

DEFINING THE COURT'S ROLE AS FAITHFUL
AGENT IN STATUTORY INTERPRETATION:
Exxon Mobil Corp. v. Allapattah Services, Inc.,
125 S. Ct. 2611 (2005)

The Supreme Court has long failed to provide guidance to lower courts as they seek to interpret the meaning of ambiguous congressional enactments. Thus it was no surprise that after Congress passed the Judicial Improvements Act of 1990,¹ courts began to split over language in 28 U.S.C. § 1367,² a supplemental jurisdiction statute that appeared to grant courts sitting in diversity supplemental jurisdiction over claims brought by parties who did not meet the amount-in-controversy requirement of 28 U.S.C. § 1332.³ Last Term, in *Exxon Mobil Corp.*

1. Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended primarily in scattered sections of 28 U.S.C.).

2. This section of 28 U.S.C. provides,

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

28 U.S.C. § 1367(a)–(b) (2000).

3. In cases based on diversity jurisdiction, the matter in controversy must exceed “the sum or value of \$75,000, exclusive of interest and costs.” 28 U.S.C. § 1332(a) (2000). At the time the Judicial Improvements Act of 1990 was enacted, however, the relevant amount was \$50,000. 28 U.S.C. § 1332(a) (1988 & Supp. II 1990).

v. Allapattah Services, Inc.,⁴ the Supreme Court held that when the other elements of jurisdiction are satisfied and at least one plaintiff satisfies the amount-in-controversy requirement, section 1367 permits federal courts to exercise supplemental jurisdiction over the claims of additional plaintiffs in the same case or controversy, even when those claims are “for less than the jurisdictional amount specified in the statute setting forth the requirements for diversity jurisdiction.”⁵ Disregarding the arguments advanced by the four dissenting Justices, the majority not only held that section 1367 “by its plain text” compelled this result, but also declared that the absence of ambiguity in section 1367 rendered reference to the legislative history unnecessary.⁶ *Allapattah* thus clarified that when the Court interprets statutes it considers unambiguous, it will consult only the statutory text to discern Congress’s intent. This strong endorsement of textualism, combined with the majority’s refusal to articulate a definition of “ambiguity” sufficient to justify consultation of extratextual sources, suggests that the Court considers textualism⁷ the theory of statutory interpretation that best comports with the Court’s role as Congress’s faithful agent.⁸

Allapattah involved two consolidated cases. In the first, gas station owners, not all of whom met the \$50,000 amount-in-controversy amount required at the time, won a judgment against Exxon for intentional and systematic overcharging for fuel.⁹ The trial court certified the case for interlocutory review to the Eleventh Circuit to decide the section 1367 question.¹⁰

The Eleventh Circuit affirmed, finding that the new section 1367(a) intended “a general grant of supplemental jurisdic-

4. 125 S. Ct. 2611 (2005). The opinion of the Court decided the consolidated cases of *Exxon Mobil Corp. v. Allapattah Services, Inc.* and *Rosario Ortega v. Star-Kist Foods, Inc.* *Id.* at 2611–12.

5. *Id.* at 2615.

6. *Id.* at 2625.

7. For an excellent treatment of textualism, see William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623–24 (1990).

8. See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415 (1989) (noting faithful agent theory’s central role in the American model of statutory interpretation).

9. *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1252–53, 1255 (11th Cir. 2003).

10. *Allapattah Servs., Inc. v. Exxon Corp.*, 157 F. Supp. 2d 1291, 1326–27 (S.D. Fla. 2001).

tion, which is then narrowed for diversity cases by § 1367(b).¹¹ None of the exceptions in subsection (b), however, precluded a grant of federal jurisdiction over members of a class action, and so the court approved the exercise of supplemental jurisdiction, the rule of *Zahn v. International Paper Co.*¹² notwithstanding.¹³

