IDEA OF JUSTICE* (2009) (reflecting a somewhat more positive and regulatory view of the subject).

The *Sweet Home* plaintiffs (and the Supreme Court dissenters) viewed their lawsuit against Secretary Babbitt in something like these principled terms: they were farmers and ranchers who wanted to work their land without harming anyone else, and without burdensome bureaucratic habitat rules encumbering their properties against routine use and development; their freedom of property use was not only foundational to their own lives, but also to the United States as a thriving political as well as economic community.¹²³ If Congress had wanted to impose such rules for a larger biodiversity purpose, it had the power to do so, though some of the plaintiffs may have thought the restrictions so great as to require the government to compensate them for effectively “taking” their property. But Congress had not done so. In the 1973 Act, Congress protected habitat through other mechanisms, where the costs of habitat conservation were on the government.¹²⁴ The Department’s 1975 “harm” regulation, which was a short paragraph attached to a long rule about alligators and which sneaked through the notice-and-comment process with virtually no attention to its drastic consequences, went beyond Congress’s 1973 deal, and the 1982 Amendments were not explicit enough to trump this fundamental principle of American political morality.

Not only could Justice Scalia have presented his arguments as a meta-interpretation in the Case of the Spotted Owl, but his crack about a farmer’s land being “conscripted to national zoological use”¹²⁵ suggests that he was in fact engaged in a process of meta-interpretation. Each analytical move in his dissenting opinion fits snugly in a law as integrity exercise, albeit one grounded in very different principles than those followed by the *Sweet Home* majority or by Professor Dworkin. While Dworkin might view Scalia’s meta-interpretivism (or my presentation of it) as terrible philosophy, the fact is that judges told to view law as integrity would tend to write the same kinds of opinions they do now. Calling the judges Hercules would not make their opinions much, if any, stronger.¹²⁶

Note the irony. H.L.A. Hart’s positivist theory of law does not necessarily reflect American social consensus, and the legal conventions it encourages

123. Brief for Respondents at 5, 37–38, 47–48, *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995) (No. 94-859), 1995 WL 130541.

124. *Id.* at 41, 46–48. Compare 16 U.S.C. §§ 1534, 1536 (eminent domain and federal program protections for habitat, where the cost of protecting endangered species would be assumed by the whole nation), with 16 U.S.C. § 1538 (the “take” provision, imposing costs on private as well as public landowners, and notably missing any explicit reference to habitat protection).

125. *Sweet Home*, 515 U.S. at 714 (Scalia, J., dissenting).

126. For a strong statement, see generally RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999) (relentless attack on the utility of moral philosophy in general and, even more, lawyers’ amateur deployment of it). Like H.L.A. Hart’s *Concept of Law*, Judge Posner’s *Problematocs* originated as his Holmes Lectures (delivered in 1997).

judges to use are not doing much work in the hard cases that judges treat as easy cases, like the Case of the Spotted Owl. But if American judges are engaged in reasoning from deep premises of political morality in the hard cases, as Ronald Dworkin maintains, they tend to be engaged in partisan rather than purely legal exercises because of the polarized public debate over a wide array of issues and the wide range of principles from which judges might cherry-pick to support an interpretation that fits with their prior belief systems.¹²⁷

Neither legisprudence is an entirely satisfactory understanding of statutory interpretation—but neither can be dismissed entirely. As positivism teaches, the ordinary work of the law is factual and conventional.¹²⁸ Following the accepted interpretive conventions, judges of all backgrounds find that most cases fall within the statutory core, including some cases that involve hard work by the judge to figure out the law's solution to the case's riddle. As normativism teaches, however, political morality and normative judgments must be made not only when cases fall within statutory penumbras, but also when judges have to decide whether value-laden cases fall within the core or within the penumbra.¹²⁹ Whether judges admit it or not, they will decide the hard cases by reference to larger policies and principles, including principles of political morality. As the Case of the Spotted Owl illustrates, decision-making in normatively high-stakes cases will toggle between conventional legal analysis and normative evaluation.

III. LEGAL PROCESS THEORY AS A LEGISPRUDENCE OF TOGGLING

Let us pause here to recall the argument that has been made. The analysis started with legal positivism developed by H.L.A. Hart. His convention-based view of law has the enormous virtue of usefulness; most everyday legal issues encountered by lawyers and judges are easy cases felling within law's core, with hard cases generated by changed circumstances over time. Antonin Scalia is an out-of-the-closet positivist, as are the other Justices on the Supreme Court. An important problem with positivism, as illustrated by the Case of the Spotted Owl, is that judges typically insist on finding law in the hard cases—

127. Cf. Dan M. Kahan, *Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1 (summarizing cultural cognition scholarship, which demonstrates that people respond to legal decisions and rules through the lens of preconceived cultural scripts that are hard to change); David Fontana & Donald Braman, *Judicial Backlash or Just Backlash? Evidence From a National Experiment*, 112 COLUM. L. REV. 731, 735, 746 (2012) (similarly explaining the effect of institutional preferences in the face of polarizing decisions).

128. See *supra* note 50 and accompanying text.

129. See *supra* note 36 and accompanying text.

and they do so through a process that toggles between facts and norms, and between conventions and political philosophy.

