"PLAIN MEANING": JUSTICE SCALIA'S JURISPRUDENCE OF STRICT STATUTORY CONSTRUCTION

BRADLEY C. KARKKAINEN*

I. INTRODUCTION

Since his elevation to the Supreme Court of the United States, Justice Antonin Scalia has aggressively challenged the Court's approach to statutory interpretation. Justice Scalia has harshly criticized the Court's reliance on legislative history as an aid in interpreting statutes. He argues that the Court should rely instead in most cases on a statute's "plain meaning," derived from an ordinary understanding of the words and structure of statutory text.

This approach, labelled "the new textualism" by William Eskridge,[1] has not won general acceptance on the Court. Justice Scalia's views on statutory interpretation have been articulated mainly in concurring opinions or dissents; the Court has not openly endorsed his views in a majority opinion. Only Justices Anthony Kennedy and Clarence Thomas can be called adherents of Justice Scalia's plain meaning approach.[2] Chief Justice Rehnquist and Justice O'Connor frequently join Justice Scalia's opinions, but seldom rely on his approach in their own opinions.[3] Justice Souter appears to have decisively rejected Justice Scalia's

* B.A., University of Michigan; J.D. candidate, 1994, Yale Law School. The author thanks Paul Kahn and Aharon Barak for their helpful comments on earlier drafts, and Ann Mongoven and Emma Karkkainen Mongoven for their support and boundless patience.

1. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) [hereinafter Eskridge, *New Textualism*].

2. *See, e.g.*, Connecticut Nat'l Bank v. Germain, 112 S. Ct. 1146, 1149 (1992) (Thomas, J.) (citing Plain Meaning Rule as a "cardinal canon" in statutory interpretation); Eli Lilly & Co. v. Medtronic, Inc., 496 U.S. 661, 679 (1990) (Kennedy, J., dissenting) (criticizing the Court for departing from plain meaning in interpreting statute exempting certain medical devices from patent infringement claims).

3. For cases in which these justices join Justice Scalia, see, *e.g.*, United States v. Nordic Village, Inc., 112 S. Ct. 1011 (1992); Blatchford v. Native Village of Noatak and Circle Village, 111 S. Ct. 2578 (1991); West Virginia Univ. Hosps., Inc. v. Casey, 111 S. Ct. 1138 (1991). For departures from Justice Scalia's plain meaning approach, see, *e.g.*, Rust v. Sullivan, 111 S. Ct. 1759, 1767-68 (1991) (Rehnquist, C.J.) (finding the statutory language and legislative history ambiguous, thus justifying deference to administrative agency interpretation of Title X of Public Health Act); Ardestani v. INS, 111 S. Ct. 515, 520 (1991) (O'Connor, J.) (holding that legislative history is ambiguous and does not justify departure from plain meaning of Equal Access to Justice Act).

approach,[4] and Justices Blackmun and Stevens frequently oppose Justice Scalia on questions of statutory interpretation.[5] While it remains to be seen how the newest Justice, Ruth Bader Ginsburg, will address these questions, her opinions as a federal appellate judge on the District of Columbia Circuit indicate that she has not been an advocate of Justice Scalia's plain meaning approach.[6] Nevertheless, although Justice Scalia has not yet revolutionized the Court's approach, he undoubtedly is forcing the Court to re-examine its jurisprudence of statutory interpretation. This turmoil on the Court is also generating renewed interest from legal scholars in statutory interpretation as a long-neglected area of the law.

This Article critically examines Justice Scalia's method of statutory interpretation, taking into account the views of his colleagues on the Court as well as leading academic commentators, most of whom are critical of Justice Scalia's plain meaning approach. Given the piecemeal nature of the judicial process, it should come as no surprise that the views expressed by Justice Scalia in his Supreme Court opinions and other published sources do not yet amount to a well-articulated, coherent, and complete theory of statutory interpretation. Some critics have even accused Justice Scalia of inconsistency.[7] Many of Justice Scalia's critics, however, attribute to him views that upon closer examination he does not appear to hold. This Article shall argue that Justice Scalia's new textualism is neither new nor textualism.[8] His method is more sophisticated than most of his critics

4. *See* United States v. Thompson/Center Arms Co., 112 S. Ct. 2102, 2109 n.8 (1992) (Souter, J., plurality opinion) ("Justice Scalia upbraids us for reliance on legislative history . . . . The shrine is well peopled (though it has room for one more).").

5. For Justice Blackmun's views, see, *e.g.*, Dewsnup v. Timm, 112 S. Ct. 773 (1992), discussed *infra* note 113. For Justice Stevens' views, see, *e.g.*, Connecticut Nat'l Bank v. Germain, 112 S. Ct. at 1150 (Stevens, J., concurring in the judgment) ("Whenever there is some uncertainty about the meaning of a statute, it is prudent to examine its legislative history."). For an alternative classification of the Justices' views on statutory interpretation, see William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1075-81 (1989) (describing Chief Justice Rehnquist and Justices White, Scalia, and Kennedy as "statutory nominalists"; Justice Blackmun as representing a "public values" approach; and Justices Stevens and O'Connor as "pragmatists").

6. *See, e.g.*, Railway Labor Executives' Ass'n v. National Mediation Bd., 988 F.2d 133 (D.C. Cir. 1993) (Ruth Bader Ginsburg, J.) (relying on legislative history, statutory purpose, and prior judicial interpretations to confirm textual reading of statute).

7. *See, e.g.*, Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597, 1634 (1991) (describing Justice Scalia as a "fallen textualist" who "fails to practice textualism sincerely and consistently").

8. Eskridge notes that Justice Scalia's methodology is a return to the traditional approach to statutory interpretation used before World War II but argues that it nonetheless represents a "radical" new critique of the Court's standard intentionalist approach. Es-

recognize, but ultimately his project is not so much a revolution in statutory interpretation as a counterrevolution, selectively employing interpretive principles long criticized by legal scholars and largely abandoned by the Court. The overall result is a pattern of strict construction of statutes.[9]

Part II contends that Justice Scalia's method cannot be properly characterized as "textualism," if that means (as many of Justice Scalia's critics suggest) the exclusion of extratextual aids to interpretation. Justice Scalia in fact regularly employs extratextual aids, exhibiting a broad commitment to understanding the statute in "context." He does, however, argue for the exclusion of legislative history. Many critics interpret this as an attack on the prevailing theory that statutory interpretation should be guided by the intentions of the legislature at the time a statute is enacted.

Part III maintains that while Justice Scalia is critical of the Court's use of legislative history, his project should not be conceived as a search for an alternative to intentionalism. For Justice Scalia, legislative intent is a useful concept, but not the key to statutory interpretation. His approach to statutory interpretation ultimately rests on his views concerning separation of powers and notions about the rule of law as a system of constraining rules. These views encompass a vision of limited government, enforced by strict checks and balances, in which an essential function of the courts is to check the tendency of the legislative branch to aggrandize itself by "usurping" power. In particular, by excluding legislative history and construing statutes strictly against a background of clear interpretive rules, Justice Scalia would force the

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kridge, *New Textualism*, *supra* note 1, at 624. This Article argues that although Justice Scalia selectively adopts certain traditional approaches, his return to an earlier methodology is not a faithful one, but neither does he offer a radical critique of intentionalism. *See infra* Part III.

9. This Article uses the term "strict construction" advisedly. Many commentators have pointed out that the term is ambiguous, insofar as it embraces a number of distinct but related concepts that writers do not always keep clear. *See, e.g.*, REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 206 (1975). By "strict construction," this Article refers to a construction that narrows the scope of coverage or application of a statute; this is the sense in which the term is used in the latest edition of Sutherland's *Statutes and Statutory Construction*. *See* J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 58.02 (Norman J. Singer ed., 5th ed. 1992); *id.* at § 60.01 ("A liberal construction is ordinarily one which makes the statutory rule or principle apply to more things or in more situations than would be the case under a strict construction."). Used in this way, a strict construction is one that narrows what Judge Frank Easterbrook calls a "statute's domain." Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 534-36 (1983).

legislature to legislate more clearly. This would prevent the back-door enactment of implied statutory provisions through legislative history without the discipline of the constitutionally prescribed requirements of bicameralism and presentment, and keep courts from improperly entangling themselves in the legislative process by examining, and giving legal effect to, the unenacted wishes of Members of Congress.

Part IV examines in closer detail the methods Justice Scalia typically employs in interpreting statutes. Section IV.A discusses Justice Scalia's effort to revive the Plain Meaning Rule, a much criticized and heretofore nearly abandoned Nineteenth Century interpretive principle that in Justice Scalia's view authorizes exclusion of legislative history when the meaning of a statute is "plain." To invoke the Plain Meaning Rule in any particular case, however, Justice Scalia must argue that the statute has a plain, unambiguous meaning. To reach a plain meaning, Justice Scalia frequently resorts to narrow, literal dictionary definitions of key terms, discussed in Section IV.B; traditional canons embracing principles of grammatical and structural inference, discussed in Section IV.C; and "clear statement" canons, discussed in Section IV.D. As employed by Justice Scalia, these interpretive devices often result in the strict construction of statutes even though the Plain Meaning Rule itself does not require strict construction. In principle, one might just as easily find a liberal construction to be the plain meaning, or find that the statute was capable of several meanings (suggesting that the use of legislative history would be appropriate). Building on this analysis, Part V argues that, notwithstanding the critics who find Justice Scalia's approaches to statutory and constitutional interpretation inconsistent, he does indeed present a coherent view.

Part VI examines Justice Scalia's version of the *Chevron* principle of deference to statutory interpretations by administrative agencies. While other commentators have suggested that Justice Scalia is extremely deferential toward administrative agencies, Part VI suggests that Justice Scalia actually is more inclined than other Justices to overturn an agency's interpretation, on the grounds that it exceeds the scope of the agency's statutory authority, based on his own strict construction of the statute.

Part VII offers a framework for analyzing and comparing approaches to statutory interpretation. Discussion of statutory interpretation often treats the interpretative enterprise as if it were a

single, indivisible act, in which a single approach can be applied uniformly across the entire range of interpretive activities. Part VII argues that statutory interpretation is better understood not as a single act, but as a series of distinct but interrelated acts or "interpretive moments," which together constitute the interpretive process. These moments are:

1. arriving at one or more plausible initial readings of the text;
2. resolving ambiguities and vagueness in the text;
3. fitting a statute into a broader legal context;
4. understanding the statute in light of its historical, political, and policy context;
5. filling gaps or silences in the text;
6. determining statutory domain, that is, which classes of persons and events are covered by the statute; and
7. reaching a final "legal" interpretation of the statute.

Using these moments of statutory interpretation as a framework, Part VII contends that Justice Scalia's approach is much more complex and subtle than his critics recognize. Not only do the critics oversimplify Justice Scalia's views, they do so in part because they fail to acknowledge the multidimensional nature of the interpretive enterprise. Ultimately, this Article concludes that although Justice Scalia's method is vulnerable to criticism on many fronts, his most important and lasting contribution may be that he has placed the search for a sound approach to statutory interpretation center-stage in the courts and in the academy.

II. "PLAIN MEANING": TEXT AND CONTEXT

Justice Scalia's most familiar and recurrent theme is that, in interpreting a statute, the Court should look first to the plain meaning of the statutory text rather than seeking guidance from legislative history. Many of Justice Scalia's critics take this as evidence of his commitment to strict textualism, the view that a text can and should be understood purely by examining its structure and the meanings of its words, without the assistance of extratextual materials as interpretive aids.[10] Judge Richard Posner, for

10. *See, e.g.*, Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 455 (1988) (describing Justice Scalia as a "four corners" textualist). But not all of Justice Scalia's critics subscribe to this characterization. Professor Eskridge, for example, does not believe the "new textualism" embraces a purely text-based approach. *See infra*, text accompanying note 26. Similarly, Jerry Mashaw argues that Justice Scalia's textualism consists principally of clear statement principles, plain meaning analysis, and

example, without mentioning Justice Scalia by name, labels this view the "plain-meaning fallacy," and argues that the plain-meaning view fails to account for what he calls "external ambiguities," that is, context-dependent clues to the intended meaning of a text.[11] Similarly, Justice Souter, responding to criticism from Justice Scalia, implies that Justice Scalia is attempting an impossible textualist approach: "'The meaning of . . . a statute cannot be gained by confining inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment—that to which it gave rise as well as that which gave rise to it—can yield its true meaning.'"[12]

Other critics assume that Justice Scalia holds a purely textualist view but applies that view inconsistently or has not yet fully considered the logical consequences of his own theory. Judge Patricia Wald, for example, says "the textualist view logically points to a full-scale attack on the use of any and all extra-statutory materials under any and all circumstances. Its proponents, including Justice Scalia, however, have not yet taken it that far, and it remains to be seen if they will or can."[13]

There is no basis in Justice Scalia's writings, however, to support the assertion that he holds such a purely textualist view. Indeed, Justice Scalia appears to accept the widely held thesis that statutes, like other texts, can be understood only in context.[14] In one sense, this is trivially true; not even the strictest textualist would deny the evidentiary relevance of contextual materials such as previous judicial and administrative interpretations. Justice Scalia's contextualism, however, goes well beyond this trivial

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deference to agency interpretations. Jerry L. Mashaw, *Textualism, Constitutionalism and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 828 (1991).

11. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 262-69 (1990). Similarly, Cass Sunstein argues that "textualism," which he defines as "the belief that courts have no license to rely on outside sources" in interpreting statutes, "appears to be enjoying a renaissance." But "the textualist approach is inadequate" because "words are not self-defining; their meaning depends on both *culture* and *context*." CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 113-14 (1990).

12. United States v. Thompson/Center Arms Co., 112 S. Ct. 2102, 2109 n.8 (1992) (Souter, J., plurality opinion) (quoting United States v. Monia, 317 U.S. 424, 432 (1943) (Frankfurter, J., dissenting)).

13. Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 285 (1990) [hereinafter Wald, *Sleeper*]. *See also* Zeppos, *supra* note 7, at 1634 (accusing Justice Scalia of applying textualism inconsistently).

14. See DICKERSON, *supra* note 9, at 105-24 for a discussion of context in interpretation of texts.

version. In *Green v. Bock Laundry Machine Co.*,[15] Justice Scalia articulates a further contextual vision:

> The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind.[16].

In this passage, Justice Scalia appears to be referring to at least four contexts into which the words of a statute must fit. Two of these contexts are inconsistent with a purely textualist approach.

1. The ordinary usage of language is itself a broad linguistic and cultural context within which statutory language is to be understood.[17] Unless there is a clear statement to the contrary within the text of the statute, Justice Scalia will assume that terms have their ordinary or commonly-understood meanings. How are those ordinary meanings to be determined? Justice Scalia frequently cites to dictionaries and *Roget's Thesaurus*, although he also argues from contemporaneous usage at the time of a statute's enactment.[18] Use of this broad linguistic context is, of course, consistent with textualism; even the strictest textualist would acknowledge that the meanings of the words and sentences in a statutory text are a function of their usages within a linguistic community.

2. The meaning of statutory terms, according to Justice Scalia, is to be understood in light of context as well as ordinary usage. Justice Scalia may be referring here to the internal context, that is, how a term is used within the text. In *Chisom v. Roemer*, Justice Scalia labels this internal context the "textual context" of the statute.[19] Determining the meanings of words in light of the context

15. 490 U.S. 504 (1989) (Scalia, J., concurring in the judgment).

16. *Id.* at 528.

17. Dickerson, *supra* note 9, at 105-07 (describing ordinary language as an inescapable element of the context in which statutory language must be understood, "reflect[ing] . . . the conceptual matrix of established ideas and values that identifies the culture to which it belongs").

18. *See infra* notes 157-80 and accompanying text.

19. 111 S. Ct. 2354, 2369 (1991) (Scalia, J., dissenting) (arguing that for purposes of the Voting Rights Act, the term "representative" does not include elected judges).

of their use within the four corners of the text is a routine element in most interpretive approaches, and is consistent with most versions of textualism.

3. Justice Scalia may be referring to external contexts, that is, where the statute fits in a larger picture that includes legislative history, policy considerations, institutional arrangements, and facts about the world. While Justice Scalia often prefers to resolve interpretive problems through reference to internal context, he frequently resorts to many kinds of external context to assist in interpretation.[20] While Justice Scalia eschews the use of legislative history, other kinds of extratextual historical and factual evidence are within the bounds of interpretation. Use of this kind of external contextual evidence is inconsistent with a purely textualist approach to statutory interpretation.

4. The legal context or surrounding body of law is also relevant to the meaning of a statute in Justice Scalia's view. This context, too, is theoretically inconsistent with pure textualism, for it requires the interpreter to employ evidence from a wide range of legal sources to limit, expand, or shade the meaning that would otherwise be derived from the statutory text.[21]

Justice Scalia's view of the importance of the surrounding body of law as an aid in statutory interpretation is articulated in *Department of Justice v. Julian,* where he says it is a "fundamental judicial function [to] read . . . the body of enacted laws in such fashion as to cause none of them to be pointless."[22] This suggestion seems eminently sensible, but for Justice Scalia it has far-reaching implications: A judicial interpretation of a statute must be faithful to the text, but the meaning of the text itself can change over time as the legal landscape changes. In *United States v. Fausto,* Justice Scalia writes: "This classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be

20. *See infra* notes 27-47 and accompanying text.

21. William Popkin describes this surrounding body of law as a "super-text" and says that Justice Scalia's method is to read particular statutes as if they were written by an ideal drafter who integrates them into the super-text. Popkin thus views Justice Scalia as a textualist operating on a broader body of law than the particular statutory text. William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation,* 76 MINN. L. REV. 1133, 1148 (1992).

22. 486 U.S. 1, 15 (1987) (Scalia, J., dissenting) (arguing that the Freedom of Information Act should be read to be consistent with, and not to supersede, the Federal Rules of Criminal Procedure and the Parole Act, which limit criminal defendants' access to presentence reports).

altered by the implications of a later statute."[23] Indeed, Justice Scalia has criticized his colleagues on the Court for attempting to interpret statutes in isolation, rather than as part of a larger, unified body of statutory law that the Court must attempt to "make sense of" as a whole.[24]

Moreover, the legal context within which a statute is to be understood includes not only other statutes, but judge-made law as well. In *Holmes v. Securities Investor Protection Corp.*, Justice Scalia says that Congress legislates against a judicial "background" that includes common-law notions such as "proximate cause" and "zone of interests" tests.[25] Unless Congress clearly states otherwise, courts should presume that the statute is meant to include the common-law rules as implied terms.

William Eskridge, one of Justice Scalia's most sympathetic and careful critics, suggests that Justice Scalia accepts "horizontal" contextualism, that is, interpreting a statute in light of the surrounding statutes and larger body of law into which it fits. Eskridge argues, however, that Justice Scalia rejects "vertical" contextualism, which looks to the specific factual and historical context in which the statute arose, as evidenced, for example, by its legislative history.[26] Eskridge's analysis, however, misstates Justice Scalia's views on vertical contextualism. Moreover, it is questionable whether on closer examination Eskridge's horizontal-vertical distinction can stand up at all.

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23. 484 U.S. 439, 453 (1988) (Scalia, J.) (arguing that the Civil Service Reform Act precludes judicial review of disciplinary action against certain federal employees, despite provisions of Back Pay Act to the contrary). Justice Scalia's opinion in *Fausto* appears squarely to contradict the traditional canon of statutory interpretation that "repeals by implication are disfavored." *See id.* at 461 (Stevens, J., dissenting).

24. Pennsylvania v. Union Gas Co., 491 U.S. 1, 29 (1989) (Scalia, J., concurring in part and dissenting in part) (arguing that provisions of the Comprehensive Environmental Response, Compensation and Liability Act [CERCLA] and Superfund Amendments and Reauthorization Act [SARA] must be read in combination to hold states liable for damages in private suits over hazardous waste sites). Justice Scalia further argues that it is especially inappropriate to look to the legislative history for evidence of legislative intent as to the meaning of a statutory provision when that statute is subsequently modified by a later enactment, because the statutes read in combination may come to mean something other than what the enacting Congress originally intended. He ridicules the notion that "the task of a court of law is to plumb the intent of the particular Congress that enacted a particular provision." Instead, the court's job is "to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times." *Id.* at 29-30.

25. 112 S. Ct. 1311, 1328 (1992) (Scalia, J., concurring in the judgment) (arguing that absent statutory provisions to contrary, plaintiff suing in civil RICO action must show that defendant's action was proximate cause of plaintiff's injury, and that plaintiff is within the class of persons to be benefited by the statute allegedly violated).

26. Eskridge, *New Textualism*, *supra* note 1, at 655.

Justice Scalia clearly looks to a broader context that includes not only other law, but specific policy considerations underlying the statute. In *United States v. Fausto,* Justice Scalia explicitly relies on the policy and purposes of the statute at the time of its enactment to inform his interpretation: "A leading purpose of the CSRA [Civil Service Reform Act] was to replace the haphazard arrangements for administrative and judicial review of personnel actions."[27] Here Justice Scalia is arguing that the statute is to be understood in light of its purpose, which is to be gleaned from the historical, factual, and legal background against which the statute was enacted. Finding this statutory purpose is essential to Justice Scalia's argument that the CSRA precludes judicial review of disciplinary action against federal employees covered by the statute.[28] The context that informs Justice Scalia's reading is in part horizontal and in part vertical, to use Eskridge's terms; it includes contemporaneous law, but also the specific factual circumstances and policy failures that the statute was intended to remedy. Similarly, in *Blanchard v. Bergeron,* Justice Scalia explicitly eschews reliance on legislative history, but seeks to "develop an interpretation of the statute that is reasonable, consistent, and faithful to its apparent purpose."[29] Here, Justice Scalia endorses the majority's reasoning from the apparent purpose of the fee-shifting provision in a federal civil rights statute, based on an assessment of the legal and factual background against which the statute was enacted, as well as subsequent consequences and policy implications.[30] However, Justice Scalia declines to join the majority's reliance on legislative history, which further buttresses its reading of the statute.

A final example illustrates Justice Scalia's use of purposive interpretation. In *Eli Lilly & Co. v. Medtronic, Inc.,* Justice Scalia interprets a statutory provision that creates an exemption from patent infringement claims for patented devices used in developing data for federal regulatory approval under any "federal law

27. 484 U.S. at 444.

28. Federal employees are normally entitled to judicial review of disciplinary action against them under the Back Pay Act, a statute that predates the CSRA. Justice Stevens, dissenting, specifically notes that Justice Scalia's "nontextual" reading of the CSRA would repeal Back Pay Act protection by implication. *See id.* at 456 (Stevens, J. dissenting).

29. 489 U.S. 87, 100 (1989) (Scalia, J., concurring in part and concurring in the judgment) (arguing that "reasonable" attorney's fees for purposes of Civil Rights Attorney's Fees Awards Act are not limited by the terms of a contingent fee arrangement).

30. *See id.* at 99-100.

which regulates the manufacture, use, or sale of drugs."[31] While devices used to test drugs for FDA approval clearly fall within the statutory exemption, the question before the Court is whether devices used to test medical equipment are to be treated similarly. These items require regulatory approval under the Federal Food, Drug, and Cosmetic Act, which also regulates drugs. Justice Scalia finds the phrase "federal law which regulates . . . drugs" to be ambiguous; on the one hand, it could be read to apply only to devices used to test drugs, but on the other hand it could be read to apply to any device used to test any product requiring FDA approval.[32] He resolves the ambiguity by arguing from the purpose of the statute, which in his view is to overcome "distortions" of patent terms caused by the lengthy time period necessary to get federal regulatory approval.[33] Because the same logic applies to the testing of both drugs and medical equipment, he reasons, the structure of the statutory scheme requires that the same exemption be granted to medical equipment as is clearly available for drugs.[34] The crucial point for our purposes is that Justice Scalia again relies on a historical context consisting of background facts, institutional arrangements, public policy considerations, and law to inform his judgment about the purpose of the statute, which in turn drives his interpretation.

Justice Scalia further elaborates his views on purposive interpretation in a 1989 law journal article:

> [T]he 'traditional tools of statutory construction' include not merely text and legislative history but also, quite specifically, the consideration of policy consequences. . . . Surely one of the most frequent justifications courts give for choosing a particular construction is that the alternative interpretation would produce 'absurd' results, or results less compatible with the reason and purpose of the statute. This, it seems to me, unquestionably involves judicial consideration and evaluation of competing policies . . . to determine which one will best effec-

31. 496 U.S. 661 (1990).

32. *Id.* at 665-69.

33. *See id.* at 669-74. The "distortions," according to Justice Scalia, come at both ends of the patent term. First, the clock would begin running on the patent term of a device used to test a product requiring regulatory approval, depriving the inventor of a portion of the full royalty income she would expect if the product were approved for manufacture. Second, an expiring patent could in effect be extended, because a drug company seeking regulatory approval could be required to pay royalties in advance at the beginning of a lengthy regulatory process.

34. *See id.* at 672-73. Justice Kennedy criticizes Justice Scalia's departure from the plain meaning of the phrase "federal law which regulates . . . drugs," which in his view limits the exemption to devices used to test drugs. *Id.* at 679-80 (Kennedy, J., dissenting).

> tuate the statutory purpose. Policy evaluation is, in other words, part of the traditional judicial tool-kit . . . the step that determines . . . whether the law is indeed ambiguous.[35]

In this passage Justice Scalia is not merely describing what courts actually do; he is explicitly endorsing the use of a purposive, policy-oriented approach in what are, for him, the first stages of the interpretive inquiry—namely, the determination whether a statute can be said to have a plain meaning and whether the Court will recognize that plain meaning as the authoritative intepretation of the statute.[36] Before ascribing a plain meaning to a statute, the judge must first determine that it does not produce "absurd" results, and thus that its policy consequences are within acceptable limits. That, in turn, requires an inquiry into the purposes of the statute and an evaluation of the policy implications of various alternative readings. For Justice Scalia, statutory interpretation is not purely textually-driven, coming solely from within the four corners of the text. Instead, interpretion may require an evaluation of the statute's policy and purpose, which are determined in large measure by the factual circumstances and institutional arrangements that form the background against which the statute was enacted—in short, its (vertical) context. At a minimum, the contextually-based argument from "absurdity" always holds a kind of veto power over any intepretation the court might place on a statute. In some cases, such as *Eli Lilly* and *Fausto,* arguments from policy and statutory purpose assume a more direct and prominent role in Justice Scalia's determination of textual meaning. Thus, far from being the strict textualist that many of his critics suggest, Justice Scalia is in fact a thoroughgoing contextualist.

This re-examination is not to suggest, however, that Justice Scalia gives *carte blanche* to purposive interpretation, or that he feels compelled to rely on statutory purpose in every case. For Justice Scalia, statutory purpose may be used to inform the Court's reading of the text, but (except in exceptional circumstances, such as absurdity) interpretation must remain consistent with the letter of the statutory text. He warns against the tendency of some judges to rely on the "spirit of the statute" to read

35. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law,* 1989 DUKE L.J. 511, 515 [hereinafter Scalia, *Deference*].

36. Justice Scalia himself employs this method in Green v. Bock Laundry Machine Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring in part and concurring in the judgment), discussed *infra* notes 72-74 and accompanying text.

it more broadly than, in his view, the text permits.[37] In *K-Mart Corp. v. Cartier, Inc.*, Justice Scalia writes: "The principle of our democratic system is not that each legislature enacts a purpose, independent of the language of the statute, which the courts must then perpetuate, assuring that it is fully achieved but never overshot by expanding or ignoring the statutory language as changing circumstances require."[38]

Justice Scalia is arguing here principally against Justice Brennan, who would read the statute liberally to achieve its purposes even when applied under circumstances not contemplated by the enacting legislature.[39] Justice Scalia does tentatively suggest, however, that in some circumstances, a court might be permitted to use statutory purpose to narrow, but not to expand, the scope of application of an obsolescent statute:

> [A court might] disregard the plain application of [the] statute when changed circumstances cause its effects to *exceed* the original legislative purpose . . . [but] only when (1) it is clear that the alleged changed circumstances were unknown to, and unenvisioned by, the enacting legislature, and (2) it is clear that they cause the challenged application of the statute to *exceed* its original purpose.[40]

Thus, for Justice Scalia, in the event of changed factual circumstances, statutory purpose might be used to *narrow* the Court's reading of a statute, but never to expand the interpretation beyond what the words of the text permit, even to fulfill the statute's purpose.

Justice Scalia's use of purposive interpretation is thus limited to four situations: first, as an aid in determining the plain meaning of the statutory text, as in *Fausto*;[41] second, in determining

37. *See* Johnson v. Transportation Agency, 480 U.S. 616, 670 (1987) (Scalia, J., dissenting). Justice Scalia argues against the majority's broad purposive reading of Title VI of the Civil Rights Act of 1964, in which legality is "to be judged not by [the statute] but by a judicially crafted code of conduct, the contours of which are determined by no discernible standard, aside from . . . the divination of congressional 'purposes' belied by the face of the statute." *Id.* at 670-71.

38. 486 U.S. 281, 325 (1988) (Scalia, J., concurring in part and dissenting in part) (arguing that Customs Service regulation permitting importation of certain foreign-made goods under U.S. trademark is impermissible interpretation of statute prohibiting importation of goods "of foreign manufacture" bearing a trademark "owned by" a citizen of or "corporation . . . organized within the United States").

39. Justice Brennan sees the purpose of the statute as the protection of United States trademark owners from gray-market competition. Reading the statute in light of that purpose, he finds the statutory language ambiguous, and would defer to the Customs Service interpretation as a reasonable one. *See id.* at 316-17 (Brennan, J.).

40. *Id.* at 325 (emphasis added).

41. *See supra* notes 27-28 and accompanying text.

whether the plain meaning of the text produces absurd results, as in *Bock Laundry Machine*;[42] third, in helping to resolve ambiguities in a "textually ambiguous" statute, as in *Eli Lilly*;[43] and fourth, in at least some circumstances, in narrowing the application of a broadly worded, obsolescent statute, as he suggests in *K-Mart*.[44] These uses of policy, purpose, and context, while not integral to Justice Scalia's interpretive method in every case, are nonetheless sufficiently frequent and clearly articulated to rebut the claims of those who would regard Justice Scalia as a strict textualist, whether of the pure or fallen variety.

Some commentators are critical of Justice Scalia's brand of purposive interpretation, especially insofar as it is not based on legislative history.[45] Judge Wald argues that if statutory purpose is not anchored in legislative history, it must be a judicial construct, and "the door is inevitably left open for judicial assumptions, speculation, preferences and notions of 'sound public policy' to fill the vacuum."[46] Justice Scalia might respond that the method Judge Wald prefers, inferring congressional intent from legislative history, also involves the use of a judicial construct—namely, legislative intent—masquerading as an objectively determinable historical fact. Nonetheless, Wald's criticism is a telling one—Justice Scalia cannot criticize the use of legislative history on the grounds that it leads to subjectivism and then replace it with a method that appears equally subjective. Indeed, Judge Wald's criticism of Justice Scalia's purposive method sounds strikingly like Justice Scalia's own criticism of his colleagues' reliance on legislative history in statutory intepretation,[47] the subject to which we next turn.

III. Legislative History, Legislative Intent, and The Separation of Powers

This Article has argued that some of Justice Scalia's critics mistakenly view him as attempting to restrict the evidence admissible in statutory interpretation to the four corners of the statutory

42. *See supra* note 36 and accompanying text.
43. *See supra* notes 31-34 and accompanying text.
44. *See supra* text accompanying note 40.
45. For an example of purposive interpretation that admits evidence from legislative history, see Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1410-17 (tent. ed. 1958).
46. Wald, *Sleeper*, *supra* note 13, at 304.
47. *See infra* notes 79-82 and accompanying text.

text. But others of Justice Scalia's critics contrast his textualism to the Court's prevailing intentionalist approach to statutory interpretation. T. Alexander Alienikoff, for example, sees Justice Scalia's approach as an effort to find a fixed statutory meaning embedded in the statutory text, rather than in the intentions of members of the legislative body. In Alienikoff's view, both approaches are misguided "archeological" attempts to unearth a statutory meaning frozen in time, which fail to consider that the meaning of the statutory text is itself dynamic, inevitably changing in response to changing legal and factual contexts.[48] Similarly, William Eskridge describes Justice Scalia's approach as a "radical critique" of the Court's established intentionalist methodology.[49]

There are many reasons to be skeptical of an intentionalist view. Intentionalists contend that we should interpret a statute by determining what the legislature intended the statute to mean. Opponents of intentionalism hold that such an effort is doomed to failure, for one or more of the following reasons:[50]

1. A collective body made up of many members with diverse views cannot have a single intention. Individuals may have mental states, but groups do not. The group may act (for exam-

48. *See* T. Alexander Alienikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 30 (1988). As we have seen, however, Justice Scalia would allow "updating" of statutory intepretation in response to a changing legal background, as in *Fausto*, *see supra* note 23, and *Pennsylvania v. Union Gas Co.*, *see supra* note 24 and accompanying text. Moreover, Justice Scalia might permit limited updating of statutory intepretation in response to changing factual circumstances, but only to narrow the domain of the statute, as he suggests in *K-Mart*, *see supra* note 40 and accompanying text.

49. Eskridge, *New Textualism*, *supra* note 1, at 624. *See also* Farber & Frickey, *supra* note 10, at 423 ("[Justice Scalia] would . . . jettison the whole idea of legislative intent as a guide to interpretation"). Farber and Frickey's characterization of Justice Scalia as an anti-intentionalist appears to rest on comments Justice Scalia made in a 1985 speech: "If I were writing on a blank slate, I suppose I would call into question the fundamental premise upon which all use of legislative history is based . . . that 'interpretive doubts' . . . are to be resolved by judicial resort to an intention entertained by the lawmaking body at the time of its enactment." Antonin Scalia, Speech on Use of Legislative History 15-16 (given at various law schools in 1985-86) [hereinafter Scalia, Speech] (emphasis omitted), *quoted in* Farber & Frickey, *supra* note 10, at 454. But in the same speech, Justice Scalia admits that he is not writing on a blank slate, and therefore such a radical anti-intentionalist project is impossible. Instead, he would "requir[e] some indication that [the legislative history] at least genuinely reflects the *intent* of one of the houses of Congress." Scalia, Speech, *supra*, at 18, *quoted in* Farber & Frickey, *supra* note 10, at 442 n.64 (emphasis added). This Article suggests that Justice Scalia is now engaged in this more modest project of limiting the search for legislative intent in the legislative history, but he has not entirely abandoned legislative intent as a useful concept in statutory interpretation.

50. Many of these criticisms were first articulated in Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930), and were updated in a more sophisticated form in RONALD M. DWORKIN, LAW'S EMPIRE 313-54 (1986).

ple, by enacting a statute), but it is a mistake to attribute a collective intention to its action. We may call this the "problem of anthropomorphism."

2. Even if we knew the views of all the individuals who make up the legislature, we would not know, as a matter of principle, how to aggregate their intentions. A statute typically reflects legislative compromises, with members supporting various combinations of its provisions for very different reasons, with varying degrees of intensity. Moreover, some provisions may be left deliberately vague or ambiguous precisely because ambiguity is necessary to reach a compromise.[51] These difficulties arise even in the simplest cases. Suppose we have a statute containing only two provisions, A and B; 30% of the legislature's members oppose both A and B; 25% support A but not B; 25% support B but not A; and 20% support both A and B. Thus A is supported by only 45% of the legislature; the same is true for B. One possible outcome is that no statute will be enacted; but it is also entirely possible that a statute containing both A and B will be enacted if some of those who support A or B or both join forces in a compromise. Such a compromise is made even more likely if the language of A or B (or both) is left sufficiently vague or ambiguous to satisfy its supporters and simultaneously mollify some of its opponents. What, then, are we to say is the intention of the legislature as to the meaning of A or B, given that there may not be majority support for any particular reading of the statute? Let us call this the "problem of aggregation."

3. We can never have sufficient evidence to determine the actual mental states of the hundreds of persons who make up a legislative body. Using Eskridge's terminology, we can call this the "historicist critique."[52]

4. The reality is that many members of a legislative body in many cases do not have clear thoughts or intentions as to the detailed provisions of a statute, and the intentions of the handful of members (if any) who may have such thoughts cannot be taken to represent the intentions of the group. Again using Eskridge's terminology, let us call this the "realist critique."[53]

51. *See* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947) ("Statutes as well as constitutional provisions at times embody purposeful ambiguity or are expressed with a generality for future unfolding.").

52. *See* Eskridge, *New Textualism*, *supra* note 1, at 641.

53. *See id.*

5. Even if it were possible to identify the intentions of individual legislators and aggregate them into a collective intention, it would be a meaningless exercise because intentions are not law. Only those provisions expressed in the statutory text itself have the authoritative status of law. Following Eskridge, we will call this the "formalist critique."[54]

Justice Scalia does indeed sometimes appear to criticize intentionalism, employing historicist, realist, and formalist arguments. In *Wisconsin Public Intervenor v. Mortier*, for example, Justice Scalia makes all three arguments: "[W]e are a Government of laws not of committee reports" (formalist critique); committee reports are "unreliable" as "a genuine indicator of congressional intent" (historicist critique); and they "d[o] . . . not necessarily say anything about what Congress as a whole actually thought . . . . [W]e have no way of knowing that they had any *rational* motive at all" (realist critique).[55] In *I.N.S. v. Cardoza-Fonseca*, Justice Scalia employs a formalist critique: "Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent."[56] In *Pennsylvania v. Union Gas Co.*, he combines realist and formalist critiques:

> It is our task, as I see it, not to enter the minds of the Members of Congress—who need have nothing in mind in order for their votes to be both lawful and effective—but rather to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times.[57]

In *Conroy v. Aniskoff*, Justice Scalia launches what appears to be a direct formalist assault on intentionalism: "The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators."[58]

On closer examination, however, it appears that Justice Scalia's principal concern is not intentionalism, but rather a strong formalist objection to treating legislative history as having the au-

54. *See id.* at 641-42.

55. 111 S. Ct. 2476, 2488-90 (1991) (Scalia, J., concurring in the judgment).

56. 480 U.S. 421, 452 (1987) (Scalia, J., concurring in the judgment) (arguing that Immigration and Naturalization Service's interpretation of Immigration and Nationality Act is not reasonable and therefore not entitled to deference because not supported by plain meaning and structure of statutory text).

57. 491 U.S. 1, 30 (1989) (Scalia, J., concurring in part and dissenting in part).

58. 113 S. Ct. 1562, 1567 (1993) (Scalia, J., concurring in the judgment) (criticizing the majority's use of legislative history to confirm its facial reading of tolling provision in Soldiers' and Sailors' Relief Act).

thoritative status of law. Indeed, Justice Scalia often argues that the plain meaning of the text is the most reliable evidence of Congress's intentions. In *United States v. Fausto*, Justice Scalia relies on the "clear congressional intent" displayed in "the context of the entire statutory scheme,"[59] and suggests that intent may be determined "by examining the purpose of the [statute], the entirety of its text, and the structure . . . that it establishes."[60] In *Thompson v. Thompson*, Justice Scalia employs versions of the historicist and realist critiques to suggest that congressional intent might be relevant when it exists and is knowable, but that it frequently is neither: "If we were to announce a flat rule that private rights of action will not be implied in statutes hereafter enacted, the risk that that course would occasionally frustrate genuine legislative intent would decrease from its current level of minimal to virtually zero."[61] In *Blanchard v. Bergeron*, Justice Scalia argues that it is not "conducive to a genuine effectuation of congressional intent" to "give legislative force to each snippet of analysis" contained in the legislative history.[62]

Justice Scalia obviously is quite comfortable using the language of legislative intent, but he insists that Congress must be presumed to have written the statute to reflect its intent. Any "intent" beyond what is expressed in the statutory text is typically either unknown, unknowable, nonexistent, or not accurately reflected in the legislative history; consequently, courts should dispense with the unproductive and misleading practice of attempting to divine genuine legislative intent from legislative history. Instead, in Justice Scalia's view, courts should rely on judge-made rules that allow the courts to infer intent (or, perhaps more accurately, to impute intent) on the basis of their reading of the language, structure, and purpose of a statute. These judge-made rules not only simplify the judicial task and keep judges from entering the dark interpretive alleys of legisla-

59. 484 U.S. 439, 447 (1988) (Scalia, J.).

60. *Id.* at 444.

61. 484 U.S. 174, 192 (1988) (Scalia, J., concurring in the judgment) (arguing that Parental Kidnapping Protection Act does not expressly create a private right of action, and it should not be inferred). Here, of course, Justice Scalia discusses legislative intent because that is the test the Court has established in deciding whether to recognize an implied private right of action. He argues that the Court should adopt a different test, not because intent is irrelevant, but because the Court is only guessing as to actual congressional intent. Forcing Congress to state its intent clearly in the text of the statute, he argues, is the only way to resolve this problem. *See id.* at 191-92.

62. 489 U.S. 87, 99 (1989) (Scalia, J., concurring in part and concurring in the judgment).

tive history, but to the extent the rules are clear and consistently applied, they will force Congress to state its intentions more clearly in future statutes. Justice Scalia writes:

> [T]he quest for the 'genuine' legislative intent is probably a wild-goose chase anyway. In the vast majority of cases I expect that Congress neither (1) intended a single result, nor (2) meant to confer discretion upon [an administrative] agency, but rather (3) didn't think about the matter at all. If I am correct in that, then any rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate.[63]

Elsewhere, he adds: "What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts."[64]

Justice Scalia certainly should not be mistaken for an intentionalist; he does not believe it is always necessary or even possible for courts to determine actual congressional intent before reaching interpretive conclusions about the meaning of a statute. But neither does his project appear to be centrally concerned with constructing an alternative to intentionalism.[65] For Justice Scalia, congressional intent is a useful concept (or perhaps a useful fiction) in statutory interpretation, but not the touchstone. Legislative intent may be reflected in the statutory text and structure, or it may be imputed through the use of a variety of judge-made interpretive rules. What is central for Justice Scalia, however, is that the courts must adopt clear interpretive rules that serve the dual purpose of disciplining judges in the reading of statutes and disciplining Congress in the writing of them.[66] To do so, it is necessary to dispense with judicial reliance on legislative history in statutory interpretation, which allows both judges and

63. Scalia, *Deference*, *supra* note 35, at 517.

64. Finley v. United States, 490 U.S. 545, 556 (1989) (holding that Federal Tort Claims Act does not create pendent party jurisdiction in absence of some other statutory basis for jurisdiction over parties).

65. *Cf.* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988) (mounting a full-scale attack on intentionalism, arguing that the subjective intentions of legislators are simply irrelevant in statutory interpretation). Judge Easterbrook, like Justice Scalia, eschews the use of legislative history, but Judge Easterbrook himself points out that his foundational critique of intentionalism differs substantially from Justice Scalia's objections to the use of legislative history, which are based on separation-of-powers grounds. *See id.* at 60-61.

66. *See infra* notes 105-23 and accompanying text.

legislators too much latitude to write and interpret statutes loosely.

Justice Scalia further argues on formalist grounds that legislative history should be disregarded because to rely on it will only encourage cynical attempts by interest groups—and their well-placed congressional allies—to tailor the legislative history to influence future courts, thus enabling these groups to win back-door enactment of statutory terms they are unable to win through bicameralism and presentment. Justice Scalia writes disparagingly of the pedigree and purpose of legislative history:

> As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references . . . were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . but rather to influence judicial construction. What a heady feeling it must be for a young staffer, to know that his or her citation of obscure district court cases can transform them into the law of the land, thereafter dutifully to be observed by the Supreme Court itself.[67]

Even if we accept Justice Scalia's criticisms of legislative history at face value, however, they are at best arguments for not treating legislative history as law and for discounting its evidentiary value; they are not convincing reasons to exclude legislative history altogether.[68] One might agree with Justice Scalia that legislative history is an unreliable indicator of legislative intent, and that frequently many members of Congress do not have clear thoughts, much less clearly expressed thoughts, about key provisions of a bill they vote to enact. One might further agree that, even if members of Congress did have clear thoughts, and even if those thoughts were clearly and accurately expressed in the legislative history, those thoughts do not have the authoritative status of law. Yet, even after conceding the historicist, realist, and formalist arguments, one might still think that, properly discounted, what members of Congress said at the time a bill was enacted

67. Blanchard v. Bergeron, 489 U.S. 87, 99 (1989)(Scalia, J., concurring in part and concurring in the judgment).

68. *See* HART & SACKS, *supra* note 45, at 1284-86 (arguing that legislative history, while sometimes of limited probative value, is part of context in which statute should be understood); SUNSTEIN, *supra* note 11, at 128 (describing Justice Scalia's objections to the use of legislative history as "legitimate" but "overstate[d]" because "one cannot get a sense of the context and purpose of a statutory enactment without a reading of the legislative history").

may sometimes be a valuable aid to interpretation of an unclear statute. Children and politicians may sometimes lie, deliberately mislead, exaggerate, or simply misunderstand and consequently misreport events; but even though we may not take their statements at full face value, those statements may sometimes help inform our understanding, especially when we use them to supplement other, more reliable information, or when other sources of information are limited. As Karl Llewellyn pointed out, "any aspect of legislative history may be useful, and should be looked at, for what it is worth; thus, the contrived 'friendly colloquy' deserves attention, frequently, as evidence of what was carefully left out of the bill."[69] In the words of Justice Frank Murphy: "Legislative materials may be without probative value, or contradictory, or ambiguous, it is true, and in such cases will not be permitted to control the customary meaning of words or overcome rules of syntax or construction found by experience to be workable; [but] they can scarcely be deemed to be incompetent or irrelevant."[70]

Some of Justice Scalia's critics offer harsher criticisms. Judge Patricia Wald writes:

> To disregard committee reports as indicators of congressional understanding because we are suspicious that nefarious staffers have planted certain information for some undisclosed reason, is to second-guess Congress' chosen form of organization and delegation of authority, and to doubt its ability to oversee its own constitutional functions effectively. It comes perilously close . . . to impugning the way a coordinate branch conducts its operations and, in that sense, runs the risk of violating the spirit if not the letter of the separation of powers principle.[71]

Justice Scalia's hostility toward the use of legislative history is all the more puzzling in light of the fact that he himself occasionally resorts to it. In *Green v. Bock Laundry Machine Co.*, Justice Scalia countenances the use of legislative history to avoid an "absurd" result of literal interpretation:

> I think it entirely appropriate to consult all public materials, including the background of Rule [of Evidence] 609(a)(1) and the legislative history of its adoption, to verify that what seems to us an unthinkable disposition . . . was indeed unthought of,

69. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 529 (1960) (emphasis omitted).