If statutory interpretation involves such a toggling between facts and norms, it is hard to consider it consistent with positivism, which maintains that “law” is established only by conventions and social facts, not by norms and political morality.¹³⁰ One version of positivism maintains that norms can be relevant on the ground that convention allows or requires law to take account of them,¹³¹ but there is no uncontroversial convention or practice that supports the kind of values analysis that occurred in the Case of the Spotted Owl. Nino’s nightmare, again: the jurist who is most emphatic in claiming that legal interpretation must be stripped of judicial values and normative analysis is the one whose normative priors are easiest to spot.

The normative turn in the Case of the Spotted Owl prompted a consideration of Ronald Dworkin’s theory of law as integrity. For the hard cases, law as integrity deepens our understanding of what judges are typically doing and even how they are thinking, albeit more crudely and with less information than Dworkin would like Herculean judges to have. Although Dworkin has not written about the Case of the Spotted Owl, one can easily imagine how law as integrity would analyze the issue presented by the case—and in a manner that would better justify the result reached by the Court. Indeed, the dissenting opinion would have been more powerful if Nino-Hercules had engaged in a more openly normative analysis. The dissenters had no conventional answer to the Court’s reliance on the 1982 Endangered Species Act Amendments. Their best argument would have been to defend their neo-Blackstonian baseline and argue that Congress needs to speak more clearly if it wants to impose huge costs onto farmers and ranchers, rather than stick with the original (1973) statutory scheme, where society as a whole absorbed the costs of protecting the habitat of endangered species.¹³²

But the Case of the Spotted Owl brought out a central problem with Dworkin’s meta-theory, which demands that political philosophy be grounded

130. See *supra* notes 27–33 and accompanying text.

131. This is the inclusive legal positivism described in Coleman, *supra* note 88, at 53–59.

132. That is, in the 1973 Act, §§ 5 and 7 were the provisions explicitly protecting habitat, the former through the government’s eminent domain power and the latter by limiting federal projects. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 889, 892. In both instances, the costs of protecting endangered species are dispersed generally (i.e., general taxes). *Id.* Section 9, which imposes costs more narrowly (i.e., on farmers and ranchers but not on urban dwellers and renters), did not specifically protect habitat. *Id.* at 87 Stat. 893. The agency’s 1975 harm regulation expanded § 9 to join the habitat-protective policy of §§ 5 and 7, but at no cost to the government. Endangered and Threatened Wildlife and Plants, 40 Fed. Reg. 44,412–13 (Sept. 26, 1975) (codified at 50 C.F.R. § 17.3). The dissenters probably felt that that shift was unfair, and Justice Scalia could have used that as his baseline for reading the 1982 Endangered Species Act Amendments narrowly.

in a factual as well as normative account of our polity's commitments. Ronnie-Hercules and Nino-Hercules start off with vastly different understandings of American history and of the values that undergird our shared community. Each version of Hercules toggles between facts/conventions and norms/philosophy as he makes his case both for a theory of statutory interpretation and for the application of the statute in *Sweet Home*.¹³³

With a clear idea of how positivist and normativist legisprudences present themselves as distinctive, and—I hope—a clear idea of the problems each legisprudence faces in light of the toggling phenomenon, it is time to consider a theory that has not been treated as a distinctive jurisprudence, namely, legal process theory.¹³⁴ Legal process theory is a distinctive legisprudence because it celebrates and indeed rests upon a pragmatic toggling between facts and norms.¹³⁵ In other words, the fact-norm toggling that causes problems for positivism and normativism becomes the central feature for legal process. Legal process theory is a legisprudence of toggling—and not just between facts and norms, but also (and perhaps more importantly) between agencies and courts as situses of statutory interpretation, an even more important contribution that legal process theory has made to American legisprudence.

The legal process approach is classically developed in teaching materials prepared by Professors Henry Hart and Albert Sacks on *The Legal Process*.¹³⁶ Although neither scholar was a jurisprude, they worked closely with and were

133. Thus, Nino-Hercules says that American history and normative commitments support a strict textualism as a theory of statutory interpretation, and that application of that theory in *Sweet Home* requires judges to overrule the agency's incorrect reading of the 1973 Act (even as amended). See SCALIA & GARNER, *supra* note 11, at 230–33. Ronnie-Hercules says that our history and commitments support an integrity-based theory of statutory interpretation, and would probably have applied that theory to affirm the agency in *Sweet Home*. See DWORKIN, *supra* note 11, at 249, 255.

134. The neglect of legal process theory by scholars of jurisprudence is being rectified by some excellent treatments in the last generation. See, e.g., SEBOK, *supra* note 88 (arguing that legal process is an important contribution to positivist jurisprudence, filling in important holes in H.L.A. Hart's understanding of the exercise of discretion); Vincent A. Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart & Sacks*, 29 ARIZ. L. REV. 413 (1987) (arguing that legal process theory was an important precursor for Dworkin's law as integrity; for example, it created the notion that interpretation involves consideration of general policies and principles as well as specific texts and purposes); Charles L. Barzun, *The Forgotten Foundations of Hart and Sacks* (Univ. of Va. Pub. Law and Legal Theory Working Paper Series, Paper No. 2011-44, 2011), available at <http://ssrn.com/abstract=1959406> (arguing that legal process is not simply a positivist theory but, instead, rests upon a jurisprudence informed by the pragmatism of William James).