70. United States v. Dickerson, 310 U.S. 554, 562 (1940).

71. Wald, *Sleeper*, *supra* note 13, at 306-07.

> and thus to justify a departure from the ordinary meaning of the word 'defendant.'[72]

This use of legislative history is consistent with Justice Scalia's view that the Court should rely on plain meaning unless it produces patently absurd results,[73] and it squares with Justice Scalia's views on statutory purpose and policy considerations as a kind of overriding control on statutory interpretation.[74] But even if the absurd implications of a straightforward reading of the statutory text justify a departure from ordinary methods of interpretation, one must still question why, if legislative history is as unreliable as Justice Scalia claims, we should resort to legislative history under these circumstances. Does legislative history somehow become reliable in the event of an absurd statutory text, while remaining unreliable in other circumstances? If legislative history can set us straight in the event of absurdity, perhaps it can also help prevent a simple misreading of the statute. For Justice Scalia, the response must be that in the event of absurdity, all bets are off; if the most reliable method of statutory interpretation produces unacceptable consequences, then any method that offers hope of producing better results becomes fair game, however questionable it may be as a general method. Still, this is not entirely satisfying, and it raises doubts about the sincerity of Justice Scalia's conviction that legislative history has nothing useful to tell us about a statute.

Further, absurdity is not the only instance in which Justice Scalia resorts to legislative history. In *Edwards v. Aguillard*, a First Amendment Establishment Clause case, Justice Scalia reviews legislative history at great length to show that the Louisiana legislature had a legitimate "secular purpose" in enacting a statute that requires the teaching of creation science in the public schools.[75] Here he may be resorting to legislative history simply because his back is against the wall: The Court is using a constitutional test in which statutory purpose is a critical factor.[76] Because his oppo-

72. 490 U.S. 504, 527 (1989) (Scalia, J., concurring in the judgment).

73. *See infra* notes 127-29 and accompanying text.

74. *See supra* notes 35-36 and accompanying text.

75. *See* Edwards v. Aguillard, 482 U.S. 578, 631 (1987) (Scalia, J., dissenting) ("The legislative history gives ample evidence of the sincerity of the Balanced Treatment Act's articulated [secular] purpose.").

76. The Court is relying on the *Lemon* test, articulated in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). Under this test, a statute challenged under the Establishment Clause will pass constitutional muster if it has a "secular legislative purpose," its "principal or primary effect" is not one that advances or impedes religion, and it does not foster "excessive government entanglement with religion." *Id.*

nents find a constitutionally impermissible purpose in the legislative history, Justice Scalia would be on weak ground if his only response is that the legislative history is irrelevant or incompetent. His argument is stronger if the legislative history shows something other than what the majority thinks it shows.[77] Moreover, Justice Scalia might argue that he is not using legislative history to interpret the statute in *Aguillard*, where the disagreement does not concern what the statute requires but whether the statute's purpose is constitutionally impermissible. Yet if the legislative history can conclusively reveal the statutory purpose in an Establishment Clause case, as Justice Scalia argues it does in *Aguillard*, then why can it not also reveal the statutory purpose in a simple case of statutory interpretation? Further, why should such evidence of statutory purpose not be relevant for Justice Scalia, who, as we have seen, invokes statutory purpose in statutory interpretation?[78]

Justice Scalia's objection to the use of legislative history in statutory interpretation is based only in part on his doubts about its evidentiary value. Admittedly, he does think the legislative history is unreliable. Equally troublesome, in his view, is that judges cannot be trusted with this sort of material. Given the abundance of legislative history and the absence of a reliable way to infer actual legislative intent from those materials, judges will end up using legislative history selectively.[79] Reliance on legislative history thus leads to judicial subjectivism. "We use them [committee reports] when it is convenient, and ignore them when they are not,"[80] and it is "dangerous to assume that, even with the utmost self-

77. Although he joins the battle over purpose as revealed in the legislative history, Justice Scalia also argues that the purpose prong of the *Lemon* test should be discarded. He claims on realist and historicist grounds that legislative purpose understood as reflecting legislators' "motivations" (intent) is impossible to establish, Edwards v. Aguillard, 482 U.S. at 636-37, and further, that the purpose prong of the *Lemon* test "has no basis in the language or history of the [First] Amendment." *Id.* at 640.

78. *See supra* notes 27-44 and accompanying text.

79. *See* Conroy v. Aniskoff, 113 S. Ct. 1562, 1567 (1993) (Scalia, J., concurring in the judgment) (interpreting tolling provision in Soldiers' and Sailors' Relief Act) ("[N]ot the least of the defects of legislative history is its indeterminacy. If one were to search for an interpretive technique that, *on the whole*, was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history.") Justice Scalia then delves into the legislative history, attempting to demonstrate that selected excerpts from the historical record can be used to support contradictory interpretations of the statute. *Id.* at 1567-72.

80. Wisconsin Pub. Intervenor v. Mortier, 111 S. Ct. 2476, 2488 (1991) (Scalia, J., concurring in the judgment) (arguing the majority ignores committee reports tending to support interpretation of Federal Insecticide, Fungicide, and Rodenticide Act as preempting local pesticide regulations, a result it does not want to reach).

discipline, judges can prevent the implications they see from mirroring the policies they favor" when relying on legislative history.[81]

Still, similar arguments can be made against the kind of purposive interpretation Justice Scalia himself employs. To paraphrase Justice Scalia, there is little reason to "assume that . . . judges can prevent the implications they see from mirroring the policies they favor" in an imputed statutory purpose, any more than in a legislative intent inferred from the legislative history.[82]

Ultimately, Justice Scalia's antipathy toward legislative history probably has less to do with its evidentiary value than with its consequences for how law is made.[83] Judicial reliance on legislative history, in his view, allows Congress to write and courts to effectuate vague, ambiguous, broadly drawn, and far-reaching statutes. All this is deeply offensive to Justice Scalia's deeply held formalist beliefs about the proper roles of Congress, the courts, and the executive branch in our constitutional scheme of separation of powers. The solution, for Justice Scalia, is to place the legislative history out-of-bounds as an aid in statutory interpretation, and replace it with a set of strict interpretive rules that will force both courts and Congress to operate within a more tightly constrained sphere, and within what Justice Scalia believes are their proper, constitutionally assigned roles. He writes: "An enactment by implication cannot realistically be regarded as the product of the difficult lawmaking process our Constitution has prescribed. Committee reports, floor speeches, and even colloquies between Congressmen . . . are frail substitutes for bicam-

81. Thompson v. Thompson, 484 U.S. 174, 192 (1988) (Scalia, J., concurring in the judgment).

82. *See supra* notes 46-47 and accompanying text, in which Judge Wald launches the same accusation of judicial subjectivism against Justice Scalia's method as he uses against legislative history. Justice Scalia, however, insists that "it is possible to discern the objective 'purpose' of a statute (i.e., the public good at which its provisions appear to be directed) . . . [but] discerning the subjective motive of those enacting the statute [that is, legislative intent] is . . . almost always an impossible task." Edwards v. Aguillard, 482 U.S. at 636. Nowhere in his writings does Justice Scalia elaborate on his theory of the "objective . . . public good."

83. Justice Scalia states in no uncertain terms that "[t]he *greatest* defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators." Conroy v. Aniskoff, 113 S. Ct. at 1567 (Scalia, J., concurring in the judgment) (emphasis added). *See also* Mashaw, *supra* note 10, at 838-39 (arguing that Justice Scalia's approach to statutory interpretation is driven by "constitutional values" of separation of powers rather than concerns about "interpretive accuracy").

eral vote upon the text of a law and its presentment to the President."[84] Elsewhere he writes:

> It should not be thought that, simply because adverting to the legislative history produces the same result we would reach anyway, no harm is done. . . . We should not make the equivalency between making legislative history and making an amendment [to the statutory text] plausible. It should not be possible, or at least should not be easy, to be sure of obtaining a particular result in this Court without making that result apparent on the face of the bill which both Houses consider and vote upon, which the President approves, and which, if it becomes the law, the people must obey. I think we have an obligation to conduct our exegesis in a way which fosters that democratic process.[85]

Justice Scalia's formalist vision of separation of powers is clearly revealed in these passages, but his words also suggest that his interpretive approach will operate as a kind of broad-brush "clear statement" principle in which all statutes will be strictly construed, with only those provisions clearly expressed in the statutory text being given effect by the courts. This Article contends that Justice Scalia's strongly held views on separation of powers and the rule of law as a system of constraining rules are what drives this strict-constructionist approach to statutory interpretation.[86]

Justice Scalia describes separation of powers as "more sacred than any other [principle] in the Constitution":[87] It is "the cor-

84. Thompson v. Thompson, 484 U.S. at 191-92.

85. United States v. Taylor, 487 U.S. 326, 345-46 (1988) (Scalia, J., concurring in part).

86. *Cf.* SUNSTEIN, *supra* note 11, at 122 (arguing that "the best defense" of Justice Scalia's approach to statutory interpretation is that it is "an inference from the system of separation of powers rather than a necessary view about interpretation," one that will "discipline the judges, limit their discretion, hold them to Congress' actual words, and warn the lawmakers to be clear about their language"); Price Marshall, *"No Political Truth": The Federalist and Justice Scalia on the Separation of Powers*, 12 U. ARK. LITTLE ROCK L.J. 245, 260-61 (1989) (arguing that Justice Scalia sees separation of powers and the rule of law as deeply interwined); Mashaw, *supra* note 10, at 838-39 (arguing that the new textualism is founded on constitutional values such as separation of powers, rather than a theory of how to achieve accuracy in interpretation); Jay Schlosser, Note, *The Establishment Clause and Justice Scalia: What the Future Holds for Church and State*, 63 NOTRE DAME L. REV. 380, 386-87 (1988) (arguing that Justice Scalia's approach to statutory interpretation advances the separation of powers by forcing the legislature to enact clearer laws and reducing legislative-type lawmaking by the courts); Arthur Stock, Note, *Justice Scalia's Use of Sources in Statutory and Constitutional Adjudication: How Congress Always Loses*, 1990 DUKE L.J. 160, 165-68 (arguing that Justice Scalia's attempt to exclude legislative history from statutory interpretation is based on formalist separation-of-powers concerns).

87. *Proceedings of the Administrative Law Section's 1976 Bicentennial Institute on Oversight and Review of Agency Decisionmaking*, 28 ADMIN. L. REV. 569, 686 (1976) (remarks of Antonin Scalia) [hereinafter Scalia, *Bicentennial*].

nerstone of our Constitution and the North Star of our founding fathers' constellation."[88] He writes approvingly of James Madison's argument in *Federalist No. 47* that "no political truth [is] of greater intrinsic value" than separation of powers.[89] Justice Scalia articulates a powerfully formalist vision of separation of powers as "requir[ing] that each of the three branches restrict itself to its allocated sphere of activity—legislating, executing the law, or seeing to its interpretation."[90] These formalist views are further expressed in his influential 1979 article criticizing the legislative veto,[91] and in his dissenting opinions in *Mistretta v. United States*[92] and *Morrison v. Olson.*[93] In *Morrison,* Justice Scalia argues that the Ethics in Government Act, which provides for an independent special counsel to investigate and prosecute criminal wrongdoing in the Executive Branch, violates the constitutional principle of separation of powers. At the heart of his argument is a formalist syllogism: Prosecution is an executive function, the Constitution vests executive power in the President, therefore a congressional act creating a prosecutorial function independent of presidential control usurps presidential power and runs afoul of the Constitution.[94]

Similarly, in *Mistretta,* Justice Scalia argues that the federal Sentencing Commission, operating within the judicial branch but charged with the quintessentially legislative function of drawing up federal Sentencing Guidelines, is constitutionally impermissible. He describes such independent agencies as "illogical and destructive of the structure of the Constitution" and "a new branch altogether, a sort of junior-varsity Congress."[95] He writes: "I can find no place within our constitutional system for an agency cre-

88. *Id.* at 693.

89. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers,* 17 SUFFOLK U. L. REV. 881, 881 (1983) [hereinafter Scalia, *Standing*] (citing THE FEDERALIST No. 47 (James Madison) (Clinton Rossiter ed., 1961).

90. Scalia, *Bicentennial, supra* note 87, at 686.

91. Antonin Scalia, *The Legislative Veto: A False Remedy for System Overload,* 3 J. REG., Nov.-Dec. 1979, at 19 [hereinafter Scalia, *Legislative Veto*]. The article was an important intellectual underpinning for what is arguably the Supreme Court's most important separation-of-powers decision in recent decades, I.N.S. v. Chadha, 462 U.S. 919 (1983) (holding legislative veto unconstitutional because it violates separation-of-powers requirements of bicameralism and presentment).

92. 488 U.S. 361 (1989).

93. 487 U.S. 654 (1988).

94. *See id.* at 703-15 (Scalia, J., dissenting). For criticism of Justice Scalia's view of prosecution as a "quintessentially executive function," see Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function?* Morrison v. Olson *and the Framers' Intent,* 99 YALE L.J. 1069 (1990).

95. Mistretta v. United States, 488 U.S. at 424, 427 (Scalia, J., dissenting).

ated by Congress to exercise no governmental power other than the making of laws."[96] Justice Scalia recognizes that both executive agencies and courts exercise some lawmaking power; "no statute can be entirely precise, and . . . some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it."[97] But the lawmaking power of executive agencies and courts is "ancillary" to their executive and judicial power, respectively; by contrast, "[t]he lawmaking function of the Sentencing Commission is completely divorced from any responsibility for execution of the law or adjudication of private rights under the law."[98]

Yet Justice Scalia's formalism is not formalism merely for its own sake. His is a vision of governmental minimalism, resting on strict separation of powers to preserve individual liberties by keeping the power of each branch limited—a vision he traces to the Founders.[99] Moreover, for Justice Scalia, separation of powers and the rule of law are deeply intertwined; a limited government must be constrained by the rule of law, and "[a] government of laws means a government of rules."[100] He criticizes his colleagues' "ad hoc approach to constitutional adjudication" under which

> [t]he law is, by definition, precisely what the majority thinks, taking all things into account, it ought to be. I prefer to rely upon the judgment of the wise men who constructed our system, and of the people who approved it, and of two centuries of history that have shown it to be sound.[101]

In this view, without strict and formal adherence to rules, including strict separation of powers, we are rudderless. In particular,

96. *Id.* at 413.

97. *Id.* at 415.

98. *Id.* at 420.

99. *See* Daniel N. Reisman, *Deconstructing Justice Scalia's Separation of Powers Jurisprudence: The Preeminent Executive*, 53 ALB. L. REV. 49 (1988) ("For Justice Scalia, the Framers meticulously constructed a federal structure characterized by separate and distinct powers in pursuit of a higher goal: the protection of individual rights through the prevention of tyranny. Tyranny is avoided by preventing a gradual concentration of the enforcement, lawmaking, and judicial powers in one branch"); Christopher E. Smith, *Justice Antonin Scalia and the Institutions of American Government*, 25 WAKE FOREST L. REV. 783, 793 (1990) ("From Scalia's perspective, any deviation, no matter how minor or apparently inconsequential, from the strict boundaries that separate the authority and functions of the respective branches of government may ultimately lead to an excessive accumulation of power in a single branch and thereby threaten individual liberty.").

100. Morrison v. Olson, 487 U.S. at 733. *See* Marshall, *supra* note 86, at 260-61, for a discussion of Justice Scalia's view that strict separation of powers is necessary to ensure the rule of law.

101. Morrison v. Olson, 487 U.S. at 734.

strict adherence to separation of powers will prevent undue concentration of power in any branch of the federal government. Justice Scalia quotes with approval Madison's argument in *Federalist No. 48* that the legislative branch is the most dangerous because it is likeliest to "usurp" power, but adds that Madison did not adequately perceive the threat posed by "judicial intrusion into the operations of the other two branches."[102] In Justice Scalia's view, judicial intrusion into the proper spheres of the political branches (for example, using legislative history to justify a broad interpretation of a statute that an agency construes narrowly) not only violates the principle of separation of powers in its own right, but gives voice and effect to unwarranted congressional assertions of power through the enactment of vague statutes with the expectation that gaps can be filled in later through reference to unenacted legislative history.[103]

Justice Scalia's formalist views on separation of powers are, then, related both to a substantive vision of limited government, and abstract notions about the nature of the rule of law. He further expresses his views on the rule of law in an article entitled *The Rule of Law as a Law of Rules,* in which he "explore[s] the dichotomy between general rules and personal discretion," and argues that law should consist of rules of general applicability—so long as they are clear and predictable.[104] In particular, he criticizes both the Court's reliance on "totality of the circumstances tests," which leave too much to the Court's discretion on a case-by-case basis,[105] and "[s]tatutes . . . establishing rules of inadequate clarity or precision," which "leave too much to be decided by persons other than the people's representatives."[106]

For Justice Scalia, however, clarity is not only a virtue in its own right; insistence on clarity also limits legal rules from overreaching. He warns of

102. Scalia, *Standing, supra* note 89, at 882-83 (citing THE FEDERALIST No. 48 (James Madison) (Clinton Rossiter ed., 1961)). A number of commentators have noted Justice Scalia's antipathy toward the legislative branch in particular. *See* Marshall, *supra* note 86, at 253-54 (noting Justice Scalia's emphasis on the need within a scheme of separation of powers to restrain the legislative branch's hunger to expand its influence); David Schultz, *Judicial Review and Legislative Deference: The Political Process of Antonin Scalia,* 16 NOVA L. REV. 1251, 1265-71 (1992) (arguing that Justice Scalia's "opinions reveal a deep distrust for the legislative process").

103. *See supra* text accompanying notes 84-85.

104. Antonin Scalia, *The Rule of Law as a Law of Rules,* 56 U. CHI. L. REV. 1175, 1176 (1989) [hereinafter Scalia, *Rule of Law*].

105. *Id.* at 1180.

106. *Id.* at 1176.

> the need for caution in framing . . . rules of law. The need is the more urgent when there is no background of experience out of which the standards have emerged. They are then, not the natural flowerings of behavior in its customary forms, but rules artificially developed, and imposed from without.[107]

Legal rules, then, must be clear, but limited in their reach. By insisting on such clarity and constraint, Justice Scalia would in effect impose clear statement principles on *all* law, and narrow its scope. Yet, ironically, it is only rules of general applicability that can provide the necessary restraint:

> For when writing for the majority of the Court, I adopt a general rule, and say, 'This is the basis of our decision,' I not only constrain lower courts, I constrain myself as well. If the next case should have such different facts that my political or policy preferences regarding the outcome are quite the opposite, I will be unable to indulge those preferences; I have committed myself to the governing principle. . . . Only by announcing rules do we hedge ourselves in.[108]

Justice Scalia, then, would force both the courts and Congress to submit to the discipline of constraining rules, because only such constraining rules can ensure that both institutions will remain within their proper and limited roles within our constitutional scheme of separation of powers. He contends that both judges and legislators have chosen to exercise their power in an unanchored, undisciplined fashion, making law that is excessively broad in its reach and indefinite in its contours.[109] The unrestrained use of legislative history in statutory interpretation, in particular, leaves Congress too much leeway to enact broad,

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107. *Id.* at 1188.

108. *Id.* at 1179.

109. *See supra* text accompanying notes 104-06. Before his appointment to the federal bench, Justice Scalia was particularly critical in his academic writings of Congress's tendency to confer "standardless discretion" on administrative agencies and occasionally on courts, through enactment of broad, vague statutes. *See* Antonin Scalia, *Guadalajara! A Case Study in Regulation by Munificence*, 2 J. REG., Mar.-Apr. 1978, at 23, 27-28 (calling such "standardless discretion" a "deplorable distortion of the democratic order"); Scalia, *Legislative Veto*, *supra* note 91, at 25 (arguing that vague statutes combined with the legislative veto allow Congress "effectively to control the outcome . . . without affirmatively accepting responsibility in a record vote" and represent "an egregious subversion of the democratic process"); Scalia, *Bicentennial*, *supra* note 87, at 694 (arguing that the enactment of "generalized mandates without standards" and "amounting to little more than platitudes which no one can disagree with" is an abdication of Congress's constitutionally assigned duty to enact "clear prescriptions which may lose votes on one side or the other in the next election"). In the 1980s, however, the overall trend was toward more specificity in legislative enactments as a Democratic Congress sought to constrain agency discretion during Republican administrations. *See* Sidney Shapiro & Robert Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819.

unclear statutes, and invites judges to engage in ad hoc, statutory gap-filling on a case-by-case basis.[110] Clear, consistent, predictable, and stable judge-made law applied within the traditional judicial sphere of authority to intepret the laws, on the other hand, will both curtail judicial lawmaking and constrain congressional overreaching.

Justice Scalia argues that judges should be constrained by what he sees as sound, time-tested principles of law—fidelity to constitutional first principles, fidelity to statutory text, and tried-and-true canons of statutory construction. At the same time, the courts must play a role in restraining and disciplining Congress through judge-made rules of strict statutory construction. For when courts give effect to less-than-fully-articulated expressions of congressional intent, they encourage Congress to be less than fully articulate, enacting indefinite and overly broad law through the backdoor of legislative history.[111] This, in turn, encourages courts to become entangled in the legislative process by reading implied statutory provisions into the legislative history, thus "intru[ding] into the operations of the [legislative] branch."[112] Clear-statement principles are perhaps the most obvious such constraining rules, but Justice Scalia's entire strict-constructionist approach amounts to a sophisticated and multi-dimensional clear-

110. *Cf.* Popkin, *supra* note 21, at 1164 (contending that Justice Scalia's rule-based approach to statutory interpretation "rest[s] on considerations favoring a restrained judiciary"). Yet this is only half of the equation; Justice Scalia's approach seeks to rein in Congress as well as the courts, and return both to a more limited role under the constitutional scheme of limited government through the separation of powers. *Cf.* POSNER, *supra* note 11, at 301 (arguing that interpretive approaches that "enlarg[e] the power of the courts to repair the legislative product" will "reduce the cost of statutory enactment" and therefore are consistent with a liberal-activist conception of legislative power, while a strict-constructionist approach "curtails judicial power to make legislation effective in changed circumstances" and is consistent with a conservative vision of limited government); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 822 (1983) ("It is not an accident that most 'loose constructionists' are political liberals and most 'strict constructionists' are political conservatives. The former think modern legislation does not go far enough, the latter that it goes too far.").

111. Numerous commentators have suggested, however, that the assumption that a strict-constructionist approach will force the legislature to draft clearer statutes is unrealistic, or at least unproven. *See* SUNSTEIN, *supra* note 11, at 119; MICHAEL ZANDER, THE LAW-MAKING PROCESS 106-07 (3d ed. 1989) (describing strict constructionism as the "punitive or disciplinarian school of judicial interpretation"); Eskridge, *supra* note 1, at 677 (expressing doubts that Justice Scalia's method will force Congress to write clearer statutes or even provide a "set of clear interpretive rules" against which Congress can legislate, because the interpretive rules themselves are vague, manipulable, and evolving over time).

112. Scalia, *Standing*, *supra* note 89, at 882-83.

statement requirement.[113] The Plain Meaning Rule, as Justice Scalia uses it in conjunction with a series of strict-construction devices that effectively resolve ambiguities in favor of the narrowest construction consistent with the statutory text, operates as the ultimate clear-statement rule.[114] If Congress wants to get a statute past Justice Scalia, it had better be explicit.