135. Phil Frickey and I suggested that Hart and Sacks owed much to the philosophical pragmatism of John Dewey, see Eskridge & Frickey, *supra* note 5, at lxxv, and Charles Barzun now adds that the pragmatism of William James probably influenced their thought. See Barzun, *supra* note 134, at 16–18.

136. HART & SACKS, *supra* note 2, at xi.

influenced by Professor Lon Fuller, the leading normativist of their time, and engaged Professor H.L.A. Hart, the leading positivist, in a seminar on interpretive discretion when he visited at the Harvard Law School in 1956–57.¹³⁷ The next year, Hart and Sacks promulgated what was to be the last “tentative edition” of their legal process teaching materials. Those materials set forth an approach to statutory interpretation that has proven to be highly influential and, as I shall argue, jurisprudentially interesting and important. At the very least, purposive interpretation, along the lines laid out by Hart and Sacks, requires our attention because it is the most popular approach to statutory interpretation followed by judicial officials across the industrialized world.¹³⁸

In developing the outlines of a meta-theory, Professors Hart and Sacks started with the basic conditions of human existence, which entail cooperation in order to satisfy basic needs, not to mention advancing society and meeting its more ambitious goals.¹³⁹ Thus, people form institutions (families, partnerships, etc.), including the state, which is arguably the “overriding, general purpose group” with the greatest power and the greatest responsibility for “establishing, maintaining, and perfecting the conditions necessary for community life to perform its role in the complete development of man.”¹⁴⁰ The state exists “to avoid the disintegration of social order and the consequent destruction of the existing benefits of group living” and “to maximize the total satisfactions of valid human wants . . . by making a steadily more effective use of the resources of group living.”¹⁴¹ Consistent with this view of the state, Hart and Sacks offered the following theory of law: “Law is a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living.”¹⁴² Accordingly, “[i]t can be accepted as a fixed premise, therefore, that every statute and every doctrine of unwritten law developed by the decisional process has some kind of purpose or objective[.]”¹⁴³

Professors Hart and Sacks thus announced a meta-theory that openly toggles between facts and norms, instrumental analysis, and broader evaluation. What is law for? Law “follows from the fact that interdependent

137. See Eskridge & Frickey, *supra* note 5, at c–ci.

138. AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 85–86, 340–41 (2005) (purposive interpretation dominates common law and civil law jurisdictions); *see id.* at 227–28 (acknowledging Hart and Sacks as the pioneer thinkers in advancing a purposive approach to legal interpretation).

139. HART & SACKS, *supra* note 2, at 1–4.

140. *Id.* at 2, 102.

141. *Id.* at 104.

142. *Id.* at 148.

143. *Id.* “The idea of a statute without an intelligible purpose is foreign to the idea of law and inadmissible.” *Id.* at 1124.

living is collaborative, cooperative living.”¹⁴⁴ How does law contribute to interdependent living? The most obvious contribution of law is to enable social projects that solve collective action problems and create economic and social structures (such as the market and the family) that help people contribute to the common interest and live flourishing lives. As Professor Scott Shapiro puts it, “the fundamental rules of legal systems *are* plans. Their function is to structure legal activity so that participants can work together and thereby achieve goods and realize values that would otherwise be unattainable.”¹⁴⁵ Shapiro’s account is a thoroughly positivist understanding of a purpose-based meta-theory. If a plan is to settle the moral and policy disagreements that precede it, the plan itself should be applied purely by reference to social facts, namely, the statutory purpose.¹⁴⁶ Once a plan has been adopted, it becomes a social fact that binds us and authorizes judges to apply it through the lens of its purpose, another social fact.¹⁴⁷

Unlike Shapiro, however, Hart and Sacks *also* embrace normative evaluation in their understanding of what law is for. The linchpin for their understanding of law is not just solution of collective action problems, but also something more. “The social problem [confronted by government and law] has been broadly described as that of ‘establishing, maintaining, and perfecting the conditions necessary [. . .] for community life to perform its role in the complete development of man.’”¹⁴⁸ Government and the system of law have as their overarching goals (1) the protection of its citizens and the preservation of order, (2) the positive goal of “maximiz[ing] the total satisfactions of valid human wants,” and (3) “the *pragmatic necessity* of a currently fair division” of the fruits of society among its members.¹⁴⁹ Hart and Sacks have a meta-theory regarding the point of government—and it is a pragmatic, multifaceted meta-

144. HART & SACKS, *supra* note 2, at 3.

145. SHAPIRO, LEGALITY, *supra* note 28, at 119. Indeed, from Shapiro’s positivist point of view, introduction of normativity would undermine the point of law, which is to be “agile, durable, and capable of reducing planning costs to such a degree that social problems can be solved in an efficient manner.” *Id.* at 172. “The circumstances of legality obtain whenever a community has numerous and serious moral problems whose solutions are complex, contentious or arbitrary.” *Id.* at 170. Law is a mechanism, often a coordinating mechanism, by which planning can be facilitated, structured, or carried out in an efficient and productive manner. *Id.* at 172; *see also* Waldron, *supra* note 116, at 893.

146. *See supra* note 145 and accompanying text. *But see* Waldron, *supra* note 116, at 893–96 (suggesting circumstances under which moral criteria would be necessary to fill in the gaps of law’s plan).

147. BARAK, *supra* note 138, at 172 (suggesting that many fundamental rights developed out of judicial application of the generalized and ultimately accepted presumptions about objective texts).

148. HART & SACKS, *supra* note 2, at 102 (quoting Joseph M. Snee, *Leviathan at the Bar of Justice*, in GOVERNMENT UNDER LAW 47, 52 (1955)).

149. HART & SACKS, *supra* note 2, at 104 (emphasis in original).

theory that requires the state to evaluate as well as facilitate people's lives, organizations, and institutions of cooperation.

Following Fuller's lead, *The Legal Process* emphasized the way in which institutions and process can enhance the legitimacy of statutes and the purposes they embody. In their discussion of procedural and institutional structure, Hart and Sacks explicitly toggled between the "is" and the "ought."¹⁵⁰ Thus, Hart and Sacks recognized the independent moral significance of the processes of law, but they also treated statutory purposes as constantly in a state of reevaluation, not just in light of their efficacy but also in light of their relationship to the larger moral goals of society,¹⁵¹ as well as the law's general principles and policies.¹⁵² Note Hart and Sacks's anticipation, here and elsewhere, of key ideas later developed by Dworkin's theory of law as integrity.¹⁵³

At the end of their lengthy materials on the making and application of law, Professors Hart and Sacks presented their theory of statutory interpretation that is derived from their meta-theory:

In interpreting a statute a court should:

1. Decide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved; and then
2. Interpret the words of the statute immediately in question so as to carry out the purpose as best it can, making sure, however, that it does not give the words either—
 - (a) a meaning they will not bear, or
 - (b) a meaning which would violate any established policy of clear statement.¹⁵⁴

Among the policies of clear statement Hart and Sacks had in mind were the rule of lenity in criminal cases and their own rule that a court should not "understand a legislature as directing a departure from a generally prevailing principle or policy of the law unless it does so clearly."¹⁵⁵ Encapsulated in the

150. *Id.* at 4–6, 108–10.

151. After defending their principle of institutional settlement, which takes ethical inquiry out of the process of rule-following, *id.* at 109–10, the authors pose a different relationship between law and morality when there is a proper proceeding for altering a previous settlement or for settling an unsettled issue: "Is it not plain that here an ethics of a different order has an indispensable role to play in assisting the decisionmaker in the evaluation of purposes and of the possible means of advancing them?" *Id.* at 110.

152. *Id.* at 148–49.

153. The striking parallels between Hart and Sacks and Dworkin have been thoroughly documented by Vincent A. Wellman. Wellman, *supra* note 134.

154. HART & SACKS, *supra* note 2, at 1374. For earlier statements to similar effect, see *id.* at 166–67, 1179–1203.

155. *Id.* at 1377.

programmatic essay that ended the materials in the 1958 “tentative edition,” Hart and Sacks’s *summum* on statutory interpretation looks like positivist prescription for judges because its formula seems to be a straightforward conventional inquiry into typically ascertainable facts. Reading this formula in light of the authors’ meta-theory and, even more, in light of the problems and exercises that form the backbone of their materials, however, reveals that their purposive method involved plenty of evaluation.

How should the court figure out what purpose(s) to *attribute* to the statute? Hart and Sacks counseled judges to follow enacted statements of purpose¹⁵⁶ and, more generally, to put themselves in the place of the legislature enacting the measure, “assum[ing], unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.”¹⁵⁷ Reasonableness, it may be assumed, is understood by reference to the social purposes served by government, namely, protection, human flourishing, and fairness.¹⁵⁸ If statutory meaning is not clear after considering these standard sources, Hart and Sacks urged that the interpreter consider “an appropriate presumption drawn from some general policy of the law.”¹⁵⁹ Policies and principles of the law are “useful as guides to the exercise of a trained and responsible discretion.”¹⁶⁰ And when the underlying statutory purpose or policy is ambiguous, “the official should interpret it in the way which best harmonizes with more basic principles and policies of the law.”¹⁶¹

Consistent with their engagement with the legispudences of both Lon Fuller and H.L.A. Hart, Henry Hart and Albert Sacks sought to create a theory of statutory interpretation that was conventional, but with room for normative evolution, responsiveness, and creativity. Like Shapiro’s planning theory, Hart and Sacks emphasized problem-solving; once the legislature has itself engaged in normative deliberation, its purposes as well as the statutory text it has produced are both social facts that can be applied through conventional reasoning. Unlike Shapiro’s planning theory, however, Hart and Sacks

156. *Id.*

157. *Id.* at 1378. In ascertaining purpose, Hart and Sacks urged judges to consider not just the legislative history of the law, but also the administrative and popular understanding of what the law means. *Id.* at 1379; *see also id.* at 1253–54 (urging judges to be aggressive when interrogating legislative history to discern what it might teach them about a statute, especially its purpose).

158. *Id.* at 104.

159. HART & SACKS, *supra* note 2, at 1380.

160. *Id.* at 143.