Furthermore, Justice Scalia's approach should not be seen as mere aggrandizement of the executive branch at the expense of Congress, as some commentators have suggested.[115] It is probably fair to say, as Nicholas Zeppos does, that Justice Scalia holds a "pessimistic view of the legislature" arising out of recent public choice theory, which sees most legislation as unprincipled and economically inefficient interest-group transfers.[116] Justice Scalia's opinions do indeed sometimes echo contemporary public choice theory; his evocation of *The Federalist*'s warnings against the dangers of legislative usurpation,[117] combined with his separation-of-powers formalism and strict construction of statutes,[118] suggest that he is skeptical of legislative power and legislative enactments.[119] Yet in fairness, Justice Scalia cannot be seen as en-

113. *Cf.* Note, *Intent, Clear Statements and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 920 (1982) (characterizing the statutory strict constructionism of the Burger Court as a "clear statement" approach).

114. Nonetheless, the Rule still affords Justice Scalia some flexibility in its implementation. *See infra* text accompanying note 217.

115. *See infra* notes 239-41 and accompanying text. *But cf.* Reisman, *supra* note 99 (arguing that Justice Scalia's theory of "unitary executive" supports expansion of executive power); James G. Wilson, *Constraints of Power: The Constitutional Opinions of Judges Scalia, Bork, Posner, Easterbrook, and Winter*, 40 U. MIAMI L. REV. 1171, 1199-1200 (1986) (arguing that Justice Scalia is especially deferential to the executive on foreign policy questions and in his theory of the unitary executive).

116. Zeppos, *supra* note 7, at 1620. *See also* Farber & Frickey, *supra* note 10, at 437-38 (arguing that Justice Scalia's skepticism of legislative history is based largely on public choice theory).

117. *See, e.g.*, Scalia, *Bicentennial*, *supra* note 87, at 688 (arguing that the central separation-of-powers principles of bicameralism and presentment are designed to protect the public against "'encroachments of the popular branch' and guard against the legislature's 'swallowing up all the other powers'").

118. *See* Eskridge, *New Textualism*, *supra* note 1, at 683 ("[Justice Scalia's approach] seems unfriendly to democratically achieved legislation and threatens to undo much of Congress's statutory work.").

119. While Justice Scalia warns of congressional "usurpation" of power, he has also been critical of what he regards as Congress's tendency to abdicate its difficult but constitutionally-mandated decisionmaking role through enactment of vague statutes delegating real law-making authority to administrative agencies and courts:

> In an area such as environmental protection the Congress owes the people a politically crafted standard more specific than merely the injunction that no one should pollute too much. . . . Fleshing out such generalized mandates, converting them from platitudes which no one can disagree with to clear prescriptions which may lose votes on one side or the other in the next election, is a

tirely deferential to executive agencies either.[120] His is a vision of limited government,[121] in which countervailing powers keep all branches in check:

> [T]he Constitution leaves open the theoretical possibility that the actions of one Branch may be brought to nought by the actions or inactions of another. Such dispersion of power was central to the scheme of forming a Government . . . that would 'secure the blessings of liberty' rather than use its power tyranically.[122]

In Justice Scalia's view, the job of the judiciary includes keeping the other branches, especially the legislature, in check, while itself staying within the confines of its constitutionally assigned role.[123]

IV. Justice Scalia's "Plain Meaning" Method

A. *The "Plain Meaning" Rule As A Canon of Statutory Interpretation*

Thus far this Article has argued that, contrary to many of his critics, Justice Scalia's project is neither to offer an alternative to intentionalism, nor to establish strict textualism in statutory in-

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difficult and distasteful task. But it is the task and should be the primary function of the Congress.

Scalia, *Bicentennial, supra* note 87, at 694. Yet in his view, Congress wants to have it both ways, to "preserve[ ] congressional control while relieving the people's representatives of the embarrassment of voting" on specific statutory provisions. Scalia, *Legislative Veto, supra* note 91, at 25. While these criticisms are directed at broad delegations of legislative authority, they implicitly suggest that the use of legislative history in statutory interpretation similarly undercuts the separation of powers. By giving effect to excessively vague, generalized statutes, this practice arguably relieves Congress of the necessity of voting on specific statutory provisions while still allowing Congress to have the last word on specific applications of a statute, as interpreted through the lens of unenacted legislative history.

120. *See infra* notes 239-41 and accompanying text.

121. "You must face the unhappy fact that democratic government implies—at least at any single level—limited government. . . . The [current] system is overloaded. We are now at the point at which each major new program entails an overall diminution of democratic control." Scalia, *Legislative Veto, supra* note 91, at 26. The quoted language is part of a fictional letter Justice Scalia suggests an honest member of Congress would write to her constituents.

122. Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 817 (1987) (Scalia, J., concurring in the judgment) (arguing that because prosecution is an executive function, separation of powers prevents judiciary from appointing special prosecutor to prosecute contempt).

123. Thus, Justice Scalia writes that:

> [The judicial branch's] most significiant roles, in our system, are to protect the individual criminal defendant against the occasional excesses of th[e] popular will, and to preserve the checks and balances within our constitutional system that are precisely designed to inhibit swift and complete accomplishment of that popular will.

Scalia, *Rule of Law, supra* note 104, at 1180.

terpretation. Instead, he opposes reliance on legislative history as evidence of congressional intent, and argues for the strict construction of statutes under clear interpretive rules against which Congress must legislate. The most important of those rules, for Justice Scalia, is a judge-made canon of statutory interpretation, the Plain Meaning Rule, which authorizes courts to ignore legislative history if the meaning of a statute is plain on its face.

The Plain Meaning Rule is a product of Nineteenth Century jurisprudence.[124] Its classic statement[125] came in *United States v. Missouri Pacific Railroad Co.*, where Justice Butler wrote: "[W]here the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended."[126] Justice Scalia repeats this formula, with some variations, in case after case.[127] The Plain Meaning Rule, as Justice Scalia sees it, precludes the use of legislative history if a court can find a plain meaning in a statute without it.[128] Justice Scalia contends that the courts' reliance on legislative history is a late-Twentieth Century aberration, an "ill-advised deviation from the venerable principle that if the language of a statute is clear, that language must be given effect."[129]

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124. The American Plain Meaning Rule is "a derivative of English literalism, but a qualification of it." HART & SACKS, *supra* note 45, at 1267. Its two closest older British cousins are the "literal rule" ("If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity," R. v. Judge of the City of London Court, 1 Q.B. 273, 290 (1892)) and the "golden rule" ("We must . . . give the words of the legislature their plain and natural meaning unless it is manifest from the general scope and intention of the statute injustice and absurdity would result," Mattison v. Hart, 14 C.B. 357, 385 (1854)). The literal rule and the golden rule themselves rose in reaction to, and remained in tension with, a much older rule of liberal construction, the "mischief rule," which authorized courts to "make such construction as shall suppress the mischief, and advance the remedy" that Parliament had created in the statute. Heydon's Case, 3 Co. Rep. 7a (1584); ZANDER, *supra* note 111, at 90-92. *See also* RUPERT CROSS, STATUTORY INTERPRETATION 14 (John Bell & George Engle eds., 2d ed. 1987)

125. Arthur W. Murphy, *Old Maxims Never Die: The "Plain Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1299 (1975).

126. 278 U.S. 269, 278 (1929).

127. *See, e.g.*, Chisom v. Roemer, 111 S. Ct. 2354, 2369 (1991); Pavelic & LeFlore v. Marvel Entertainment, 493 U.S. 120, 123 (1989); I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 452-53 (1987).

128. The Plain Meaning Rule, however, comes in many variations. *See* DICKERSON, *supra* note 9, at 229-33 (describing variations of the Rule, ranging from the "tautology" that "[w]ords should be read as saying what they say" to a rule of strict literalness in interpretation). Most versions would exclude legislative history if the meaning is plain, but more extreme versions would "exclude consideration of even related parts of the statute and the scheme as a whole . . . as well as prior acts and other elements of the general historical context . . . ." HART & SACKS, *supra* note 45, at 1267.

129. I.N.S. v. Cardoza-Fonseca, 482 U.S. at 452.

However, there are reasons to doubt Justice Scalia's claims about the origins and purpose of the Plain Meaning Rule.

British courts historically did not consult legislative history to determine the meaning of statutes.[130] Early American courts appear to have followed the British practice until the 1880s. Theodore Sedgwick, in his 1857 treatise on statutory interpretation, argued that it was always inappropriate to consult legislative history, although he believed contemporaneous legal materials, including commentaries by "learned persons," were an appropriate guide to understanding the meaning and purpose of a statute.[131] By the late Nineteenth Century, however, American judges had begun to consult legislative history with some regularity.[132] Although the first edition of J.G. Sutherland's influential 1890 treatise did not authorize the use of legislative history in statutory construction, its use was a well-recognized practice when Sutherland's second edition was published in 1904.[133]

Thus, although the Plain Meaning Rule has its roots in stricter versions of English literalism, the Rule in its modern form arose in reaction to the American trend toward increasingly liberal use of legislative history. By its very terms, however, the Rule authorizes the use of legislative history whenever the meaning of the statutory text is not "clear" and "unambiguous."[134] Judge Wald[135]

130. DICKERSON, *supra* note 9, at 161-62; Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 196 (1983) [hereinafter Wald, *Observations*]. British judges have made exceptions to, or deviated from, this rule on occasion. *See* FRANCIS A.R. BENNION, STATUTORY INTERPRETATION 455-58 (2d ed. 1992); ZANDER, *supra* note 111, at 133-39. In an important recent case, however, the House of Lords announced a new rule allowing courts to consult legislative history in interpreting ambiguous or obscure statutory provisions. Pepper v. Hart, 1 All E.R. 42 (1993).

131. THEODORE SEDGWICK, STATUTORY AND CONSTITUTIONAL LAW 247, 251 (1857).

132. The earliest Supreme Court case commonly cited for the use of legislative history to construe a statute is Church of the Holy Trinity v. United States, 143 U.S. 457 (1892). In that case, a statute prohibiting "the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States" was held not to bar a New York church from hiring an English minister. The Court, examining the legislative history, determined that employing foreign clergy was not part of the "evil which was intended to be remedied" by the statute. *Id.* at 465.

133. *Compare* J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 470 (1890) *with* J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 470 (John Lewis ed., 2d ed. 1904) ("The proceedings of the legislature in reference to the passage of an act may be taken into consideration in construing the act."), and cases cited therein.

134. Richard Powell, *Construction of Written Instruments*, 14 IND. L.J. 309, 324 (1939). Even in *Missouri Pacific*, frequently cited as the "classic" statement of the Plain Meaning Rule, the Court makes clear that "[w]here doubts exist and construction is permissible, reports of the committees of Congress . . . may be taken into consideration to aid in the ascertainment of the true legislative intent." 278 U.S. at 278. The Plain Meaning Rule traditionally did not rule out the use of legislative history in all cases, or even in most

traces the Rule to the 1899 Supreme Court case of *Hamilton v. Rathbone*: "[P]rior acts [of the legislature] may be resorted to, to solve, but not to create an ambiguity."[136] Thus, contrary to Justice Scalia's view, the use of legislative history in statutory interpretation actually coincides historically with the introduction of the Plain Meaning Rule in its modern form. The Rule itself was meant not to preclude the use of legislative history generally, but only to prevent a court from using it when the meaning of a statute was so plain on its face as to make a search of the legislative history unnecessary.[137]

Although some commentators have suggested the Rule was never as widely practiced as it was preached,[138] courts have used

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cases, but only in those cases where the meaning was thought to be immediately apparent on the face of the statute. For that reason, a prominent British commentator recently argued that British courts should adopt the (American) Plain Meaning Rule in order to liberalize the use of legislative history in interpreting statutes whose meaning was not "plain." CROSS, *supra* note 124, at 164-65.

135. Wald, *Observations*, *supra* note 130, at 197.

136. 175 U.S. 414, 421 (1899). *But cf.* DICKERSON, *supra* note 9, at 229 (tracing the Rule to Lake County v. Rollins, 130 U.S. 662, 670 (1889)) ("If the words convey a definite meaning, which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it."). Justice Scalia himself traces the Rule to United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95-96 (1820) ("The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction.") (*quoted in* I.N.S. v. Cardozo-Fonseca, 480 U.S. 421, 452 (1987) (Scalia, J., concurring in the judgment)). The *Wiltberger* rule, however, is a stricter rule of literalism that would prohibit any "construction" of a statute that had a clear meaning on its face. To Nineteenth Century judges and commentators, "construction" meant any interpretive method necessary to understand a statute whose meaning was not apparent on its face in some immediate, preinterpretive sense; the rule thus prohibited courts from employing such traditional linguistic canons as *ejusdem generis*, *expressio unius*, *in pari materia*, and others. *See* SEDGWICK, *supra* note 131, at 195, 199-200 (citing rule that "it is only when the language is ambiguous that the courts are called on to construe or interpret," whether by "means to be found within the statute itself," such as the linguistic canons, or "means to be employed from outside the statute"). But Justice Scalia typically employs these canons of construction in order to show that a statute has a plain and unambiguous meaning. *See infra* notes 183-95 and accompanying text. Thus, Justice Scalia's method is not consistent with the *Wiltberger* rule. Nor did Nineteenth Century judges and commentators believe, as Justice Scalia apparently does, that in most cases a statute will have a single plain meaning. See SUTHERLAND (2d ed.), *supra* note 133, at ch. XIII, for citations to numerous cases wherein construction was used because the meaning was not plain.

137. Hart and Sacks note, however, that in practice the Plain Meaning Rule required litigants to research the legislative history and argue in the alternative, first, that the plain meaning supported their position, and second, that if the meaning was not plain, the legislative history supported their position. This was because one could never be certain whether the judges would find the meaning of the statute plain or ambiguous. HART & SACKS, *supra* note 45, at 1268.

138. *See* Harry W. Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U. L.Q. 2, 12 (1929); Wald, *Observations*, *supra* note 130, at 197. *But cf.* Hans W. Baade, *Original Intent in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1088 (1991) (pointing to a marked upturn in Supreme Court citations to

the Plain Meaning Rule. For example, in *Caminetti v. United States*, the Supreme Court held that the plain meaning of the Mann Act, prohibiting "transport . . . in interstate commerce, [of] any woman or girl for purposes of prostitution . . . or for 'any other immoral purpose,'" extended to such non-commercial "immoral purposes" as adultery and fornication, even though (as the dissenters pointed out) the legislative history clearly revealed that Congress thought the legislation addressed only prostitution and other forms of commercial sex.[139]

Many commentators thought the Plain Meaning Rule received a well-deserved "death blow"[140] in 1940 when, in *United States v. American Trucking Ass'ns*, Justice Reed declared for the Court: "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'"[141] After *American Trucking Assn's*, the Rule was occasionally cited, but never strictly relied upon by the Supreme Court, although lower federal courts occasionally resorted to it.[142] As recently as 1983, Judge Patricia Wald announced the "fall of the plain meaning rule,"[143] arguing that "although the Court still refers to the 'plain meaning' rule, the rule has been effectively laid to rest."[144] In Judge Wald's view, the Rule had come to be used as a rationale to justify a resort to a literal reading of the statutory text when the legislative history itself pointed to ambiguous results, thus standing the traditional Rule on its head.[145]

If this history of the Plain Meaning Rule is correct, Justice Scalia's claims about its historical significance must be questioned. One must ask whether the Plain Meaning Rule, in common use only from 1899 to 1940, is really such a venerable, time-tested approach to statutory interpretation. A stronger argument

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legislative history in the New Deal era, especially after the *American Trucking Ass'ns* decision). Notwithstanding Baade, a substantial upturn in citations to legislative history during and after the New Deal should be expected based on the dramatically heightened volume and prominence of statutory law in this period.

139. 242 U.S. 470, 485 (1917).

140. HART & SACKS, *supra* note 45, at 1268; Murphy, *supra* note 125, at 1301.

141. 310 U.S. 534, 543-44 (1940).

142. *See* Murphy, *supra* note 125, at 1302-08.

143. Wald, *Observations*, *supra* note 130, at 196.

144. *Id.* at 195.

145. *Id.* at 196. For a recent example of this use, see Ardestani v. I.N.S., 112 S. Ct. 515 (1991) (O'Connor, J.) (holding that because the legislative history of the Equal Access to Justice Act is ambiguous, the Court must rely on plain meaning of the statutory text).

can be made for seeing the Plain Meaning Rule as a temporary line of resistance in a longer historical march toward the liberal use of legislative history in the American courts. One must also ask why a late-Twentieth Century Supreme Court Justice would be so interested in reviving a late Nineteenth-Century, judge-made rule of statutory interpretation, especially one of such dubious origins and checkered history.

In practice, Justice Scalia seems to cite the Rule as a rationale, plausibly defensible within the Court's own traditions, for excluding legislative history from statutory interpretation. The traditional Plain Meaning Rule, however, does not rule out the use of legislative history under all circumstances. Instead, it explicitly endorses the use of legislative history to resolve ambiguities and interpretive doubts in a statutory text.[146] Thus, for Justice Scalia to use the Rule to exclude legislative history in any particular case, he must claim that there are no ambiguities or doubts as to the meaning of the text; otherwise, the Plain Meaning Rule would allow the use of legislative history in through the back door. Justice Scalia himself candidly acknowledges that he often finds statutes unambiguous when his colleagues on the Court insist there are ambiguities.[147]

Justice Scalia does not deny the possibility of statutory ambiguity, as a purely textualist view would require.[148] He does, however, insist that there must be a "textual or structural basis" for finding ambiguity.[149] This is a critical move. Other Justices, with a more tolerant attitude toward the use of legislative history, will look to the legislative history to "confirm" their reading of the text.[150] Judge Wald argues that this is, in fact, the principal way

146. *See supra* note 134.

147. Scalia, *Deference*, *supra* note 35, at 521.

148. *See supra* note 11.

149. Dewsnup v. Timm, 112 S.Ct. 773, 781 (1992) (Scalia, J., dissenting) (interpreting Bankruptcy Code). Justice Blackmun, for the majority, finds that a disputed section of the Bankruptcy Code "do[es] embrace some ambiguities" insofar as both parties present plausible conflicting interpretations. *Id.* at 777 (Blackmun, J.). He finds the legislative history silent on the disputed point, confirming that the text is ambiguous. Justice Blackmun then argues that, given textual ambiguity, silence in the legislative history, and "basic bankruptcy principles," the statute should not be reinterpreted to grant a debtor a "broad new remedy." *Id.* at 779. Justice Scalia counters that "ambiguity" requires more than the mere possibility of two or more plausible readings of the text; the Court should try to find a preferred reading, based on textual and structural arguments, and only if it cannot reach a preferred reading should it conclude the text is ambiguous. *Id.* at 788 (Scalia, J., dissenting).

150. *Cf.* Frederick J. de Sloovere, *Extrinsic Aids in the Interpretation of Statutes*, 88 U. PA. L. REV. 527 (1940), a work roughly contemporaneous with the Supreme Court's abandon-

legislative history is used by the Supreme Court, and in most cases it results either in clear confirmation of the Court's initial textual reading, or at least produces no evidence sufficiently compelling to cause the Court to depart from its textual reading.[151] Occasionally, however, this confirmatory look at legislative history will suggest that a statutory provision may mean something other than what at first blush might have appeared; the Justices then go on to explore the legislative history in greater depth to resolve the ambiguity.[152] This appears to be an eminently sensible approach, but Justice Scalia disparages this method as "permit[ting] the apparent meaning of a statute to be impeached by the legislative history."[153] For Justice Scalia, evidence from legislative history, no matter how extensive and compelling, is inadmissible at the moment of determining whether the text is capable of lending itself to more than one plausible interpretation.[154] If through the use of such techniques as nar-

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ment of the Plain Meaning Rule, which argues that there are three main approaches to the use of "extrinsic aids" (including legislative history):

> (1) Restrict interpretation to the statutory text, statutes *in pari materia*, decisions interpreting the statute, and the common law, and avoid using any factual extrinsic aids even when there are patent ambiguities.
>
> (2) Admit factual extrinsic aids as part of the contextual process, not to change a plain meaning but only to clear up doubts in the statutory text itself—patent ambiguities—or doubts arising from application of an apparently clear meaning—latent ambiguities.
>
> (3) Permit full discretion in determining the relevancy of extrinsic aids not only to clear up patent or latent ambiguities in the text, but also to check an apparently plain and explicit meaning . . . .

Id. at 530. De Sloovere argued that the first approach—strict textualism—was impossible, *id.*; the second approach—a version of the Plain Meaning Rule—was the "usual approach" of courts in 1940, *id.* at 531; and the third approach (which Judge Wald describes as the standard approach today, *see infra* text accompanying notes 151-52) was in de Sloovere's view a much needed reform, *id.* at 554. Justice Scalia's overall approach is much closer to de Sloovere's second, plain meaning approach than to strict textualism, and in a sense, Justice Scalia is merely urging a return to this pre-New Deal approach. What complicates the story, however, is that Justice Scalia also argues that one kind of "extrinsic aid," the legislative history, should be excluded under virtually all circumstances.

151. Wald, *Sleeper*, *supra* note 13, at 289-90. For an example of this use of legislative history, see, *e.g.*, Railway Labor Executives' Ass'n v. National Mediation Bd., 988 F.2d 133 (D.C. Cir. 1993) (Ruth Bader Ginsburg, J.) (relying on legislative history to confirm textual reading of statute).

152. Wald, *Sleeper*, *supra* note 13, at 294.

153. Scalia, *Deference*, *supra* note 35, at 521. One reason Justice Scalia writes so many opinions "concurring in the judgment" is that even when he agrees with the majority's reading of a statutory text, he declines to sign on to an opinion in which the Court confirms its textual reading by looking to legislative history. To endorse this method is to open the possibility that in future cases, when legislative history conflicts with the initial textual reading, the Court will be guided by the legislative history and adopt another (and most likely broader) reading of the statute.

154. *Cf.* de Sloovere, *supra* note 150, at 531-32 (arguing that the Plain Meaning Rule "overlooks the necessity of bringing out all possible meanings the words may bear," and

row readings of crucial statutory terms and traditional canons of grammatical and structural interpretation the Court reaches a plain meaning, that ends the inquiry.[155] Significantly, however, when legislative history is admitted as evidence, it will often work to allow a broader reading of the statute than Justice Scalia would otherwise find in the plain meaning of the text.[156]

Justice Scalia's refusal to admit evidence from legislative history thus is crucial. If legislative history is inadmissible at the moment of determining whether the statutory language is capable of bearing more than one meaning, other interpretive techniques may lead Justice Scalia to reach a single "plain meaning." Once he finds a "plain meaning," the Plain Meaning Rule endorses his exclusion of legislative history. Thus, although the Plain Meaning Rule itself does not compel narrow readings of statutes, it does allow Justice Scalia to exclude the use of legislative history that might otherwise tend toward broader statutory readings.

Justice Scalia's method nonetheless requires the use of a variety of other interpretive tools beyond the Plain Meaning Rule. It is to those other tools that the Article now turns.

B. *Literalism in Service of Strict Construction*

Thus far, this Article has argued that Justice Scalia's approach depends on the use of the Plain Meaning Rule as the cardinal canon in statutory interpretation, and that this constitutes neither textualism nor nonintentionalism, but instead offers a traditional rationale for ruling out the use of legislative history if the meaning of a statute is plain. Justice Scalia typically reads a statute coming before the Court as if it had a single plain meaning. One technique Justice Scalia frequently uses in this enterprise is to argue for narrow, literal readings of crucial statutory

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that it is inappropriate to "apply[ ] high rules of exclusion" at the point of initially assigning possible meanings to the text).