161. *Id.* at 147. The basic principles and policies of the law form the basis for extending a rule or statute to a novel context, *id.* at 362–83; for reformulating old rules or provisions, *id.* at 383–403; and for replacing old rules or practices with more up-to-date ones, *id.* at 545–76; *see also* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 87–89 (1982) (drawing from Hart and Sacks the notion that courts ought to be able to overrule obsolescent statutes).

required that judges “attribute” (not “discover”) statutory purpose and then “evaluate” (not “apply”) that purpose in light of broad social goals, as well as legal principles and policies.¹⁶² Not only did Hart and Sacks explicitly contemplate toggling between social facts (the legislative purpose) and norms (the attributed purpose), but they also seemed comfortable with the possibility that our society is *both* a rulebook community *and* a community of principle. Thus, they say that courts serve a useful function in our polity in part because they settle uncertainties in the law, but also because they are “agencies of correction of law which is unclear or unjust.”¹⁶³

Professor Anthony Sebok considers Hart and Sacks important to a robust positivist theory of law because they filled in an important hole in H.L.A. Hart’s theory.¹⁶⁴ Recall that H.L.A. Hart believed that the law “ran out” in the hard cases and that judges had discretion in those cases to make law.¹⁶⁵ Hart and Sacks’s theory of adjudication fills in this discretionary space with their distinctive contribution to legal analysis, namely, the role of general policies and principles. Thus, the judge in the hard cases is guided by general policies and principles when she decides how to exercise that lawmaking discretion. Sebok considers this entirely positivist.¹⁶⁶ Although Sebok is correct to say that *The Legal Process* provides a useful supplement to H.L.A. Hart’s theory of discretionary decision-making, that is not the only point that can be made about the materials.¹⁶⁷ Again anticipating Dworkin, Hart and Sacks understood adjudication to be a process of “reasoned elaboration” that demanded judicial creativity in applying existing legal authorities to concrete cases and new problems in light of the larger goals of society as well as overarching legal policies and principles.¹⁶⁸

162. HART & SACKS, *supra* note 2, at 1374 (“attribute”), 110 (“evaluation”).

163. *Id.* at 343.

164. SEBOK, *supra* note 88, at 129–38.

165. *See supra* notes 41–43 and accompanying text; *see also* HART, CONCEPT OF LAW, *supra* note 1, at 132.

166. Unlike Shapiro, who is an exclusive legal positivist, Sebok is an inclusive legal positivist, who maintains that the law can incorporate normative precepts. Hart and Sacks’s notion of general policies and principles that guide discretion is, from Sebok’s point of view, a splendid example of inclusive legal positivism. *See* SEBOK, *supra* note 88.

167. Barzun, *supra* note 134, at 5; Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1394–97 (1996) (noting that the legal process theory envisions “a blend of positive and normative functions [for judges], thus rescuing judicial action from the moral aridity of positivism”); Vincent A. Wellman, *Positivism, Emergent and Triumphant*, 97 MICH. L. REV. 1722, 1737–45 (1999) (reviewing SEBOK, *supra* note 88) [hereinafter Wellman, *Positivism*].

168. HART & SACKS, *supra* note 2, at 145–52; *see* Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601, 633, 640 (1993); Wellman, *Positivism*, *supra* note 167, at 1738–39.

The jurisprudential toggling that I have been exploring is a useful way to understand the relationship of legal process theory to positivism and normativism. Unlike Professors H.L.A. Hart and Ronald Dworkin, Professors Hart and Sacks were not analytic philosophers. They were practical lawyers, and Hart (the senior partner in the enterprise) had been a significant official administering the wartime economy during World War II.¹⁶⁹ In my view, the legal process materials were less interested in the positivism-natural law debate, and were more interested in laying out a theory of law that provided overall predictability but flexibility in response to the fast-changing world they saw unfolding (and that Hart knew well from his service in the government). Professor Fuller, their close collaborator, spoke for the legal process school when he observed that “in the moving world of law, the *is* and the *ought* are inseparably mixed.”¹⁷⁰

If legal process theory is a jurisprudence of toggling, as I am claiming, consider how it would apply to the Case of the Spotted Owl. Justice Stevens’s opinion for the Court made a classic legal process argument to support a broad reading of “take.”¹⁷¹ Section 2(a) states that a central purpose of the endangered species law is preserving the habitat of endangered species, a point amply confirmed by the law’s legislative history.¹⁷² To the extent that § 9(a)’s anti-take rule is ambiguous as to whether it bars farmers and ranchers from harming endangered animals by destroying habitat, such ambiguity should be resolved consistent with the statutory purpose.¹⁷³

This syllogism resolves the case for the majority Justices, but this would not have been the end point for Hart and Sacks, as they demanded that the judge critically interrogate the invocation of purpose.¹⁷⁴ And that is exactly what the dissenting Justices did. Accepting the statutory purpose to protect

169. See William N. Eskridge, Jr. & Philip P. Frickey, *The Making of The Legal Process*, 107 HARV. L. REV. 2031, 2036 (1994) (Professor Hart took a leave of absence from Harvard in 1942 to serve as Associate General Counsel of the Office of Price Administration).

170. LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 64 (1940); accord HART & SACKS, *supra* note 2, at 108–10. The account in text is taken from Eskridge & Frickey, *supra* note 5, at liv–lxviii (providing a thick account of the intellectual background of the materials and making this point by reference to Fuller’s response to the legal realists).

171. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 698 (1995).

172. 16 U.S.C. § 1531(b) (Endangered Species Act purpose clause); *Sweet Home*, 515 U.S. at 704–08.

173. In detail, here is the argument: section 9(a) says that private persons may not “take” an endangered species. Section 3(19) says that “take” includes “harm.” It is plausible to say that destroying an endangered species’ habitat in a way that “actually harms” the species (the precise rule adopted by the agency in 1975 and 1981) “harms,” and therefore “takes,” the species. If there is any ambiguity, it ought to be resolved in favor of an interpretation that carries out the § 2(a) purpose of protecting habitat and, by that, helping prevent endangered species from becoming extinct.

174. HART & SACKS, *supra* note 2, at 1377–80.

endangered species against harms, Justice Scalia observed that the most obvious way landowners can “harm” endangered species is by a “specially focused hurt or injury” to particular animals.¹⁷⁵ Both the statutory structure and the representations of the sponsors demonstrated that these discrete problems faced by endangered species were meant to be addressed by different statutory provisions. Thus, §§ 5 and 7(a) were the provisions aimed at the habitat conservation goal, while § 9(a) was aimed at the anti-predation goal.¹⁷⁶ This is an excellent point regarding the 1973 Act—though Justice Stevens effectively responded that the 1982 Amendments expanded the habitat conservation goal to include private landowner development projects and routine economic uses.¹⁷⁷

This is still not the end of a legal process analysis. Consider the pragmatics that are opened up by the legal process approach, as reflected in the jurisprudence of Justice Stephen Breyer. Following Hart and Sacks, Breyer maintains that statutory interpretation is a purposive enterprise, but he deepens legal process jurisprudence with his highly practical approach to statutory purpose. Thus, Breyer asks the standard Hart and Sacks questions, such as what are the statutory purposes, and which interpretation best carries forth the statutory purpose?¹⁷⁸ But he also wants to know, what is the actual effect of adopting this rule as opposed to that rule, or that standard? How will each rule or standard work? Where an agency has implemented a statutory scheme through regulation, Breyer is interested in knowing what effect his ruling will have on the agency’s ability to enforce the statute effectively.¹⁷⁹ These lines of inquiry are entirely consistent with the pragmatic philosophy underlying and the method deployed in the Hart and Sacks materials.¹⁸⁰

Although Breyer joined Stevens’s opinion for the Court in the Case of the Spotted Owl, his pragmatics of purposivism does suggest a concern with the

175. *Sweet Home*, 515 U.S. at 719 (Scalia, J., dissenting).

176. *Id.* at 724–29.

177. *Id.* at 700–01 (Stevens, J., majority opinion); *see also id.* at 703 n.17 (Congress also relied on the Department’s understanding when it amended the law in 1978). *But see* Victoria F. Nourse, *Decision Theory and Babbitt v. Sweet Home: Skepticism about Norms, Discretion, and the Virtues of Purposivism*, 57 ST. LOUIS U. L.J. 909, 911, 916–20 (2013) (in her commentary, Professor Nourse cogently argues that Justice Stevens should have written a much shorter opinion, starting with the 1982 Amendments, which were the decisive text, and legislative history supporting the agency’s interpretation).

178. STEPHEN BREYER, *ACTIVE LIBERTY* 85–101 (2005) (advocating purpose-based statutory interpretation precisely along Hart and Sacks lines) [hereinafter BREYER, LIBERTY].

179. BREYER, *DEMOCRACY*, *supra* note 11, at 106–20 (although this book is concerned with constitutional interpretation, its themes are highly relevant to statutory interpretation as well: the Court should encourage the application of policy expertise, encourage experimentation, and not readily substitute judicial judgments for agency ones).

180. *See* Barzun, *supra* note 134, at 16–18 (arguing that Henry Hart, in particular, was influenced by the philosophical pragmatism of William James).

Court's interpretation. Confronted with the Department's "harm" regulation, Chuck Cushman, Executive Director of the American Land Rights Association, insisted upon the Blackstonian rights of ranchers and farmers. Defiantly, he publicly urged this response: when landowners find an endangered animal on their property the best solution under current law is to "shoot, shovel and shut up."¹⁸¹ According to Cushman, "[a] private-property owner is thinking to himself, 'I find a spotted owl on my property, I'm going to lose everything I've worked for all my life.'"¹⁸² Perhaps a more common response than this abrasive one was that of Betty Orem, one of the property owners who were plaintiffs in the *Sweet Home* litigation. Quietly and during the course of the litigation, without the knowledge of the regulators, Orem went ahead and cut the trees on her land, destroying habitat needed by the spotted owl.¹⁸³

The Justices (perhaps including Breyer) were probably not aware of these ramifications of the sweeping rule they were upholding, and that is one of the pitfalls of the Hart and Sacks purpose approach. The instrumental and evaluative analysis required by their theory asks the interpreter to figure out which interpretation will best carry out and even deepen the statutory purpose—and often that cannot be determined without a greater understanding of markets, sociology, behavior, cognitive biases, and economics than judges (including Hercules) possess.