155. *See, e.g.*, I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring in the judgment) (finding I.N.S. interpretation of Immigration and Nationality Act "unreasonable" and therefore not entitled to deference) ("[D]espite having reached the . . . conclusion [as to the plain meaning of the statute], the Court undertakes an exhaustive investigation of the legislative history of the Act . . . . [T]here is simply no need for the lengthy effort to ascertain the . . . legislative history.").

156. *See, e.g.*, Chisom v. Roemer, 111 S. Ct. 2354 (1991) (Voting Rights Act); EEOC v. Arabian American Oil Co., 111 S. Ct. 1227 (1991) (extraterritorial application of Title VII, Civil Rights Act of 1964); United States v. R.L.C., 111 S. Ct. 1329 (1991) (Juvenile Delinquency Act); Bowen v. Massachusetts, 487 U.S. 879 (1988) (jurisdictional grant to U.S. district courts).

terms. For Justice Scalia, adherence to the letter of the statutory text is essential, but given a choice he typically reads the letter of the statute narrowly, rather than liberally. Frequently, he appeals to a narrow dictionary definition of a crucial word or phrase to reach what he claims is the definitive plain meaning of the larger text.[157] At other times, he cites contemporaneous usage, or usage in parallel statutes, to arrive at a definition of a key term.[158] In a few instances, he interprets a crucial term broadly, but with the effect of narrowing the domain of the statute.[159]

This strict-constructionist approach is certainly not compelled by the Plain Meaning Rule. Indeed, a judge could insist on a broad reading as the "plain meaning" of a statutory text.[160] It is possible to accept the Plain Meaning Rule as a valid interpretive principle while simply disagreeing with Justice Scalia's repeated determinations that the narrower constructions of statutory terms are the correct ones.[161] Nor must an adherent of the Plain Meaning Rule agree with Justice Scalia that the meanings of crucial statutory terms are typically so plain and unambiguous as to rule out the use of legislative history.[162] For Justice Scalia, however, the combination of the Plain Meaning Rule with typically narrow readings of crucial terms produces narrow plain meanings of statutory texts which, because they are plain, cannot be rebutted by legislative history. This method tends inevitably to

157. *See, e.g.*, Smith v. United States, 113 S. Ct. 2050, 2060-63 (1993) (Scalia, J. dissenting) (meaning of "use" in 18 U.S.C. § 18924(c)(1)); Chisom v. Roemer, 111 S. Ct. 2354-72 (1991) (Scalia, J., dissenting) (meaning of "representative" in 42 U.S.C. § 1973(b)). Hart and Sacks label this the "one word, one meaning fallacy," warning that "[a] dictionary . . . never says what meaning a word *must* bear in a particular context. Nor does it ever purport to say this. An unabridged dictionary is simply an historical record, not necessarily all-inclusive, of the meanings which words in fact *have* borne." HART & SACKS, *supra* note 45, at 1220.

158. *See, e.g.*, Morales v. Trans World Airlines, Inc., 112 S. Ct. 2031, 2037 (1992) (Scalia, J.) (meaning of "related to" in 49 U.S.C. § 1305(a)(1)); United States v. Burke, 112 S. Ct. 1867, 1876 (1992) (Scalia, J., concurring) (meaning of "personal injuries or sickness" in 26 U.S.C. § 104(a)).

159. *See, e.g.*, Wisconsin Dep't of Revenue v. Wrigley, 112 S. Ct. 2447 (1992) (Scalia, J.) (meaning of "solicitation" in 15 U.S.C. § 381(a)(1)); Lukhard v. Reed, 481 U.S. 368 (1987) (Scalia, J., plurality opinion)) (meaning of "income" in 42 U.S.C. § 601-15).

160. An example is Caminetti v. United States, 242 U.S. 470 (1917), discussed *supra* text accompanying note 139, where the Court read the Mann Act broadly to prohibit noncommercial sexual immorality; the legislative history supported a narrower reading.

161. BENNION, *supra* note 130, at 377 (arguing that the Plain Meaning Rule may lead to strict or liberal constructions).

162. *Id.* at 377, 405-07 (arguing that the Plain Meaning Rule does not imply that all statutes have plain meanings). *See also* HART & SACKS, *supra* note 45, at 1268 (arguing that historically, judges who used the Plain Meaning Rule often found statutory texts ambiguous and resorted to legislative history, which led litigants to argue in the alternative with both a plain meaning analysis and an argument from legislative history).

narrow what Judge Frank Easterbrook calls the "domain" of statutes.[163]

In *McCormick v. United States*, Justice Scalia, citing contemporaneous usage, argues that the phrase "receipt of money under color of right" does not include bribe-taking for purposes of the Hobbs Act, a federal criminal statute prohibiting extortion.[164] On a strictly literal interpretation of the words as they are used by ordinary English speakers, bribe-taking certainly constitutes "receipt of money," and if done by government officials while in connection with their official capacity could be "under color of right." At a minimum, one might think, the words themselves are sufficiently ambiguous to warrant an inquiry into all available interpretive aids, including legislative history. But for Justice Scalia, the words lend themselves to a single meaning that excludes bribery. Result: The statutory domain is narrowed to exclude bribery.

In *Moskal v. United States*, Justice Scalia, again citing contemporaneous usage, finds that a "falsely made" document for purposes of the federal forgery statute does not include every document with false content. He writes: "Commentators in 1939 [when the statute was enacted] were apparently unanimous in their understanding that 'false making' was an element in the crime of forgery, and that the term did not embrace false contents."[165] Result: The statutory domain is narrowed to exclude certain false documents.

In *West Virginia University Hospitals, Inc. v. Casey*, Justice Scalia, citing usage in parallel statutes, finds that "attorney's fees" in the fee-shifting provision of the Civil Rights Attorney's Fees Awards Act does not include expert witness fees.[166] Justice Scalia is certainly correct that the term "attorney" is not ordinarily understood to include an expert witness, and in the legal profession, attorney's fees are understood to represent something quite different from expert witness fees. But for the ordinary English-speaking client, attorney's fees might reasonably include all that

163. Easterbrook, *Statutes' Domains*, *supra* note 9, at 534-36. The "domain" of a statute is the class of persons and events to which the statute applies.

164. 111 S. Ct. 1807, 1819-20 (1991) (Scalia, J., concurring).

165. 111 S. Ct. 461, 474 (1991) (Scalia, J., dissenting).

166. 111 S. Ct. 1138, 1143 (1991). Some of the parallel statutes cited by Justice Scalia expressly allow shifting of expert witness fees along with attorney's fees, but Justice Scalia contends that this merely shows that Congress could have included expert witness fees in this statute if it had so intended.

is paid to or through one's attorney, not only for her own professional services but for costs, including the hiring of expert witnesses. Again, there is at least a plausible alternative reading, but Justice Scalia sees no ambiguity in the "plain meaning" of the statutory text, as construed with the aid of parallel statutes. Result: The domain of the fee-shifting provision is narrowed, to exclude the awarding of expert witness fees.

In *Crandon v. United States,* Justice Scalia, citing *Webster's Second New International Dictionary,* says that "salary" does not include severance pay or other forms of non-periodic compensation, and therefore a federal statute prohibiting private payments of supplemental salary to government officials does not prohibit defense contractors from making cash payments to their former employees now in government service.[167] Result: The statutory domain is narrowed, such that private employers may make large cash payments to their former employees upon joining government service.

In *Chisom v. Roemer,* Justice Scalia, citing *Webster's Second New International Dictionary,* finds that "representative" in the Voting Rights Act does not include elected judges. Result: The statutory domain is narrowed, to exclude elections of judges.[168]

In *Smith v. United States,* Justice Scalia argues that a penalty enhancement provision for "use" of a firearm in a narcotics offense does not extend to a situation involving a barter exchange of a firearm for narcotics. Although (as Justice O'Connor argues for the majority) the dictionary would permit a broader reading of "use" to include such a barter exchange, Justice Scalia insists that the phrase "uses a firearm" is ordinarily understood more narrowly to mean "uses a firearm as a weapon," and the phrase should be read as it "ordinarily is used," not as it "can be used." Result: The domain of the penalty enhancement provision is narrowed, to exclude such barter exchanges.[169]

167. 494 U.S. 152, 171-72 (1990) (Scalia, J., concurring in the judgment). Justice Scalia reaches this result even though the payments were based on the employees' monthly salaries, and were explicitly given for the purpose of compensating the employees for the reduction in salary they suffered upon going into government service.

168. 111 S. Ct. 2354, 2372 (1991) (Scalia, J., dissenting) ("[O]ur job is not to scavenge the world of English usage to discover whether there is any possible meaning of 'representatives' which . . . includes judges; our job is to determine whether the *ordinary* meaning includes them . . . ."). Justice Stevens, for the majority, points out that "representatives" could plausibly mean "winners of representative, popular elections," a straightforward interpretation consistent with the legislative history and broad remedial purposes of the statute. *Id.* at 2366 (Stevens, J.).

169. 113 S. Ct. 2050, 2061 (1993) (Scalia, J., dissenting).

In *Bray v. Alexandria Women's Health Clinic*,[170] Justice Scalia's interpretation of the Ku Klux Klan Act of 1871, which provides a federal cause of action against a conspiracy to deprive persons of their federal civil rights, turns in part on a narrow reading of a crucial term in a prior case interpreting the statute. Plaintiffs claimed their civil rights were violated by an alleged conspiracy to obstruct access to abortion clinics. Justice Scalia, for the Court, interprets the statute in conformity with previous decisions construing the statute narrowly, requiring a showing of "invidiously discriminatory animus" against a protected class. Citing *Webster's Second New International Dictionary*, Justice Scalia argues that "invidious" means characterized by hatred or hostility; here, there is no showing that anti-abortion protestors are motivated by an irrational hatred or desire to harm women.[171] Justice Stevens, dissenting, argues that "[t]he plain language of the statute is surely broad enough to cover petitioners' conspiracy," and that the majority "bypasses the statute's history, intent, and plain language in its misplaced reliance on prior precedent."[172] Moreover, Justice Stevens says, even if a showing of "invidiously discriminatory intent" is required, that does not require a showing of irrational hatred toward women; as in other civil rights cases, all that is required is a showing of a desire to discriminate on the basis of sex.[173] In a separate dissent, Justice O'Connor argues that "[m]icroscopic examination of the language we chose in [a previous case interpreting the statute] should not now substitute for giving effect to Congress' intent in enacting the relevant legislative language . . . ."[174] Result: The domain of the statute is narrowed to exclude suits by women seeking abortions against conspiracies to obstruct their access to abortion clinics.

Sometimes, however, a crucial word or phrase may be given a broad reading, with an ultimately statute-narrowing result. In

170. 113 S. Ct. 753 (1993) (Scalia, J.) (holding that the Civil Rights Act of 1871, commonly known as the Ku Klux Klan Act, does not provide a federal cause of action against persons conspiring to obstruct access to abortion clinics).

171. *Id.* at 761-62. Justice Scalia also contends that "women seeking abortions" are not a protected "class," and that the alleged conspiracy does not discriminate against "women in general." *Id.* at 759.

172. *Id.* at 782-83 (Stevens, J., dissenting). Justice Stevens argues that the statute was given a narrow construction in prior cases in order to avoid constitutional infirmities that do not arise in this case, which involves just the kind of private conspiracy to obstruct civil rights that the statute was intended to cure. Consequently, Justice Stevens says, the Court should not place undue weight on precedent here. *Id.* at 783-85.

173. *Id.* at 787.

174. *Id.* at 802-03 (O'Connor, J., dissenting).

Lukhard v. Reed,[175] Justice Scalia, citing *Webster's Third New International Dictionary*, says that "income" as used in the federal Aid to Families with Dependent Children (AFDC) statute may include personal injury awards. Because personal injury awards are excluded from income for purposes of the Internal Revenue Code, food stamps, and federal poverty guidelines, one might make an argument based on the principle *in pari materia* (a principle Justice Scalia uses elsewhere) that income for the purposes of AFDC should be presumed to have the same meaning as in other welfare-related statutes. Justice Scalia reaches the opposite conclusion, claiming the fact that parallel statutes define income to exclude such awards shows that Congress could have written the AFDC statute to exclude personal injury awards from income if it had so intended. Result: Although the term "income" is read broadly, the effect is to allow Virginia to narrow the scope of its welfare program by excluding the recipient of a personal injury award.

In *Johnson v. Transportation Agency*,[176] Justice Scalia argues that an affirmative action program is not permitted under a literal reading of Title VII of the Civil Rights Act of 1964, which prohibits its use of "race and gender criteria" in hiring and promotion decisions. Result: A broad reading of what it means to use race and gender as criteria narrows the affirmative action remedies available to state and local governments.

Justice Scalia does not always rely on literal readings of critical terms, however. In *Green v. Bock Laundry Machine Co.*,[177] he states the term "defendant" in Federal Rule of Evidence 609(a)(1) must be construed non-literally to exclude defendants in civil actions, in order to avoid the "absurd" result that civil defendants, but not civil plaintiffs, are automatically entitled to use evidence of past criminal convictions to impeach hostile witnesses.

Justice Scalia may indeed have good arguments for many of the interpretations he chooses. But it should be clear from our examination of the foregoing cases that plain meaning is typically an interpretive conclusion based on a choice from among competing plausible interpretations. Sometimes this conclusion is reached through artful application of principles of statutory

175. 481 U.S. 368, 374-76 (1987) (Scalia, J., plurality opinion).

176. 480 U.S. 616, 657 (1987) (Scalia, J., dissenting).

177. 490 U.S. 504, 527-29 (1989) (Scalia, J. concurring in the judgment). Under most versions of the Plain Meaning Rule, absurdity is a special case justifying departures from the plain meaning. *See supra* text accompanying notes 35-36 and 72-73.

construction;[178] sometimes the conclusion is justified by no more than Justice Scalia's *ipse dixit* that one dictionary definition is more ordinary or plainer than another.[179] In either case, this is a very different use of the Plain Meaning Rule than Nineteenth Century judges and commentators would have recognized.

Frederick Schauer points out:

> [W]hen an interpretation is taken to be the only possible one when there is . . . a plausible alternative, then one of two legal pathologies is taking place. Either a decision is in fact being made on grounds of policy or principle . . . hidden . . . by a denial of the grounds for the decision, or courts are making decisions not fully aware of the options in fact available to them.[180]

C. *Justice Scalia's Use of Grammatical and Structural Canons to Resolve Apparent Ambiguities*

Justice Scalia describes what he views as the "regular method" of interpreting a statute in *Chisom v. Roemer*:

> [F]irst, find the ordinary meaning of the language in its textual context; and second, using established canons of statutory construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not—and especially if a good reason for the ordinary meaning appears plain—we apply that ordinary meaning.[181]

So far as it goes, Justice Scalia's formula appears unobjectionable: Who can argue against beginning the interpretive inquiry by looking to the ordinary meaning of the language, then proceeding to ask whether additional meanings might be permissible?[182] What Justice Scalia's formula omits, however, is what to

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178. *See infra* Part IV.C.

179. Michael Zander argues that this kind of literalism is "defeatist and lazy" and "amounts to an abdication of responsibility on the part of the judge. Instead of decisions being based on reason and principle the literalist bases his decision on one meaning arbitrarily preferred." ZANDER, *supra* note 111, at 108. *See also* DICKERSON, *supra* note 9, at 230 (arguing that literalism, in which words are "given effect according to their relevant dictionary senses," is "simple nonsense" because it is insensitive to the context that gives words their meaning).

180. Frederick Schauer, *A Brief Note on the Logic of Rules, with Special Reference to* Bowen v. Georgetown University Hospital, 42 ADMIN. L. REV. 447, 455 (1990) (criticizing Justice Scalia's concurring opinion in Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988), where Justice Scalia argues that the only possible reading of the phrase "future effect" in the Administrative Procedure Act is as a statutory bar to retroactive rulemaking).

181. 111 S. Ct. 2354, 2369 (1991) (Scalia, J., dissenting).

182. *See* Frankfurter, *supra* note 51, at 535 ("Though we may not end with the words in construing a disputed statute, one certainly begins there.").

do if the ordinary meaning lends itself to more than one plausible interpretation. Justice Scalia provides no general answer, but his opinions reveal several techniques by which he dissolves such apparent ambiguities. First, as we have seen, Justice Scalia denies ambiguities by construing crucial statutory terms narrowly. Second, he uses established canons of statutory construction not to validate alternative permissible readings, but to rule out many of the remaining ambiguities in the text.

Justice Scalia uses canons of grammatical and structural interpretation aggressively. For example, in *Pauley v. Bethenergy Mines, Inc.*, Justice Blackmun, for the Court, finds the federal black lung benefits statutes ambiguous, and defers to the Department of Labor's interpretation.[183] Justice Scalia, dissenting, argues that:

> [d]eference is appropriate where the relevant language, carefully considered, can yield more than one reasonable interpretation, not where discerning the only possible interpretation requires a taxing inquiry. . . . [T]he HEW regulations referred to by the present statute are susceptible of only one meaning, although they are so intricate that that meaning is not immediately accessible.[184]

For Justice Scalia, the plain meaning apparently need not be an accessible one, even to Supreme Court Justices, agency administrators, or the Members of Congress who enacted a statute.

Similarly, in *Arcadia v. Ohio Power Co.*, Justice Scalia works his way out of an apparent ambiguity through nimble grammatical and structural inference. He invokes the canon *ejusdem generis*, as well as the principle that a statute must be read to give meaning to all its terms, to construe an unclear provision of the Federal Power Act. At issue is the phrase "or other subject matter." Justice Scalia's interpretation turns on the use and placement of the word "or", which, he claims, would be "superfluous" in any other reading of the complex statutory text.[185]

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183. 111 S. Ct. 2524 (1991).

184. *Id.* at 2539 (Scalia, J., dissenting). Justice Scalia attempts to show, using the canons *expressio unius* and *in pari materia* as well as the structure and purpose of the statutes, that his interpretation is the "plain" and "only possible" interpretation.

185. 111 S. Ct. 415, 419 (1991) (narrowly construing phrase "or any other subject matter" in § 318 of Federal Power Act, which provides that in cases of overlapping FERC and SEC regulatory jurisdiction, SEC regulations are pre-emptive with respect to enumerated subjects "or any other subject matter"). Justice Stevens concurs, but takes comfort in the fact that the legislative history supports Justice Scalia's interpretative conclusion. *Id.* at 422-24 (Stevens, J., concurring).

In *Mertens v. Hewitt Associates*, Justice Scalia, for the Court, says that an Employment Retirement Income Security Act (ERISA) provision allowing plan participants to seek "appropriate equitable relief" for violations of the statute does not authorize a damage action against a non-fiduciary who knowingly participates in a fiduciary's breach of its fiduciary duty. Justice Scalia acknowledges that, taken in isolation, "equitable relief" is ambiguous. It could mean "equitable" as opposed to "legal" relief, thus excluding money damages. On the other hand, it could mean "relief traditionally available in courts of equity," which in cases of breach of trust included all manner of legal as well as equitable remedies. But Justice Scalia insists that in its statutory context "there can be no doubt" that the former meaning applies. The modifier "equitable," to have meaning, must be taken as a limitation on "relief." But if the Court gives "equitable" its broader meaning (that is, any relief available for breach of trust), it "would limit the relief not at all. We will not read the statute to render the modifier superfluous."[186] Justice White, dissenting, argues that Justice Scalia's reading deprives trust beneficiaries of remedies they enjoyed at common law, including a money damages remedy against non-fiduciaries, but there is no indication that such a harsh result was intended. The alternative, broader reading of "equitable," Justice White says, accords with the text, history, and purpose of the statute, as well as common sense and the common-law background against which the statute was enacted.[187] Result: On Justice Scalia's reading, the statute is narrowed, to deprive ERISA plan beneficiaries of certain remedies that they enjoyed at common law.

Geoffrey Miller points out that many of the traditional canons of statutory interpretation correspond closely to interpretive rules used in other legal systems, and to the rules-of-thumb for permissible grammatical and structural inferences developed by the linguistic philosopher Paul Grice.[188] To the extent that they

186. 113 S. Ct. 2063, 2068-69 (1993). Justice Scalia also argues that the use of the term "legal relief" elsewhere in the statute implies that "equitable relief" here does not include "legal relief." *Id.* at 2070.

187. *Id.* at 2073-74 (White, J., dissenting).

188. Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1179-84, citing PAUL GRICE, STUDIES IN THE WAY OF WORDS (1989). Among the canons Miller discusses are some frequently used by Justice Scalia, such as *ejusdem generis* (general terms take their meanings from specific terms); *expressio unius est exclusio alterius* (the expression of one thing signifies the exclusion of others); *in pari materia* (terms used in other statutes on the same subject will be interpreted as having the same meaning throughout); the maxim that a court must if possible give meaning to every word in a

represent universal rules of inference, these grammatical and structural canons may be useful and defensible tools at a certain stage in the interpretive project. They should not be regarded as rules unique to statutory interpretation, however, but as guides to interpretation of any text—there is no reason to suppose that the grammar and structure of statutes are somehow so distinctive that they require special rules of inference.[189] Nor should these canons be regarded as necessarily leading to a single authoritative interpretation or plain meaning of a text in every case, or even in most cases. Instead, they may sometimes help us narrow the range of possible interpretations by ruling out impermissible ones. It seems equally likely, however, given the ambiguities inherent in language and our ordinary imprecision in its use, that they will often lead to multiple, permissible interpretations.[190] It would be extraordinary indeed, if every statute were so well-constructed that the sum of all permissible grammatical and structural inferences within its language and structure inevitably led to a single permissible interpretation. Most statutes are written by Members of Congress, their staffs, and lobbyists, often working in groups, forging compromises, and leaving provisions deliberately vague. But if the grammatical and structural canons result in more than one permissible interpretation, we must

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statutory text; the principle that the meaning of a statute is not to be obtained from any single section, but from the whole text read together; and the principle that when two statutes are capable of being read together to make sense of each, it is the duty of the courts to do so, absent a clear expression of contrary congressional intent.

189. BENNION, *supra* note 130, at 805 (arguing that linguistic canons are applicable to all language, not just statutes); Miller, *supra* note 187, at 1183 (arguing that grammatical canons "possess features of considerable generality," as evidenced by their similarity to ostensibly universal rules of implicature). *But cf.* DICKERSON, *supra* note 9, at 234-35 ("Several Latin maxims masquerade as rules of interpretation while doing nothing more than describing results reached by other means.").

190. *See* HART & SACKS, *supra* note 45, at 1221 ("Maxims [of grammatical and structural inference] should not be treated, any more than a dictionary, as saying what meaning a word or groups of words *must* have in a given context. They simply answer the question whether a particular meaning is linguistically permissible, if the context warrants it."). *See also* DICKERSON, *supra* note 9, at 228-29 (stating that grammatical canons are merely "rebuttable presumptions" that "reflect the probabilities generated by normal usage," but should not be applied mechanically). Judge Posner claims:

> [Grammatical and structural canons] are just a list of relevant considerations, at best of modest utility. . . . Cautionary rather than directive, often pulling in different directions like their counterparts, the maxims of ordinary life ['haste makes waste,' but 'he who hesitates is lost'], the canons are the collective folk wisdom of statutory interpretation and they no more enable difficult questions of interpretation to be answered than the maxims of everyday life enable the difficult problems of everyday life to be solved.