Although not given great prominence in their materials, Professors Hart and Sacks did think about this problem and had a suggestion: courts should follow the policy leads of agencies that have been charged with implementing statutory schemes.¹⁸⁴ On the current Court, Justice Breyer has carried forth this legal process idea most enthusiastically to support judicial deference to agency interpretations.¹⁸⁵ While most of the Justices emphasize the greater legitimacy agencies enjoy when filling in statutory gaps, Justice Breyer gives some emphasis to the agency's greater competence to figure out the delicate balance of purposes and goals the statute carries with it, and to figure out, both instrumentally and normatively, how to implement those statutory goals in the

181. Mark Sagoff, *Muddle or Muddle Through? Takings Jurisprudence Meets the Endangered Species Act*, 38 WM. & MARY L. REV. 825, 826–27 (1997) (quoting Cushman, who called civil disobedience a rational response to *Sweet Home*'s outcome).

182. *Id.* at 827.

183. *Id.* at 853–54.

184. HART & SACKS, *supra* note 2, at 1380.

185. See Eskridge & Baer, *supra* note 43, at 1154 (reporting that Justice Breyer is the most agency-deferential of the Justices currently in practice, going along with agency views in almost three-quarters of the "hard cases" heard by the Court from 1984–2006).

right way.¹⁸⁶ If Breyer rather than Stevens had written for the majority in *Sweet Home*, he would have focused much more on the competence of the agency to do the cost-benefit calculus and the balance of normative considerations entailed by the “harm” regulation. Indeed, he might have advised the Department of Interior to proceed with the “harm” rule cautiously, in light of the balance of purposes reflected in the 1982 Amendments.

And that is precisely what Secretary Babbitt did. In the wake of his smashing victory, Secretary Babbitt, an environmentalist but also a pragmatist, pledged to make the Endangered Species Act less onerous for private landowners. In June 1995, a month after *Sweet Home*, the Department proposed to exempt nearly all small and residential landholders (such as Betty Orem) from its § 9 requirements for protecting the habitat of threatened plants and animals.¹⁸⁷ Within three years of *Sweet Home*, the Department issued a final rule assuring landowners who negotiated “habitat conservation plans” that the allowances in those plans were permanent and would not be adjusted even if new circumstances would have justified more duties.¹⁸⁸ Since *Sweet Home*, the habitat-protective features of endangered species law have been primarily enforced through contracts and agreements between the government and private parties, establishing consent-based regimes for property management that create promising channels for engaging property owners in the species-preserving agenda of the Act.¹⁸⁹

As the foregoing discussion suggests, legal process theory deepens and expands the case for a primary focus on agency interpretation and implementation in the modern regulatory state. Agencies chock full of expertise and more accountable to the political process and democratically elected officials are the primary interpreters in our republic of statutes, and the complicated purposive analysis required by legal process jurisprudence can better be carried out by agencies than by judges.¹⁹⁰ Thus, the central feature of

186. See *Barnhart v. Walton*, 535 U.S. 212, 212–15, 221–22 (2005) (Breyer, J., majority opinion) (overruling the lower court and backing the administrative agency’s interpretative authority).

187. Endangered and Threatened Wildlife and Plants; Proposed Rule Exempting Certain Small Landowners and Low-Impact Activities from Endangered Species Act Requirements for Threatened Species, 60 Fed. Reg. 37,419, 37,419–20 (July 20, 1995) (to be codified at 50 C.F.R. pt. 17.31).

188. Habitat Conservation Plan Assurances (“No Surprises”) Rule, 63 Fed. Reg. 8,859, 8,859–70 (Feb. 23, 1998).

189. Cf. U.S. FISH & WILDLIFE SERV., WORKING TOGETHER: TOOLS FOR PROTECTING IMPERILED WILDLIFE ON PRIVATE LANDS 5 (2005), available at <http://library.fws.gov/ES/workingtogether.pdf> (providing a range of contract-based mechanisms for landowners and the agency to cooperate, so that land can be used productively and with minimal harm to endangered species).

190. William N. Eskridge Jr., *Comparative Institutional Analysis, Agency Interpretation, and Judicial Deference*, WIS. L. REV. (forthcoming 2013); Edward L. Rubin, *Law and Legislation in*

the Case of the Spotted Owl is not, by this account, the range of meanings that might be attributed to the words “take” and “harm,” nor the political theory that best justifies or negates the “harm” regulation, but instead the amount of trust our legal system should be lodging in the Department of Interior to carry out the requirements of the Endangered Species Act in a practical and purposive way.¹⁹¹

This “economy of trust,” in turn, creates the same kind of problem for legal process theory that I imagined for H.L.A. Hart’s theory of legal positivism, namely, the requirement of normative judgment. As Justice Scalia’s *Sweet Home* dissent suggests, whether we trust the Department of Justice to work out the application of the “harm” regulation in a satisfactory manner is not just informed by social facts (has Babbitt actually saved some endangered species by conserving habitat?), but also by judgments of political morality. Echoing the “simplest farmer,” Justice Scalia does not trust the Department. His crack about the poor farmer’s “conscription to national zoological service” is not a statement of social fact; it is an assertion of moral philosophy and, implicitly, a reminder of the property-respecting traditions that Scalia and his expected audience believe are still central to America’s great story.