POSNER, *supra* note 11, at 279-80

make arguments based on considerations external to the text for why one permissible interpretation is to be preferred to others.

Justice Scalia's description of his method, "using established canons of statutory construction [to] ask whether there is any clear indication that some permissible meaning other than the ordinary one applies,"[191] appears to recognize that the grammatical and structural canons are as likely to enlarge the range of permissible interpretations as to narrow it. In practice, however, Justice Scalia uses the canons aggressively to rule out possible interpretations. In the process, he often stretches the grammatical and structural canons beyond their valuable use.[192] His opinions typically use arcane and subtle arguments from grammar and structure.[193] The application of these grammatical and structural arguments greatly differs from the questions of law, policy, legislative history, and statutory purpose often found in judicial opinions. Indeed, they often carry him far afield from any plain meaning or ordinary usage that an ordinary reader, or even a Member of Congress voting on the statute, might glean from the text.[194] One must question the application of the Plain Meaning

191. *See supra* text accompanying note 181.

192. *See supra* note 189. *See also* POSNER, *supra* note 11, at 268 (suggesting that ordinary meaning is often less precise than rigid adherence to dictionary definitions and grammatical and structural canons assumes); Frankfurter, *supra* note 51, at 544 (arguing that grammatical canons "give an air of abstract intellectual compulsion to what is in fact a delicate judgment" and "are not in any true sense rules of law" but are merely "axioms of experience" that have been "abstracted out of context" and "codified in treatises"). *Cf.* Posner, *supra* note 110, at 806-07 (expressing doubt that these canons "have value even as flexible guideposts—rebuttable presumptions," much less as "rigid rules"); *id.* at 811 (arguing that the canons' principal effect is that they "impute omniscience to Congress").

193. Popkin argues that despite his professed devotion to the ordinary meaning of statutory language, Justice Scalia in fact "determines what statutory text means by presuming authorship by an ideal drafter who meets proper standards of style and grammar. . . . Such presumptions are not . . . genuinely concerned with how people ordinarily use and understand language." Popkin, *supra* note 21, at 1143. Eskridge argues that this method is unrealistic, in that it "assumes Congress is omniscient about the law." Eskridge, *New Textualism, supra* note 1, at 679. Justice Stevens, more pithily, says Justice Scalia reads statutes through "thick grammarian's spectacles." West Virginia Univ. Hosps., Inc. v. Casey, 111 S. Ct. 1138, 1154 (1991) (Stevens, J., dissenting).

194. In addition to *Pauley, Arcadia,* and *Mertens,* cases in which Justice Scalia relies on elaborate grammatical and structural inferences to reach a plain meaning include: Deal v. United States, 113 S. Ct. 1993 (1993) (interpreting penalty enhancement provision for "second conviction"); United States v. Thompson/Center Arms Co., 112 S. Ct. 2102 (1992) (Scalia, J., concurring in the judgment) (interpreting National Firearms Act); Dewnsup v. Timm, 112 S. Ct. 773 (1992) (Scalia, J., dissenting) (interpreting Bankruptcy Code); and K-Mart Corp. v. Cartier Inc., 485 U.S. 176 (1988) (Scalia, J., concurring in part and dissenting in part) (interpreting Tariff Act of 1930). In two of these cases he labels his readings, based on complex grammatical and structural inferences, "more natural" than the majority's interpretations, which are based in part on legislative history. *See Dewsnup,* 112 S. Ct. at 782; *Pauley,* 111 S. Ct. at 2544. This suggests that, in order to qualify as the plain meaning for Justice Scalia, an interpretation need not be the only plausible one, but

Rule when it renders the meaning of a statute plain only to a single Justice of the Supreme Court.[195]

D. *Clear Statement Canons in the Service of Strict Construction*

If literal readings of crucial terms and aggressive application of the grammatical and structural canons fail to resolve ambiguities, Justice Scalia typically relies on another set of traditional canons of statutory interpretation: the clear statement principles.[196] Justice Scalia's use of these principles again systematically narrows the domain of statutes.

In *United States v. Nordic Village, Inc.*, Justice Scalia acknowledges a textual ambiguity in the bankruptcy code, and resolves it by employing a canon requiring a clear statement in a statute before it will be construed to waive a state's sovereign immunity.[197] Result: Sovereign immunity is not waived, and the domain of the bankruptcy statute is narrowed.

In *United States v. R.L.C.*, Justice Scalia argues that the Court should not use legislative history to construe a facially ambiguous criminal statute, but instead should apply the "rule of lenity." Under this traditional clear statement principle, ambiguous pe-

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merely "more natural." Justice Scalia's version of the Plain Meaning Rule thus departs from the traditional rule, *see supra* notes 134-37 and accompanying text, in at least two respects: Justice Scalia's rule requires neither that the plain meaning be obvious, nor that it be the only plausible meaning. Moreover, as discussed *supra* note 136, Justice Scalia's heavy reliance on canons of construction to reach a plain meaning is broadly inconsistent with the purpose of the traditional Plain Meaning Rule, and directly contravenes the earlier *Wiltberger* rule that he himself cites to support his method.

195. *See* Deal v. United States, 113 S. Ct. at 2001-04 (Stevens, J. dissenting) (arguing that "In an effort to cure [the contested provision] of any ambiguity," Justice Scalia's majority opinion "undertakes an intricate grammatical analysis," and is "driven by an elaborate exercise in sentence-parsing"). Justice Scalia's grammatical analysis leads him to the conclusion that a penalty-enhancement provision for a "second conviction" applies to a criminal defendant convicted of two offenses at a single trial. Justice Stevens' dissent points out that this interpretation contradicts nineteen years of precedent interpreting the provision as aimed at repeat offenders. "Surely it cannot be argued that a construction surfacing for the first time 19 years after enactment is the only available construction." *Id.* at 2001.

196. William Eskridge describes these non-grammatical, non-structural canons as "procedural" and "federalism" canons. Eskridge, *New Textualism, supra* note 1, at 663-65. Eskridge's categories miss the mark. Some canons, such as the requirement of a clear statement before a statute will be construed to waive states' sovereign immunity, do embrace federalism concerns. But other canons embody other substantive legal principles. For example, the rule of lenity, which urges narrow construction of penal statutes, reflects the notion that the citizenry is entitled to fair warning before being subjected to criminal prosecution. This canon can hardly be described as procedural, and it has nothing to do with federalism.

197. 112 S. Ct. 1011, 1014-16 (1992).

nal statutes are construed narrowly.[198] Result: The domain of the statute is narrowed.

In *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, Justice Scalia employs yet another clear statement canon—absent a clear statement to the contrary, a statute will be construed to apply only prospectively.[199] Result: The domain of the statute is narrowed, to apply prospectively only.

In *E.E.O.C. v. Arabian American Oil Co.*, Justice Scalia relies on a presumption against extraterritorial application of statutes, absent a clear statement to the contrary.[200] Result: The domain of the statute is narrowed, to apply within the United States only.

In *Holmes v. Securities Investor Protection Corp.*, Justice Scalia appears to invent a new clear statement principle. He argues that Congress legislates against a "judicial background" that includes, for example, such common-law concepts as "proximate cause" and "zone of interests" tests, and unless Congress clearly states otherwise, these common-law presumptions will prevail.[201] In its strongest form, this principle, by establishing a clear statement test for any legislation that implicates common-law presumptions, echoes the traditional and now widely discredited canon that statutes in derogation of the common law will be construed narrowly. Result: The domain of the federal civil RICO statute is narrowed, to exclude claims in which the plaintiff cannot satisfy traditional common-law proximate cause and zone of interest requirements.

One problem with reliance on canons, as Karl Llewellyn pointed out, is that the traditional canons provide an embarrassment of riches. Llewellyn claimed that for every canon there is an equal and opposite canon; courts can thus resolve almost any interpretive question by choosing the canon that generates the de-

198. 112 S. Ct. 1329, 1339 (1992) (Scalia, J., concurring in part and concurring in the judgment). *See also* Smith v. United States, 113 S. Ct. 2050, 2063 (1993) (Scalia, J., dissenting), where Justice Scalia employs the rule of lenity as a backup to his principal argument that a criminal penalty-enhancement statute *unambiguously* demands a narrower reading than that given by the majority. *But cf.* Deal v. United States, 113 S. Ct. 1993 (1993), where Justice Scalia, for the Court, says that the "plain meaning" of a criminal statute providing stiffer penalties for a "second conviction" applies to a defendant convicted of two offenses in a single trial. Justice Stevens, dissenting, argues that the statute is aimed at repeat offenders, but at any rate is sufficiently ambiguous that the rule of lenity should apply. *Id.* at 2001 (Stevens, J., dissenting).

199. 494 U.S. 827, 841 (1990) (Scalia, J., concurring).

200. 111 S. Ct. 1227, 1236-37 (1991) (Scalia, J., concurring in part and concurring in the judgment).

201. 112 S. Ct. 1311, 1327-28 (1992) (Scalia, J., concurring in the judgment).

sired result.[202] Other commentators, such as Cass Sunstein, argue that Llewellyn overstates the case. Sunstein contends that some (but by no means all) of the traditional canons are defensible as concrete and practical expressions of important substantive legal norms that should be a part of contemporary statutory jurisprudence.[203] But even if it is not the case that every canon cancels and is cancelled by an opposing canon, there is still considerable force to Llewellyn's argument. Some canons do indeed produce conflicting results. For example, in *County of Yakima v. Yakima Indian Nation,* Justice Scalia invokes the canon that statutes should be construed favorably to Indian tribes.[204] Yet in *Blatchford v. Native Village of Noatak* he just as easily ignores that canon in favor of a competing one: that a clear statement of congressional intent is required before a state's sovereign immunity will be abrogated, to reach a result adverse to a native tribe's interest.[205]

Significantly, however, because Justice Scalia does not rely on the full range of traditional canons, those he does employ are typically not inconsistent; instead, they all tend to work in the same direction. He regularly uses clear statement principles that have the effect of systematically narrowing statutory domain,[206] while leaving aside other canons that would tend to favor broad, liberal interpretations,[207] such as the canon that remedial stat-

202. Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed,* 3 VAND. L. REV. 395, 401-06 (1950).

203. SUNSTEIN, *supra* note 11, at 148. Judge Richard Posner adds that such substantive canons, including clear statement principles, "are not interpretive at all" in the sense of helping a court determine meaning, but instead they "establish presumptions, based on substantive policy, for resolving indeterminate statutory cases." POSNER, *supra* note 11, at 280.

204. 112 S. Ct. 683, 693 (1992) (Scalia, J.) ("When we are faced with . . . two possible constructions, our choice between them must be dictated by a principle deeply rooted in the Court's Indian jurisprudence: 'statutes are to construed liberally in favor of the Indians, with ambiguous provisions intepreted to their benefit.'" (citation omitted)).

205. 111 S. Ct. 2578 (1991). Justice Blackmun, dissenting, would invoke the canon that ambiguous statutes should be resolved in favor of the tribes. *Id.* at 2589 (Blackmun, J., dissenting).

206. *See* CROSS, *supra* note 124, at 169-72 (arguing that clear statement principles are specific applications of old common-law presumption that statutes altering the law will be narrowly construed); HART & SACKS, *supra* note 45, at 1240 (suggesting that clear statement principles generally tend to support narrow constructions of statutes).

207. J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION (John Lewis ed., 2d ed. 1904), a work roughly contemporaneous with the emergence of the Plain Meaning Rule, includes these canons of liberal construction:

> § 381: "[T]he words of a statute will be enlarged or restrained in their meanings so as to carry out the manifest intent of the legislature."
>
> § 382: "The intention of the legislature being ascertained with reasonable certainty, words may be supplied in the statute so as to give it effect . . . ."

utes are to be construed liberally to achieve their purpose.[208] Judge Richard Posner argues that clear-statement canons presuppose legislative omniscience[209] and that using them to construe statutes narrowly will "make Congress work twice as hard to produce the same effect."[210] For Judge Posner, strict construction of statutes through application of the canons is a "lineal descendent of the canon that statutes in derogation of the common law are to be strictly construed." Thus, in Judge Posner's view, it is an impermissible "form of judicial activism because it would cut down the power of the legislative branch."[211] Finally, Judge Posner argues, "[b]y making statutory interpretation seem mechanical rather than creative, the canons conceal, often from the

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§ 385: "The general terms of a statute are subject to implied exceptions founded on the rules of public policy, and the maxims of natural justice, so as to avoid absurd and unjust consequences."

§ 490: "Statutes will be construed in the most beneficial way which their language will permit to prevent absurdity, hardship or injustice; to favor public convenience, and to oppose all prejudice to public interests."

§ 500: "Statutes are not, and cannot be, framed to express in words their entire meaning . . . . That which is implied in a statute is as much a part of it as what is expressed."

§ 507: "Upon every statute made for the redress of any injury, mischief or grievance, an action lies by the party aggrieved, either by the express words of the statute or by implication."

§ 508: "[S]tatutes containing grants of power are to be construed so as to include the authority to do all things necessary to accomplish the object of the grant."

§ 582: "Two classes of statutes are liberally construed—remedial statutes, and statutes which concern the public good or the general welfare . . . ."

Whether or not these are good rules of interpretation, Justice Scalia's reliance on "time-tested" canons is highly selective and skewed in the direction of statute-narrowing principles.

208. Justice Scalia ridicules this canon as "meaningless," because there are no accepted criteria by which to determine whether a statute is "remedial." Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581 (1989). Every statute presumably is enacted to remedy some perceived problem.

209. Posner, *supra* note 110, at 811. Judge Posner believes the canons as a whole are not only inconsistent but generally "vacuous," *id.* at 816, and with few exceptions just plain "wrong," *id.* at 806.

210. *Id.* at 821.

211. *Id.* at 821-22. Judge Posner argues further that although some canons counsel strict construction, others point in just the opposite direction, and therefore it is

> unlikely that the canons considered as a whole stand for some general principle of limited government and separation of powers. No doubt one could, by picking and choosing, impose such a principle. But I know of no neutral, nonpolitical basis on which a judge can decide whether the legislature should be forced by some version of strict construction to legislate less . . . .

Id. at 807. The central contention of this Article is that Justice Scalia does indeed selectively employ interpretive rules that push in the direction of strict construction; but for Justice Scalia, separation of powers and limited government are the guiding constitutional principles and not merely the incidental result of his project. *See supra* Part III.

reader of the judicial opinion and sometimes from the writer, the extent to which the judge is making new law in the guise of interpreting a statute . . . ."[212]

Justice Scalia's selective reliance on "clear statement" canons can be compared to the approach proposed by Judge Posner's colleague on the Seventh Circuit Court of Appeals, Judge Frank Easterbrook. Judge Easterbrook frankly acknowledges his skepticism toward legislative enactments.[213] He proposes a single, simple "clear statement principle" as a general rule for resolving questions of statutory domain: If it is unclear whether a statute applies as a rule of decision in a particular case, interpret the statute so that it does not apply.[214] Judge Easterbrook also argues that generally one should prefer private ordering over statutory schemes.[215] According to Judge Easterbrook, contemporary public choice theory tells us that statutes reflect unprincipled redistributive transfers or "deals" to benefit influential interest groups. These deals distort markets and create economic inefficiencies, but the Constitution assigns an important law-making role to the legislative branch. Consequently, the judiciary should

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212. Posner, *supra* note 110, at 816-17.

213. Easterbrook, *Statutes' Domains*, *supra* note 9, at 540-41; Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441 (1990) ("People of good will disagree where the common weal lies. An assumption that legislation points toward it is not so much a rule of interpretation as it is wishful thinking coupled with a hope that judges can pick up the torch. Realistic understanding of statutes treats them as compromises.").

214. Easterbrook, *Statutes' Domains*, *supra* note 9, at 544-45.

215. *Id.* at 549 ("There is still at least a presumption that people's arrangements prevail unless expressly displaced by legal doctrine."). At least on a political level, Justice Scalia shares Judge Easterbrook's preference for private ordering. *See* Antonin Scalia, *The Two Faces of Federalism*, 6 HARV. J.L. & PUB. POL'Y 19, 20-21 (1982) ("Conservatives believe that the free market has the ability to order things in the most efficient manner, and should generally be allowed to operate free of government intervention. . . . Yet I do not know a single federal statute that seeks to enact that policy."). Although it has been suggested elsewhere that this commitment to private ordering is a principal value undergirding Justice Scalia's jurisprudence, *see* Richard A. Brisbin, Jr., *The Conservatism of Antonin Scalia*, 105 POL. SCI. Q. 1, 15 (1990), Justice Scalia's writings do not suggest that he would follow Judge Easterbrook's advice and adopt a presumption in favor of private ordering as an *interpretive* principle. Justice Scalia's strict constructionist approach, however, ultimately reaches similar statute-narrowing results.

At least one prominent conservative jurist questions Judge Easterbrook's notion that judges should adopt an explicit presumption in favor of private ordering as an interpretive principle. *See* POSNER, *supra* note 11, at 290-91 (arguing that Judge Easterbrook's approach ultimately rests on a political commitment to private ordering rather than neutral interpretive principles). Some liberals, on the other hand, criticize Judge Easterbrook's approach because, in their view, it rests on the *wrong* political values. *See* SUNSTEIN, *supra* note 11, at 141-42 (arguing that "in the wake of the New Deal attack on the common law and the subsequent rights revolution, a presumption in favor of private ordering can no longer be sustained" because it is "inconsisten[t] with the values that underlie modern government").

enforce statutory deals, but only those that are clearly expressed in the language of the statute. To construe a statute broadly is to add terms to the deal, defeating the legislature's delicately crafted compromise as reflected in the statutory text. Thus, whenever a question arises as to a statute's domain, it should be resolved in favor of strict construction, that is, the narrowest domain consistent with the express language of the statute.[216]

Justice Scalia's approach is subtler, and perhaps ultimately more effective than Judge Easterbrook's. Rather than relying on a single, highly controversial clear statement principle, Justice Scalia can choose among many, each with the ring of time-tested authority. Thus, as Judge Posner suggests,[217] Justice Scalia's canon-based approach looks less "activist" and more restrained than Judge Easterbrook's. Moreover, Justice Scalia's approach embraces clear statement canons only as part of a larger tool kit of strict-construction tools such as the Plain Meaning Rule, literalistic interpretations of crucial terms, and aggressive use of grammatical and structural canons. Thus, Justice Scalia's approach offers advantages of flexibility and surgical precision. Judge Easterbrook's proposed statute-narrowing tool box, in contrast, contains a single blunt instrument.

In this regard, Justice Scalia's strict constructionist approach to statutory interpretation appears not so much revolutionary as reminiscent of an earlier era, when common-law judges were unremittingly hostile toward legislative enactments and used a variety of devices to limit the pernicious reach of statutory law.[218] Judge Wald explains:

> When faced with the alien presence of statutory law, the strategy of judges trained in the common law was to control and subdue it by means of rules and principles like those they used

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216. *See* Easterbrook, *Statutes' Domains*, *supra* note 9, at 545-46.

217. *See supra* text accompanying note 212.

218. *See* DICKERSON, *supra* note 9, at 211 (stating that strict constructionism "has long been identified with unjustified judicial unfriendliness toward statutes"); HART & SACKS, *supra* note 45, at 1241 (describing the strict constructionist approach of "Nineteenth Century literalism, coupled with the basic distrust of the legislature that was characteristic of the courts of the period"); POSNER, *supra* note 11, at 291 (arguing that the "refusal to give effect to [legislators'] purposes because they did not dot every *i* and cross every *t* is defensible only if one has some principled objection to legislation in general"); Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908) (describing late-Nineteenth and early-Twentieth Century courts' "indifference, if not contempt" for legislative enactments). *Cf.* Note, *Intent, Clear Statements and the Common Law*, 95 HARV. L. REV. 892, 911-12 (1982) (arguing that the Burger Court's strict, literalistic approach to statutory construction was grounded in a "vague judicial hostility to regulatory legislation, a sense that Congress has illegitimately extended the pervasive intrusion of federal law into private life").

> to create, develop, and integrate common-law precedent. . . . Indeed, there were canons—often inconsistent or contradictory—for every purpose and occasion.[219]

Some of those schooled in the common law candidly acknowledged the ultimate end of this approach. In 1882, Frederick Pollack wrote that the canons "cannot well be accounted for except on the theory that Parliament generally changes the law for the worse, and that the business of judges is to keep the mischief of its interference within the narrowest possible bounds."[220]

V. Justice Scalia on Interpreting Statutes and Constitutions

Many of Justice Scalia's critics point to an apparent inconsistency in his approach to constitutional provisions as opposed to statutes. While he takes a "textualist" approach to statutes and criticizes the use of legislative history to establish legislative intent, they argue, he takes a sharply originalist turn in constitutional adjudication, basing his arguments on the intentions of the Framers.[221] In particular, they assert, it is ironic that Justice Scalia the textualist waxes passionate on the subject of separation of powers, which is mentioned nowhere in the constitutional text.[222]

This Article has argued that Justice Scalia should not be understood as a pure textualist or a non-intentionalist in statutory interpretation. He does, indeed, consider himself an originalist in constitutional adjudication,[223] but his brand of originalism does not rest on the intent of the Framers as revealed in the proceed-

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219. Wald, *Observations, supra* note 130, at 206-07. Judge Wald points out that even when modern courts look to legislative history in statutory interpretation, they continue to resort to "a reliable old workhorse [canon] to carry some, but not the entire burden of argument." *Id.* at 207. Justice Scalia, if anything, relies on the canons to a greater extent than his colleagues, albeit selectively.

220. Frederick Pollack, Essays in Ethics and Jurisprudence 85 (1882), *quoted in* Wald, *Observations, supra* note 130, at 207.

221. *See, e.g.*, Arthur Stock, Note, *supra* note 86.

222. *Id.* at 180; Popkin, *supra* note 21, at 1162 ("It ill suits a textualist . . . to reject traditional tools of statutory interpretation based on a constitution whose text is silent on the matter [of separation of powers].") Dryly praising the Framers' "economy of expression," Justice Scalia himself acknowledges that "the principle of separation of powers is found only in the structure of the [Constitution]" and not in its text. Scalia, *Standing, supra* note 89, at 881.

223. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989) [hereinafter Scalia, *Originalism*]. Justice Scalia argues that originalism in constitutional adjudication, although it suffers from the serious flaw of inadequate historical information, is nonetheless preferable to the available alternatives which, in his view, are all reducible to an ultimately subjective "fundamental values" approach. *Id.* at 862-64.

ings of the Philadelphia Convention. Instead he relies upon the original understanding of constitutional terms,[224] based on arguments similar to those he uses in interpreting statutes.[225] These include arguments from text, context, purpose, contemporaneous usage of language, and the "structure of the constitutional scheme," including separation of powers and federalism.[226]

Justice Scalia recognizes weaknesses in the originalist approach to constitutional adjudication. He writes: "Properly done, the task requires the consideration of an enormous mass of material . . . an evaluation of the reliability of that material . . . [and] immersing oneself in the political and intellectual atmosphere of the time."[227] Although courts, he argues, are ill-equipped for these tasks, originalism, however grave its faults, is better than the alternatives:

> [T]he main danger in judicial interpretation of the Constitution—or, for that matter, in judicial interpretation of any law—is that the judges will mistake their own predilections for the law. Avoiding this error is the hardest part of being a conscientious judge; perhaps no conscientious judge ever succeeds entirely. Nonoriginalism, which under one or another formulation invokes 'fundamental values' as the touchstone of constitutionality, plays precisely to this weakness.[228]

Thus, for Justice Scalia, originalism may be the best that judges can achieve, but it is ultimately an inadequate approach to constitutional interpretation. Justice Scalia expresses "dissatisfaction"

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224. *Id.*

225. Justice Scalia himself sees his approach to constitutional adjudication as "a process that resembles ordinary statutory construction." Address by Antonin Scalia, Remarks at the 24th Australian Legal Convention 12 (Sept. 21, 1987), *quoted in* George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1303 (1990).

226. *See, e.g.*, Lee v. Weisman, 112 S. Ct. 2649, 2678 (1992) (Scalia, J., dissenting) ("[O]ur interpretation of the Establishment Clause should 'comport with what history reveals was the contemporaneous understanding of its guarantees.'") (citing Lynch v. Donnelly, 465 U.S. 668, 673 (1984)); Harmelin v. Michigan, 111 S. Ct. 2680, 2687 (1991) (interpreting Eighth Amendment prohibition on "cruel and unusual punishment" in light of contemporaneous understanding of "cruell and unusuall Punishments" provision in English Declaration of Rights of 1689); Freytag v. Commissioner, 111 S. Ct. 2631, 2651-54 (1991) (Scalia, J., concurring in part and concurring in the judgment) (concluding that "courts of law," for purposes of the Appointments Clause, includes only Article III courts due to the "apparent purpose of the Appointments Clause" as revealed in the constitutional text, structure, and contemporaneous materials like *The Federalist*). Although these are all strongly originalist arguments, none of them rely on the specific legislative history of the provisions in question.

227. Scalia, *Originalism*, *supra* note 223, at 856.

228. *Id.* at 863.

that "the most fundamental . . . aspect of constitutional theory and practice should end so inconclusively."[229]

Although he does not express it, lurking in Justice Scalia's remarks on constitutional interpretation is an implicit criticism of reliance on legislative history in ordinary statutory interpretation, based on historicist concerns.[230] For if it is so difficult to conduct an adequate historical inquiry in interpreting a single constitutional text, it must be much more difficult for courts and litigants to research history adequately for the thousands of statutes Congress enacts over time. In Justice Scalia's view, judges must become amateur historians in interpreting the Constitution because, even with the inadequacy and unreliability of the historical materials, these are all the judges can analyze. In interpreting ordinary statutes, however, Justice Scalia believes that judges should resist the temptation to become amateur historians because they will surely botch it; the mass of statutes and legislative history is simply too much to digest.

Yet Justice Scalia finally recognizes that neither he nor anyone else has yet successfully put forward an accepted method for interpreting statutes. He writes, "We do not yet have an agreed-upon theory for interpreting statutes, either. I find it perhaps too laudatory to say that this is the genius of the common law system; but it is at least its nature."[231] Justice Scalia seems willing, though, to continue to push the debate.

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229. *Id.* at 864-65.

230. Justice Scalia makes this argument explicitly in *Conroy v. Aniskoff*, where he says:

> [Use of legislative history to confirm an apparent plain meaning] is not merely a waste of research time and ink; it is a false and disruptive lesson in the law. It says to the bar that even an "unambiguous [and] unequivocal" statute can never be dispositive; that, presumably under penalty of malpractice liability, the oracles of legislative history, far into the dimmy past, must always be consulted. This undermines the clarity of law, and condemns litigants (who, unlike us, must pay for it out of their own pockets) to subsidizing historical research by lawyers. . . . [N]ot the least of the defects of legislative history is its indeterminacy.

Conroy v. Aniskoff, 113 S. Ct. 1562, 1567 (1993) (Scalia, J. concurring in the judgment). For further elaboration of Justice Scalia's historicist criticisms of the use of legislative history, see *supra* text accompanying notes 55-64.

231. Scalia, *Originalism*, *supra* note 223, at 865. *Cf.* HART & SACKS, *supra* note 45, at 1201 ("The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.").

VI. Deference to Agency Interpretations

Justice Scalia frequently invokes the *Chevron* principle[232] of judicial deference to a permissible agency interpretation of an ambiguous statute.[233] He writes:

> An ambiguity in a statute committed to agency implementation can be attributed to either of two congressional desires: (1) Congress intended a particular result, but was not clear about it; or (2) Congress had no particular intent on the subject, but meant to leave its resolution to the agency.[234]

In the latter case, deference to the agency's interpretation is entirely appropriate because Congress has delegated responsibility to the agency to fill statutory gaps. In the former case, courts before *Chevron* would attempt to discern congressional intent on a case-by-case basis. In either case, Justice Scalia argues, the *Chevron* presumption now allows the agency to proceed with its interpretation, so long as that interpretation is reasonable and there is no clear indication of contrary congressional intent.[235] However, because here, as elsewhere, Justice Scalia does not look to legislative history to determine congressional intent, his version of the *Chevron* principle appears at first glance to be an exceptionally strong one. For Justice Scalia, evidence of congressional intent sufficient to rebut the presumption in favor of the agency's interpretation must be expressed in the statutory text and structure; mere evidence from legislative history could never serve that purpose.[236]

Moreover, Justice Scalia argues that recent agency reinterpretations are entitled to the same deference under *Chevron* as long-standing agency interpretations:

> [I]t is up to the agency, in light of its advancing knowledge (and also, to be realistic about it, in light of the changing polit-

232. Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear . . . the court, as well as the [administrative] agency, must give effect to the unambiguously expressed intent of Congress. . . . [But] if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

233. *See, e.g.*, Sullivan v. Everhart, 494 U.S. 83, 88-89 (1990) (upholding Department of Health and Human Services "netting" regulations under which subsequent social security benefit payments are reduced to offset any overpayment despite statute prohibiting "adjustments" against recipients who innocently receive overpayments).

234. Scalia, *Deference*, *supra* note 35, at 516.

235. *Id.*

236. *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 454 (1987) (Scalia, J., concurring in the judgment) (rejecting judicial reliance on legislative history to determine legislative intent for purposes of *Chevron* analysis as an "evisceration of *Chevron*").

> ical pressures that it feels from Congress and from its various constituencies) to specify the correct meaning. If Congress is to delegate broadly, as modern times are thought to demand, it seems to me desirable that the delegee be able to suit its actions to the times . . . .[237]

That *Chevron* allows such updating of agency interpretations is, in Justice Scalia's view, among its greatest virtues.[238]

These broad principles of deference to administrative agencies have led some of Justice Scalia's critics to suggest that his statutory jurisprudence will tend over time to weaken Congress and strengthen the executive branch.[239] Yet as Justice Scalia's decision record suggests, despite his strong commitment to the *Chevron* principle, he less often defers to agency interpretations than do some other members of the Court.[240] This is because at the very first stage of the inquiry, he is less likely to find the requisite ambiguity in the statutory text necessary to bring the *Chevron* principle into play. He writes: "One who finds more often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds less often that the triggering requirement for *Chevron* deference exists."[241]

Justice Scalia's ability simultaneously to profess deference to administrative agencies and often to overturn their interpreta-

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237. Scalia, *Deference, supra* note 35, at 518.

238. *Id.*

239. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 430 n.91 (1989) ("The combination of textualism, disregard of legislative history and the *Chevron* principle . . . would produce a dramatic increase in the executive's power to make law."). *See also* Zeppos, *supra* note 7, at 1639.

240. Brisbin, *supra* note 215, at 12-13 (1990) (noting that in his first two terms on the Supreme Court, Justice Scalia voted in deference to administrative agency positions less often than the average for all justices). Brisbin's data, however, are for all cases in which an administrative agency had a position, not just statutory interpretation cases.

241. Scalia, *Deference, supra* note 35, at 521. For examples of cases in which Justice Scalia does not defer to agency interpretations, see, *e.g.*, Department of Treasury v. Federal Labor Relations Auth., 494 U.S. 922 (1990) (holding that F.L.R.A. rule interpreting federal regulations as "applicable law" for purposes of statute is unreasonable and not entitled to deference); Pittston Coal Group v. Sebben, 488 U.S. 105 (1988) (holding that Secretary of Labor's regulations for black lung benefits program deviate impermissibly from statutory text); K-Mart Corp. v. Cartier, Inc., 486 U.S. 281, 318 (1988) (Scalia, J., concurring in part and dissenting in part) (concluding that Customs Service regulation allowing importation of foreign-made goods under U.S. trademark is not a reasonable interpretation of statutory text); NLRB v. International Bhd. of Elec. Workers, Local 340, 481 U.S. 573, 597-98 (1987) (Scalia, J., concurring in the judgment) (concluding that NLRB regulation, although consistent with prior judicial interpretations of National Labor Relations Act, is not a reasonable interpretation of statutory structure and text); INS v. Cardoza-Fonseca, 480 U.S. 421, 453 (1987) (Scalia, J., concurring in the judgment) (concluding that INS interpretation of Immigration and Nationality Act is not entitled to deference because not supported by plain meaning of statutory text and structure of statutory scheme).

tions frequently stems from his strict construction of statutes. Justice Scalia often uses *Chevron* to defer to an agency interpretation that construes a statute narrowly, so long as the agency interpretation does not directly conflict with the statutory text. But if an agency interpretation is broader than the narrow reading Justice Scalia would put on the statutory text, he often uses his standard interpretive tools to find that his narrower reading is plain and unambiguous, and therefore the statute does not meet the triggering requirement for *Chevron* deference.[242]

It must be acknowledged, however, that Justice Scalia's approach is more subtle than simply upholding narrow agency interpretations and overruling broad ones.[243] Indeed, his approach here is deeply intermeshed with his views on the constitutional principle of separation of powers and the proper role of courts and Congress within the constitutional scheme.[244]

Justice Scalia argues that the courts' proper role is to protect the rights of individuals against unwarranted governmental intrusion, but that the courts should not become entangled in policing mere policy disputes between the other two branches. The

242. *Compare* Sullivan v. Everhart, 494 U.S. 83 (1990) (deferring to "netting" regulations reducing Social Security payments to innocent beneficiaries of overpayments, narrowly construing statutory provision designed to protect such beneficiaries) *with* K-Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988) (Scalia, J., concurring in part and dissenting in part) (overturning Customs Service regulation allowing import of foreign-made goods under U.S. trademarks). In *Everhart*, Justice Scalia finds that the statutory prohibition on denial of benefits to those receiving overpayments is not expressed in clear and unambiguous terms and that the agency interpretation is consequently reasonable. Justice Stevens, dissenting, replies that although the statutory language may be unclear, the purpose of the statutory provision is "clear beyond peradventure." 494 U.S. at 106 (Stevens, J., dissenting). He further explains,

> Just as we do not sit to supply directives where Congress gave none, we likewise do not sit to insist that Congress express its intent as precisely as would be possible. Our duty is to ask what Congress intended, and not to assay whether Congress might have stated that intent more naturally, more artfully, or more pithily.

Id. In contrast, in *K-Mart*, Justice Scalia uses elaborate textual, grammatical and structural arguments in an attempt to show that the statute, while unclear and inartfully drafted, could not possibly bear the interpretation that would support the Customs Service regulation, and therefore the regulation must be overturned as exceeding the agency's authority. 486 U.S. at 318-29.

243. Justice Scalia does suggest that an "agency that exercises its discretion in the direction of more limited application of environmental laws is not necessarily false to its responsibilities" because a decision to apply laws narrowly is a political decision, within the sound discretion of the executive branch. Antonin Scalia, *Responsibilities of Regulatory Agencies Under Environmental Laws*, 24 HOUS. L. REV. 97, 106 (1987). Presumably, however, discretion to apply laws broadly is constrained by the strict construction Justice Scalia would place on the statute.

244. *See* Brisbin, *supra* note 215, at 13 (arguing that Justice Scalia's decisions to overrule agency actions reflect his critique of congressional enactment of vague, standardless regulatory statutes). This critique, in turn, is rooted in separation-of-powers concerns. *See supra* note 109.

courts, he argues, must themselves stay within "their traditional undemocratic role of protecting individuals . . . against impositions of the majority, [which] excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest *of the majority itself*."[245] It is thus not the province of "courts, in the supposed interest of all the people, [to] enforce upon the executive branch adherence to legislative policies that the political process itself would not enforce . . . ."[246] In Justice Scalia's view, it is the job of the President, under his constitutional duty to "take care that the laws are faithfully executed" and to police agency actions. If Congress disagrees with how the laws are administered under presidential supervision, it is the job of Congress, not the courts, to enforce administrative compliance with its statutory policies. It *is* the job of the courts to step in and enforce a narrower reading of a statute if an administrative agency has exceeded its delegated authority, especially to prevent harm to a regulated party—the "object" of governmental regulation.[247] He writes:

> Does what I have said mean that . . . 'important legislative purposes, heralded in the halls of Congress, [can be] lost or misdirected in the vast hallways of the federal bureaucracy?' Of *course* it does—and a good thing, too. Where no peculiar harm to particular individuals or minorities is in question, lots of once-heralded programs ought to get lost or misdirected, in vast hallways or elsewhere.[248]

Justice Scalia is writing here of the standing doctrine, which he would reinterpret and constitutionalize to bar entire categories of plaintiffs—for example, some categories of plaintiffs seeking stricter enforcement of environmental laws—from even raising their claims in federal courts.[249] His approach to standing never-

245. Scalia, *Standing*, *supra* note 89, at 894.

246. *Id.* at 896.

247. *Id.* at 894.

248. *Id.* at 897 (quoting Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n, 449 F.2d 1109, 1111 (D.C. Cir. 1971)).

249. Justice Scalia's ideas on standing are put into practice in Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992) (Scalia, J., plurality opinion) (holding that environmental organization whose members only occasionally view endangered species in foreign countries cannot show concrete "injury in fact" and therefore lacks standing to challenge agency action under Endangered Species Act). For a critique of Justice Scalia's approach to the standing doctrine, see Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992). Sunstein argues that by privileging the rights of "objects" of regulation, while insisting that the constitution bars mere "beneficiaries" from holding enforceable legal rights, Justice Scalia is constitutionalizing a preference for private ordering in much the same way that the *Lochner*-era court did. Now,

theless has implications for statutory interpretation. Justice Scalia himself says that if a plaintiff's claim is not barred by the constitutional aspects of standing doctrine, the courts still may use "prudential" considerations to determine whether the legislature intended to confer a legally enforceable right. These prudential factors are "a set of presumptions derived from common-law tradition designed to determine whether a legal right exists."[250] Thus, even if a plaintiff clears the high constitutional barrier Justice Scalia proposes to erect, prudential considerations may still lead the Court to interpret the statute as not conferring a legally cognizable right of action, depending on how closely the action conforms to traditional common-law notions.[251]

Under these principles, many cases would never be adjudicated, but it is important to note the kinds of cases that are likely to be adjudicated under Justice Scalia's scheme. On the one hand, an individual "object" of regulation alleging that it is being injured by a regulation that exceeds the agency's statutory authority will typically be able to clear both the constitutional and prudential barriers to standing. On the other hand, an advocacy organization or third-party beneficiary of a regulatory statute, claiming that the agency is violating its statutory duty by failing to regulate, regulating inadequately, or failing to enforce its own regulations[252] will have a much more difficult time clearing the standing barriers.[253] Thus, a complaint by a regulated party alleging that an agency is *exceeding* its statutory authority will often make it into court, but a complaint by a regulatory proponent or beneficiary alleging that the agency is failing to carry out a statutory mandate will typically be screened out. Under Justice Scalia's

however, the preference for private ordering is carried out under the rubric of separation of powers, rather than substantive due process.

250. Scalia, *Standing, supra* note 89, at 886.

251. *See* Patrice C. Scatena, Note, *Deference to Discretion: Scalia's Impact on Judicial Review of Agency Action in an Era of Deregulation*, 38 HASTINGS L.J. 1223, 1232-35 (1987).

252. *See id.* at 1230 ("Proponents of existing regulation typically challenge in the courts agency action that threatens to lift or relax those regulations.").

253. *Id.* at 1260 (contending that Justice Scalia's approach to standing creates high barriers for proponents of regulation to challenge allegedly arbitrary agency action in court). *See also* Gene R. Nichol, Jr., *Justice Scalia, Standing and Public Law Litigation*, 42 DUKE L.J. 1141, 1167-68 (1993) (reasoning that Justice Scalia's approach to standing threatens plaintiffs' ability to bring "public law" litigation generally and "threatens to constitutionalize an unbalanced scheme of regulatory review" in which "courts can protect the interests of regulated entities" while "'regulatory beneficiaries' are left to the political process"); Michael A. Perino, Comment, *Justice Scalia: Standing, Environmental Law, and the Supreme Court*, 15 B.C. ENVTL. AFF. L. REV. 135, 135 (1987) (arguing that Justice Scalia's approach to standing "could severely limit the ability of litigants to obtain judicial review where they allege an environmental injury").

version of standing doctrine, then, we might expect that regulatory statutes will tend to be narrowed over time.[254]

VII. Justice Scalia's Jurisprudence of Strict Construction and the Moments of Statutory Interpretation

This Article has argued that Justice Scalia's views on statutory interpretation are more complex than his critics recognize. Most critics label him a textualist, or an anti-intentionalist, or both. They then proceed to criticize the views they attribute to him, and in many cases criticize him for failing to adhere consistently to those imputed views. Justice Scalia's method in fact is much richer and subtler than his critics recognize, employing a variety of interpretive tools at different stages in the interpretive process. The critics' confusion rests not merely on an oversimplification of Justice Scalia's views, but also on an oversimplification of the interpretive enterprise itself.

Discussion of statutory interpretation often treats the interpretive enterprise as if it were a single, indivisible act, subject to a single, uniform interpretive approach. Traditionally, judges applied a set of canons of statutory interpretation, which were thought to comprise a coherent, complete, neutral, and rational whole; the job of the judge was thought to be quite mechanical, consisting of choosing the proper canon to arrive at the unique correct outcome.[255] Since the days of the Legal Realists, however, these canons have been subject to withering criticism as being incoherent and inconsistent, leading to indeterminate outcomes.[256] Subsequent commentators have offered their own interpretive theories, but largely continue to discuss statutory interpretation as if a single interpretive approach could be applied uniformly across the entire range of interpretive activity.[257]

Despite this view, a closer examination of what judges actually do in interpreting statutes, together with what commentators say

254. Regulated-party plaintiffs will not always be successful, of course, but so long as the courts systematically hear statute-narrowing challenges and decline to hear statute-broadening challenges, we can expect that the long-term trend will be toward statute-narrowing.

255. *See* Sunstein, *supra* note 11, at 147-48; Posner, *supra* note 110, at 805-17.

256. *See* Llewellyn, *supra* note 202, at 399-406 (criticizing mechanical application of the canons and ridiculing the canons themselves as mutually contradictory).

257. *Cf.* Bennion, *supra* note 130, at 12-13 ("One reason why people have found statutory interpretation difficult is that they have thought it easy. They have therefore not taken the trouble to investigate it with the care and deliberation required. Learned judges sum up the whole matter in a sentence.").

judges ought to do,[258] suggests that it may be fruitful to consider statutory interpretation not as a single act, but as a series of distinct, albeit interrelated, acts or interpretive "moments" that together comprise the interpretive process. As an initial proposal,[259] we might consider the following interpretive moments:

1. reaching one or more plausible initial readings of the statutory text (using the appropriate intrinsic and extrinsic evidence);[260]

2. resolving ambiguities and vagueness or "open-textured" language in the text;[261]

3. fitting the statute into a broader legal context, including constitutional provisions, other statutes, administrative regulations, prior judicial decisions, and common-law principles;[262]

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258. In prescribing interpretive principles or approaches, commentators often implicitly recognize that interpretation is composed of different types of interpretive questions or problems; but they rarely explicitly discuss the typology. The fact that each of the Article's proposed moments finds frequent implicit recognition in the literature, *see infra* notes 260-66, is evidence that these moments are among the central tasks of interpretation.

259. This categorization of the "moments" of statutory interpretation probably is not comprehensive; the interpretative process is even more multifaceted than this list suggests. These moments, however, are at least among the most important elements of the interpretive enterprise, and illustrate that interpretation is more complex and multidimensional than much contemporary commentary acknowledges.

260. *See* Frankfurter, *supra* note 51, at 528 ("When we talk of statutory construction we have in mind cases in which there is a fair contest between two readings, neither of which comes without title deeds. A problem in statutory construction can seriously bother courts only when there is a contest between probabilities of meaning"). *See also* DICKERSON, *supra* note 9, at 221-22 (reasoning that on initial reading, a statutory text may appear to have "a wide range of plausible meanings," but that many uncertainties "dissolve when the relevant factors of text and context are logically appraised"); de Sloovere, *supra* note 150, at 531-32 (describing a theory of statutory construction advocating "the necessity of bringing out all possible meanings the words may bear" in the interpretive process and suggesting that especially at the initial stages it is inappropriate to "apply[ ] high rules of exclusion").

261. *See* DICKERSON, *supra* note 9, at 43-53 (identifying ambiguity, vagueness, and "overgenerality" as distinct but related "diseases of language" that often confront an interpreter of a statute); *id.* at 48 (distinguishing "apparent ambiguities," which dissolve on more careful and comprehensive reading of the text in its proper context, from "actual ambiguities," which remain after the interpreter has done all he can to ascertain the meaning of the text); DWORKIN, *supra* note 50, at 350-54 (distinguishing linguistic ambiguity and vagueness from non-linguistic unclarity as to which of two competing plausible interpretations of a statute a court should choose); POSNER, *supra* note 11, at 263-64 (maintaining that resolving "internal" and "external" ambiguities is central to the interpretive process); SUTHERLAND (5th ed.), *supra* note 9, at § 45.02 (stating that resolving "apparent" and "real" ambiguities in the statutory text is the central problem of interpretation).

262. *See* AHARON BARAK, JUDICIAL DISCRETION 152-55 (1989) (describing the need for overall coherence of the legal system as constraining judicial discretion in interpretation); GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1-17 (1982) (discussing the problem of obsolescent statutes that no longer "fit" the evolving legal landscape and the special role of judges as guardians of legal coherence); DWORKIN, *supra* note 50, at 225-75, 338-40 (describing the principle of "law as integrity," in which a judge interpreting a

4. understanding the statute in its historical, political, and policy context;[263]

5. filling gaps or silences in the statute;[264]

6. determining statutory domain, that is, which classes of persons and events are covered by the statute;[265] and

7. ascribing a final "legal" interpretation to the statute.[266]

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statute works toward morally coherent integration of law as a whole); SUNSTEIN, *supra* note 11, at 155-57 (observing that interpretive principles often appropriately reflect constitutional and other substantive legal norms and that their application is a way of making the law coherent); Eskridge, *New Textualism*, *supra* note 1, at 655 (maintaining that interpretation should take into account "horizontal coherence," that is, where a statute fits into a broader body of law that includes "the statutory text, the whole statute in which it is found, analogous statutory texts and their current judicial interpretations, and the canons of statutory construction"); Llewellyn, *supra* note 202, at 399 (noting that in interpreting a statute, "a court must strive to make sense *as a whole* out of our law *as a whole*").