Conversely, Justices Stevens and Breyer trust the agency. Justice Breyer’s new book, *Making Our Democracy Work* (2010), situates the Supreme Court within the larger frame of American history and claims that the Court succeeds, modestly, when it contributes to mutual cooperation (and trust) among the various institutions of government.¹⁹² Implicitly, his account suggests that the Court does not succeed when its trust is misguided or its own decisions contribute to mistrust within the system. Justice Aharon Barak, the former President of the Supreme Court of Israel, presses legal process theory even more in the direction of normative engagement. In his book on *Purposive Interpretation in Law* (2005), Justice Barak maintains that statutory interpretation is a meta-interpretation of a society’s democratic and other normative commitments.¹⁹³ Reminiscent of Dworkin as well as Hart and Sacks, Barak says that proper interpretation must not only be workable,¹⁹⁴ but

the Administrative State, 89 COLUM. L. REV. 369, 395–97 (1989); see also Rubin, *supra* note 167. See generally ESKRIDGE & FERREJOHN, *supra* note 81.

191. This is what Scott Shapiro calls the “economy of trust” that is central to any legal system. See SHAPIRO, *LEGALITY*, *supra* note 28, at 331–52 (explaining that the author’s planning theory of law “demands that the more trustworthy a person [and presumably an agency] is judged to be, the more interpretive discretion he or she is accorded; conversely, the less trusted one is in other parts of legal life, the less discretion one is allowed”).

192. See BREYER, *DEMOCRACY*, *supra* note 11.

193. BARAK, *supra* note 138, at 339–69; see also Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 98–99, 110–12 (2002).

194. BARAK, *supra* note 138, at 218–20.

“must be able to give the text the meaning that best achieves the goal of interpretation in law,” which is to “guarantee orderly social life.”¹⁹⁵

CONCLUSION: TOGGLE AND CONSEQUENCES

As illustrated by the Case of the Spotted Owl, the jurisprudence of toggling rests upon a meta-theory of law as both instrumental and constitutive. Consistent especially with legal process theory, a jurisprudence of toggling understands that legal officials engage in a hermeneutical enterprise that entails retrieving past decisions, evaluating them in light of current circumstances and the facts of the case, and figuring out the best way to go forward within the confines of legal conventions.¹⁹⁶ If I am right, or close to right, about the jurisprudence of toggling, there are important consequences for jurisprudence, statutory interpretation, and court-agency relations.

Jurisprudentially, the fact-norm toggling phenomenon presents significant problems for positivist jurisprudence and for the leading normativist theory, law as integrity. Scholars of jurisprudence might consider moving beyond the now-outdated Hart-Fuller and Hart-Dworkin debates between positivists and normativists and delving more deeply into the jurisprudence underlying (or justifying) the legal process approach. As Professors Philip Frickey and Daniel Farber have long argued, American pragmatism (James, Pierce, and Dewey, for example) offers a rich philosophical tradition from which to draw.¹⁹⁷

In terms of statutory interpretation theory, the jurisprudence of toggling suggests that legal doctrine is not as decisive as leading theorists maintain. This is Nino's Nightmare. Indeed, Justice Scalia's splendid dissenting opinion in *Sweet Home* is the exemplar for the mobility of doctrine as well as the jurisprudence of toggling. That even the doctrinally dogmatic Justice Scalia is a toggler is quite striking. He presents himself as a Hartian positivist as he argues that the *Sweet Home* majority Justices decide the case contrary to established conventions, yet his opinion also reveals a thoughtful Dworkinian process of normative meta-judgment and Hart and Sacksian purposivism. Making his nightmare worse, the toggling phenomenon also haunts Justice Scalia's new book with linguist Bryan Garner, which argues that the rule of law would be strengthened if judges would follow fifty-seven simple canons of

195. *Id.* at 220–22.

196. For my understanding of the hermeneutics of statutory interpretation, see William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609 (1990).

197. *E.g.*, Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1645–50 (1987) (discussing recent developments of legal theory). *See generally* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 323–24 (1990) (discussing Georg Gadamer's hermeneutical theory of interpretation). *Accord* BARZUN, *supra* note 134, at 9, 13–18 (discussing the possible influence of John Dewey and William James on Hart and Sacks).

statutory construction (and avoid thirteen anti-canons denounced in the book).¹⁹⁸ As the Case of the Spotted Owl suggests, a jurisprudence of canons is in no meaningful way constraining, and its effort to deny the normativity of statutory interpretation is seriously misleading.

Finally, the jurisprudence of toggling helps us understand the roles of agencies and courts in statutory interpretation. All of the leading jurisprudential theories take judges as their exemplary agents of law and interpretation. That is astounding, as agencies have long (i.e., for several generations) been the primary institutions for interpreting as well as implementing statutes. The new legal process school recognizes this fact and makes it central to a modern approach to the law that is saturated by toggles between facts and norms, instrumental and normative analyses.¹⁹⁹

198. SCALIA & GARNER, *supra* note 11, at xxviii-xxix (arguing that adherence to the authors' simple list of canons "will curb—even reverse—the tendency of judges to imbue authoritative texts with their own policy preferences" and "will provide greater certainty in the law, and hence greater predictability and greater respect for the rule of law").

199. This is the jurisprudential basis for the materials Victoria Nourse, Abbe Gluck, and I are developing for a first-year course. See Eskridge, Gluck & Nourse, *Introduction to the Regulatory State* (West, forthcoming 2014).