263. *See* DWORKIN, *supra* note 50, at 338-50 (reasoning that integrity requires a statute to be read in broad context of policy and principle, including pre- and post-enactment history); HART & SACKS, *supra* note 45, at 1410-17 (recommending interpretation of a statute in light of its purpose determined by reading text, structure, and legislative history on the assumption that a statute is the product of "reasonable legislators acting reasonably"); SUNSTEIN, *supra* note 11, at 157-59 (stating that statutes should be interpreted in light of generally accepted background norms and context that include legislative history, purpose, and "practical reasonableness"); Eskridge, *supra* note 1, at 655 (describing a statute's "vertical context" as consisting of factual circumstances, policy considerations, and legislative history); Frankfurter, *supra* note 51, at 537 ("[T]he significance of an enactment, its antecedents as well as its later history, its relation to other enactments, all may be relevant to the construction of words . . . .").

264. *See* BENNION, *supra* note 130, at 361-76 (discussing "proper legislative implications" and "interstitial articulation" as appropriate elements of the interpretive process); POSNER, *supra* note 11, at 269-73 (analogizing statutory interpretation to a subordinate officer's "imaginative reconstruction" of an incomplete command from a superior officer, such that the task is to fill the gaps in the command); *id.* at 279 (noting that courts are sometimes called upon to resolve "gaps" in statutes that arise when the legislature is unable to resolve a particular policy issue, either through inattention, lack of foresight, or simple inability to reach agreement); SUNSTEIN, *supra* note 11, at 117-18 (reasoning that some statutory gaps are implied delegations of authority to courts to provide "implementing rules" necessary to carry out the statutory scheme); *id.* at 121 (discussing interpretation in "changed circumstances" as to which the statutory text is silent).

265. *See* Easterbrook, *supra* note 9, at 533-35 (discussing statutory domain as a central question in the interpretative enterprise). *See also* DICKERSON, *supra* note 9, at 30-32 (asserting that interpretation involves, inter alia, determination of the classes of situations to which the statute applies); SUNSTEIN, *supra* note 11, at 118-21 (describing problems of "over-inclusiveness" and "underinclusiveness," that is, cases where the statutory text taken literally appears to prescribe a statutory domain broader or narrower than that consistent with the apparent purpose of the statute); SUTHERLAND (5th ed.), *supra* note 9, at §§ 58.02, 60.01 (stating that what distinguishes "strict" from "liberal" construction is the range of situations to which the statutory principle is applied).

266. *See* BENNION, *supra* note 130, at 12, 321-23 (distinguishing "legal meaning" arrived at by the court from "grammatical" or "literal" meaning, the meaning the text would bear if read as an ordinary piece of English prose); DICKERSON, *supra* note 9, at 39-40, 256 (distinguishing "legal meaning" from "true meaning" by holding the former to be the definitive meaning declared by the court, which can be "wrong" if based on faulty premises, and which may include elements of judge-made law in addition to the meaning strictly attributable to the text).

The recurring appearance of these moments of statutory interpretation in the literature suggests that they are at least widely recognized as elements of the interpretive enterprise. They are also interdependent and have no life of their own apart from the larger enterprise. It would make no sense, for example, to speak of determining statutory domain (moment six) as an activity in which one could engage apart from the larger project of interpreting the statute.

Describing them as "moments" is not meant to suggest that the above steps must fall into any fixed temporal order.[267] This presumably may vary, sometimes depending on the interpretive method employed, the personality and workstyle of the judge, or factors peculiar to the interpretive problem before the court. Moreover, in some cases, the judge might skip from one moment to another and back again, with the answers to one set of problems shaping the answers to others. For example, her understanding of the legal and factual contexts might help resolve some textual ambiguities in a way that informs her understanding of the statute's domain, which in turn sheds further light on where the statute fits into the legal context, which helps resolve additional ambiguities, and so on. Finally, the order in which these moments are discussed in a judicial opinion may not reflect (nor *need* it reflect) the order in which the writer of the opinion has actually considered these problems in reaching her conclusions.

Isolating these moments of statutory interpretation illuminates the notion that the interpretive task is not a single, indivisible act, but a complex, multifaceted act. If we attempt to understand its parts, we might gain a fuller understanding of the whole. Furthermore, the delineation of these moments makes it easier to determine whether a particular interpretive principle is appropriately applied to a particular *kind* of interpretive question. Some principles of interpretation may be useful within one or more interpretive moments but may be inappropriate when applied to other moments. For example, Justice Scalia uses tradi-

267. Moment one (reaching one or more plausible *initial* readings of the text) and moment seven (reaching a *final* "legal" interpretation of the statute) would appear to fall into the first and last temporal moments, respectively. The order, however, is a logical one, rather than necessarily a temporal one. *Cf.* Posner, *supra* note 110, at 807-08 (arguing that the maxim stating that it is necessary to "start with the text" in interpreting a statute is not even true as a matter of logical order, much less temporal order, because conscientious judges may start wherever they want, as long as they are careful to take all relevant considerations into account).

tional grammatical and structural canons aggressively to resolve apparent textual ambiguities.[268] Hart and Sacks, Justice Felix Frankfurter, Judge Richard Posner, and others would argue that these grammatical and linguistic canons may be valid interpretive principles, so long as they are understood not as strict rules, but as rough yet sensible rules-of-thumb delineating what grammatical and structural inferences are permissible in reading any text.[269] On this view, the grammatical and structural canons may be particularly useful in initially reaching one or more plausible readings of the text, which often expand the range of plausible meanings; but they are harder to justify as dispositive rules for choosing between two apparently plausible readings, as Justice Scalia uses them.[270]

Another example is Judge Richard Posner's technique of "imaginative reconstruction," which urges a judge to imagine what the enacting legislature would have done had it squarely faced the question now before the court.[271] This technique may be a creative and useful tool for generating ideas about how to fill gaps within a statutory text (moment five) consistent with the purposes of the enacting legislature, but Judge Posner seems to suggest that it is an approach generally applicable throughout the interpretive enterprise.[272] Imaginative reconstruction, however, will be of less use in some interpretive moments. A judge faced with the task of reconciling two apparently conflicting statutes (moment three), for example, will face the difficult choice as to which of the two legislatures' imagined intentions should control, or why the imaginary intentions of either of two past legislatures should determine the outcome.[273]

Understanding statutory interpretation as consisting of distinct moments may further provide a useful framework against which to compare and categorize various approaches to statutory interpretation. Typically, a proposed interpretive approach will emphasize the primacy of some of these moments, and deemphasize

268. *See supra* Part IV.C.

269. *See supra* note 190 and accompanying text.

270. *Id.*

271. *See* POSNER, *supra* note 11, at 269-74. Judge Posner credits the method to Aristotle. *Id.* at 273-75.

272. POSNER, *supra* note 11, at 265-78.

273. *Cf.* Pennsylvania v. Union Gas Co., 491 U.S. 1, 29-30 (1989) (Scalia, J., concurring in part and dissenting in part), discussed *supra* note 24, where Justice Scalia argues that when two statutes on the same subject must be read together, specific legislative intent as to the particular provisions of either statute is irrelevant.

others. Judge Posner's imaginative reconstruction approach, as we have just seen, emphasizes gap-filling (moment five) as the paradigmatic interpretive activity. While Judge Posner would seemingly recognize each of the other moments as relevant to the interpretive enterprise, his model effectively treats them all as subsidiary to the central task of filling gaps in the statutory command.[274]

Cass Sunstein's suggestion that statutory interpretation should rely principally on an updated set of substantive canons of interpretation appropriate to the modern regulatory state emphasizes moments three and four, placing the statute in the appropriate legal and policy contexts.[275] Similarly, the standard approach of interpreting statutes in light of particular legislative intent as revealed in the legislative history[276] can be seen as emphasizing moment four, the historical, political, and policy context. While this approach recognizes other moments of interpretation, those moments are subsidiary to the central task of understanding the statute in a particular context, that is, what the enacting legislature intended at the time of enactment. A variant on that approach is Hart and Sacks' proposal that statutes be interpreted not in light of specific legislative intent found in the legislative history, but in light of the court's understanding of the statute's "objective purpose."[277] Under this approach, the context is less historically specific and more policy-oriented than in the standard legislative history/legislative intent approach.

Other approaches emphasize the legal context, moment three. Ronald Dworkin, for example, argues that the overriding principle in statutory interpretation should be integrity, so that a judge interpreting a statute is working toward a morally coherent integration of law as a whole.[278] Dworkin recognizes that the statu-

274. *See* POSNER, *supra* note 11, at 269-74.

275. *See* SUNSTEIN, *supra* note 11, at 160-92 (arguing that statutory interpretation is inevitably shaped by background norms and that it is incumbent upon the courts to use those legal and institutional norms that fit with our best understanding of the modern regulatory state). Although Sunstein regards the role of background norms as crucial (whether or not they are explicitly recognized), he also recognizes that interpretation must include more than such understandings of the legal and policy context; his proposed canons are "intended to be guides to interpretation, not substitutes for the more particularized inquiry that required in every disputed case of statutory meaning." *Id.* at 161.

276. Justice Scalia most vigorously criticizes this method. *See supra* Part III.

277. *See* HART & SACKS, *supra* note 45, at 1410-17. To determine the statute's purpose, Hart and Sacks would read the text, structure, and history in light of the (probably fictitious) assumption that the statute is the product of reasonable legislators acting reasonably.

278. *See* DWORKIN, *supra* note 50, at 225-75, 338-40.

tory text and its historical, political, and policy context are relevant to the interpretive enterprise, but these are mere subcomponents of the integrity principle. "Textual integrity" means giving the plain words of the text a fair reading consistent with those larger legal policies and principles that make the "best case" for the statute.[279] Similarly, the judge must strive to make her reading of the statute consistent with the legislative history, but only to "make the legislative story as a whole as good as it can be."[280]

With these moments of statutory interpretation as background, it is apparent that much of the confusion about Justice Scalia's method stems from two sources. First, by failing to distinguish the methods Justice Scalia uses in various interpretive moments, some of his critics fail to capture the richness and complexity of his approach to statutory interpretation. Thus, for example, when Justice Scalia argues for the Plain Meaning Rule,[281] uses a literalistic definition of a crucial term,[282] or uses structural and grammatical canons,[283] it is tempting to conclude that his method looks strongly text-based and that he is therefore being inconsistent with his own textualist method when he uses nontext-based arguments from statutory purpose.[284]

Second, and more importantly, the framework of moments of statutory interpretation suggests that there are two ways to understand textualism, which many critics fail to distinguish. A broad version of textualism simply emphasizes reading the text as the primary task of the interpretive enterprise; that is, it elevates the role of moment one, reaching one or more plausible initial readings of the text, in much the same way that other interpretive approaches elevate other moments. This version of textualism does not ignore the other moments of interpretation, including contextual moments. It is perfectly plausible to see statutory interpretation as centrally and paradigmatically about the statutory text while also recognizing that placing the statute in its appropriate legal and historical contexts is a necessary part of the interpretive enterprise. On this broad understanding of "textualism," it is fair to characterize Justice Scalia as a textualist.

279. *Id.* at 338-39.
280. *Id.* at 342-43.
281. *See supra* Part IV.A.
282. *See supra* Part IV.B.
283. *See supra* Part IV.C.
284. *See supra* text accompanying note 13.

The other version of textualism—denoted in this Article as "strict" or "pure" textualism—does rule out the use of extratextual material in interpreting statutes. Specifically, it says that moment four, understanding the statute in light of its historical, political, and policy context, has no place in the interpretive enterprise.[285] This reasoning, as has been discussed, is the view that most of Justice Scalia's critics ascribe to him.[286] This Article has argued that such critics are mistaken.[287]

The moments of statutory interpretation now provide a useful framework against which to review and summarize Justice Scalia's approach:

1. Arriving at one or more plausible readings of the statutory text. Justice Scalia sharply differs from the majority of his colleagues in that, at the moment of initially determining the plausible readings of a statute, he strictly excludes evidence from legislative history.[288] Exclusion of legislative history, he argues, is justified by the Plain Meaning Rule, a traditional (albeit largely discredited in recent decades) interpretive principle that directs judges to exclude evidence from legislative history if the meaning of a statute is plain on its face.[289] Crucially, however, if the Plain Meaning Rule is to do the work of excluding legislative history, Justice Scalia must find that the statutory text has only a single plausible reading; if the text is capable of multiple plausible readings, the Plain Meaning Rule would authorize the use of legislative history.[290]

2. Resolving ambiguities and vagueness in the text. Other judges frequently find statutes ambiguous and employ a variety of methods, including arguments from statutory purpose and legislative intent as revealed in the legislative history, to resolve them. Justice Scalia acknowledges the possibility of genuine textual ambiguities, but is more inclined than his colleagues to argue away apparent ambiguities and thereby reach a single plain mean-

285. The strictest sort of textualism would also deny admission to moment three, the legal context, but to my knowledge no one has ever seriously proposed such a strict textualism. *See supra* notes 21-26 and accompanying text.

286. *See supra* notes 10-13 and accompanying text.

287. *See supra* Part II.

288. *See supra* notes 149-56 and accompanying text.

289. *See supra* notes 124-29 and accompanying text.

290. *See supra* note 134 and accompanying text.

ing.[291] He employs several techniques here. First, notwithstanding his critics, Justice Scalia does sometimes employ arguments from statutory purpose. Some of these arguments are inferences from the structure of the statutory scheme, but others are more clearly historical and policy-oriented.[292] More typically, however, he focuses on crucial, apparently ambiguous statutory terms, and argues that one meaning is preferred, based either on a literalistic dictionary definition[293] or its context within the overall statute. Justice Scalia aggressively uses traditional canons of structural and grammatical inference to argue that a particular reading is the only plausible (or at least the more natural) one.[294] Only rarely does Justice Scalia acknowledge the existence of genuine textual ambiguity; when he does, he may defer to an administrative interpretation[295] or shift to another set of traditional canons, most of them clear statement principles that tend to resolve statutory ambiguities by narrowing the statute's domain.[296]

3. Fitting the statute into a broader body of law. Justice Scalia is an aggressive legal contextualist. Not only does he argue that each statute should be interpreted in light of the United States Code as a whole (and therefore be subject to modification by the implications of later statutory enactments),[297] he also frequently relies on clear statement principles that presumptively limit the domain of statutes in cases where their application would conflict with established legal norms that the courts seek to protect.[298] Putting each statute into this broader legal context also allows Justice Scalia to create further distance between the statutory text and legislative history; for if, as he argues, the job of judges is to make sense of the entire body of law as a whole, the legislative history and legislative intent of any particular statute becomes less relevant to its current interpretation.[299] Finally, Justice Scalia argues that statutes must be interpreted against a background of clear judge-made interpretive rules. This process, he argues, will

291. *See supra* notes 147-57 and accompanying text. Note also that Justice Scalia, by his own account, is less likely to find the ambiguities necessary to trigger the *Chevron* principle of deference to agency interpretations. *See supra* notes 240-42 and accompanying text.
292. *See supra* notes 26-47 and accompanying text.
293. *See supra* Part IV.B.
294. *See supra* Part IV.C.
295. *See supra* Part VI.
296. *See supra* Part IV.D.
297. *See supra* notes 21-25 and accompanying text.
298. *See supra* Part IV.D.
299. *See supra* notes 23-24 and accompanying text.

force Congress to enact clearer statutes and limit judges' ability to impose their own policy preferences through the interpretative process.[300]

4. Understanding the statute in its broader historical, political, and policy context. Here this analysis diverges sharply from that of most of Justice Scalia's critics. The standard view is that, since Justice Scalia's method emphasizes the primacy of the text and excludes the use of arguably relevant contextual material (the legislative history), he must be a strict textualist, committed to excluding all extratextual aids to interpretation.[301] This Article has argued that Justice Scalia in fact employs, and quite openly defends his use of, a wide range of contextual materials, including arguments from historical context, policy, and statutory purpose.[302] He does not, however, permit arguments from the legislative history, in part because of concerns about its accuracy as an interpretive guide, but more importantly because of concerns about its legitimacy as a source of law and legal interpretation.[303] For Justice Scalia, who believes the Constitution requires a strict formalist separation of powers,[304] the use of legislative history in statutory interpretation encourages legislators to evade their legislative responsibilities by enacting vague and indefinite statutes,[305] to usurp power by effectively enacting implied statutory provisions through legislative history without benefit of bicameralism and presentment,[306] and to influence unduly the judicial function of interpreting the laws.[307] At the same time, the use of legislative history causes judges to become improperly entangled in legislative-type lawmaking.[308]

5. Filling gaps or silences in the statutory text. Other judges will frequently use evidence of legislative intent derived from the legislative history to read implied terms into statutes or interpret statutory provisions broadly to achieve the statute's purpose. Although Justice Scalia sometimes invokes a statute's purpose[309]

300. *See supra* notes 63-67 and accompanying text.
301. *See supra* notes 12-13 and accompanying text.
302. *See supra* notes 14-47 and accompanying text.
303. *See supra* Part III.
304. *See supra* notes 86-99 and accompanying text.
305. *See supra* notes 109-10 and accompanying text.
306. *See supra* text accompanying notes 84-85.
307. *See supra* text accompanying note 67.
308. *See supra* text accompanying notes 80-81.
309. *See supra* notes 14-47 and accompanying text.

and even the intent of Congress,[310] in his view neither purpose nor intent can justify broad readings of implied statutory terms.[311] For Justice Scalia, with his strong formalist views on separation of powers, it is illegitimate for a court to legislate by extending a statute's domain beyond what is clearly stated in the statutory text, and equally illegitimate for a legislative body to make law through any process short of formal bicameralism and presentment, requiring clear expression in the statutory text.[312] Even in the case of a statute delegating authority to an administrative agency, Justice Scalia is disinclined to allow a broad reading or delegation by implication.[313] Justice Scalia's use of the Plain Meaning Rule, narrow literalistic readings of crucial terms, aggressive use of grammatical and structural canons, and clear statement principles are the methods by which he implements this view.[314]

6. Determining statutory domain. The net effect of Justice Scalia's use of the foregoing methods—use of the Plain Meaning Rule to exclude evidence from legislative history, denial of ambiguities through narrow literalism and aggressive use of grammatical and structural canons, resolution of remaining ambiguities through selective use of "clear statement" canons, disinclination to fill gaps or silences through broad purposive readings or extratextual indications of legislative intent, and aggressive legal contextualism that frequently narrows a statute so as to avoid putative conflict with other statutes or other sources of law—is systematically to narrow the domains of statutes coming before the Court for interpretation.[315]

7. Reaching a final "legal" interpretation of the statute. This Article has argued that Justice Scalia's approach to statutory interpretation should ultimately be considered an eclectic form of strict constructionism, selectively drawing on traditional principles of statutory interpretation and applying them aggressively and sometimes in novel ways. The result is a pattern of decisions that quite consistently tend to narrow the reach of statutory law. The techniques Justice Scalia employs—the Plain Meaning Rule, narrow literal interpretations of crucial words and phrases, aggres-

310. *See supra* notes 59-64 and accompanying text.
311. *See supra* text accompanying notes 38, 56.
312. *See supra* notes 103-11 and accompanying text.
313. *See supra* notes 245-48 and accompanying text.
314. *See supra* Part IV.
315. *See supra* text accompanying notes 206-19.

sive use of canons of grammatical and structural inference, application of traditional clear statement principles, aggressive legal contextualism, and selective deference to agency interpretations—do tend to place the statutory text at center stage in the interpretive process. In that broad sense, Justice Scalia's method may be considered textualist. Moreover, his strict constructionism effectively means that, absent clear expression in the statutory text, an implied statutory provision is unlikely to be given effect. Finally, although Justice Scalia does rely on some extratextual aids to interpretation, he does not share the standard view that a court must look outside the text to some concept of legislative intent or statutory purpose as the touchstone to interpretation.

Thus, while both the outward appearances and the results of his approach are similar to those of a pure textualist, Justice Scalia's method is more subtle and complex. With more tools at his disposal, Justice Scalia leaves himself more flexibility and surgical precision in the exercise of the judicial craft than would a practitioner armed with the single blunt instrument of pure textualism.

VIII. Conclusion

Thus analyzed, Justice Scalia's project is, in my view, a dubious one. Its numerous vulnerabilities include:

—the questionable history and doubtful validity of the Plain Meaning Rule, and Justice Scalia's own use of the Rule in ways that depart from its traditional use;

—the questionable claim that legislative history is almost always irrelevant to statutory interpretation;

—Justice Scalia's routine insistence, in case after case, that a complex, apparently ambiguous, and possibly inartfully drafted statutory text is capable of only a single plausible construction;

—his inclination to rely on narrow dictionary definitions of crucial terms to resolve ambiguities;

—his questionable pattern of applying grammatical and structural canons aggressively and rigidly to narrow, but almost never to expand, the range of plausible interpretations;

—his selective reliance on clear statement canons and exclusion of competing interpretive principles that would tend to work in the direction of broader statutory readings.

While Justice Scalia often frames his arguments as attacks on judicial activism and subjectivism, it is doubtful that his method is either less activist or more objective than those he criticizes. This Article's analysis of Justice Scalia's approach suggests that a statute's plain meaning is often an interpretive conclusion reached only after a series of difficult and controversial interpretive choices are made—choices of what rules to apply, what evidence to admit, what dictionary definitions to invoke. Justice Scalia seeks solace in the discipline of rules, but the mere existence of rules does not mean that those rules are objectively valid or, as a group, consistent, coherent, and complete. Choices among rules are still choices.[316]

Nor does Justice Scalia's appeal to formalistic separation of powers and an originalist vision of limited government give him the refuge of objectivity. Justice Scalia argues that any approach but originalism ultimately rests on fundamental values, and inevitably sinks in the swamp of subjectivism.[317] But in the end he can offer no compelling rationale for his choice of originalism, formalism, and governmental minimalism over some more flexible constitutional vision. While originalism and formalism may lighten Justice Scalia's burden of choice by narrowing the range of possible outcomes in any particular case that comes before the Court, the decision to embrace that substantive constitutional vision itself ultimately rests on choices among values. Consequently, Justice Scalia's values are played out in constitutional adjudication—and in statutory interpretation, to the extent that his interpretive approach is influenced by his constitutional views[318]—just as surely as if he openly acknowledged it.

What is particularly troubling about Justice Scalia's method is that these choices are seldom made with an open acknowledgement that a choice is being made, or a public weighing of the factors that ultimately influence the choice. Instead, interpretive choices are made under the rubric of originalism in constitutional adjudication and plain meaning in statutory interpretation. Both notions lay a false claim to objectivity and imply that the conclusion reached is the only possible one, thus narrowing our range of choice and curtailing the boundaries of discourse.

316. Paul Kahn makes a similar point about Owen Fiss' theory of "disciplining rules" as the basis for objectivity in interpretation. PAUL W. KAHN, LEGITIMACY AND HISTORY 190-96 (1992).

317. *See supra* notes 223-28 and accompanying text.

318. *See supra* Part III.

Seeking objectivity, Justice Scalia ultimately finds only narrowness.

Nonetheless, Justice Scalia's contribution is a significant one. The jurisprudence of statutory interpretation remains seriously underdeveloped. Our courts comfortably embrace a variety of interpretive approaches and principles, none of them resting on rigorous theoretical underpinnings. In challenging conventional wisdom and reopening serious debate over the nature of statutory interpretation, Justice Scalia has done us all a service, even if his own attempt at a new approach fails.