Allapattah's second case involved a fourteen-year-old girl, Beatriz Blanco-Ortega, who had severely injured her finger on a can of Star-Kist tuna.¹⁴ Blanco-Ortega and her family filed separate products liability actions in federal court against Star-Kist Foods, Inc., asserting diversity jurisdiction under 28 U.S.C. § 1332.¹⁵ Blanco-Ortega's suit alleged physical damages and pain and suffering; suits filed by her relatives alleged associated emotional distress.¹⁶ In response, Star-Kist argued, and the district court agreed, that none of the plaintiffs' claims met the \$75,000 amount-in-controversy requirement;¹⁷ the court dismissed the cases for lack of jurisdiction.¹⁸

The First Circuit affirmed as to Blanco-Ortega's family members, but found her own claim sufficient to satisfy section 1332's \$75,000 requirement.¹⁹ The court then examined whether, on the basis of Blanco-Ortega's reinstated claim, section 1367's grant of supplemental jurisdiction permitted the family members' claims to proceed in federal court,²⁰ holding that Congress's use of the terms "civil action" and "original jurisdiction" signified Congressional intent to "incorporate[] into § 1367 the longstanding, judicially developed doctrines that determined whether . . . statutes confer 'original jurisdiction.'"²¹ Thus, because courts had never permitted aggregation

11. *Allapattah*, 333 F.3d at 1252, 1254.

12. 414 U.S. 291 (1973) (holding that each plaintiff in a Rule 23(b)(3) class action must separately satisfy the amount-in-controversy requirement).

13. *Allapattah*, 333 F.3d at 1255–56 (holding that *Zahn* was overturned by § 1367).

14. *Rosario Ortega v. Star Kist Foods, Inc.*, 213 F. Supp. 2d 84, 85–87 (D.P.R. 2002).

15. *Rosario Ortega v. Star-Kist Foods, Inc.*, 370 F.3d 124, 126 (1st Cir. 2004).

16. *Ortega*, 213 F. Supp. 2d at 86–87.

17. *Id.* at 87. Plaintiffs had, of course, alleged damages sufficient to meet the requirement of section 1332, but Star-Kist's challenge shifted the burden to the plaintiffs to show that it was not a legal certainty that the claims did not involve the requisite amount. *Ortega*, 370 F.3d at 128.

18. *Ortega*, 213 F. Supp. 2d at 95.

19. *Ortega*, 370 F.3d at 131.

20. *Id.*

21. *Id.* at 135.

of multiple plaintiffs' insufficient claims to satisfy the amount-in-controversy requirement,²² and because section 1367's legislative history manifested no evidence of a congressional desire to alter fundamentally the law of diversity jurisdiction,²³ the failure of any plaintiff except Blanco-Ortega to satisfy the amount-in-controversy requirement frustrated original jurisdiction over the other plaintiffs' claims.²⁴

The U.S. Supreme Court affirmed *Allapattah* and reversed *Ortega*.²⁵ Writing for the Court, Justice Kennedy²⁶ concluded that "whether a diversity case in which the claims of some plaintiffs satisfy the amount-in-controversy requirement, but the claims of others [sic] plaintiffs do not, presents a 'civil action of which the district courts have original jurisdiction'"²⁷ is readily answered by the only plausible reading of section 1367: Congress granted federal courts jurisdiction over all claims by diverse parties arising out of the same case or controversy.²⁸

Implicitly rejecting the First Circuit's reasoning in *Ortega*, the majority found nothing in section 1367 that requires "all claims in the complaint . . . [to] stand or fall as a single, indivisible 'civil action'" or mandates that "the inclusion of a claim or party falling outside the district court's original jurisdiction somehow contaminates every other claim in the complaint."²⁹ Although section 1367 clearly did not permit supplemental jurisdiction over plaintiffs who would destroy complete diversity,³⁰ this was true only "in the special context of the complete diversity requirement because the presence of nondiverse parties on both sides of a lawsuit eliminates the justification for providing a federal forum."³¹ A plaintiff's failure to meet section 1332(a)'s amount-in-controversy requirement, however,

22. *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 589 (1939).

23. *Ortega*, 370 F.3d at 143.

24. *Id.* at 144.

25. *Exxon Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2615 (2005).

26. Chief Justice Rehnquist and Justices Scalia, Souter, and Thomas joined Justice Kennedy's opinion. *Id.* at 2614.

27. *Id.* at 2620.

28. *Id.* at 2620–21, 2625.

29. *Id.* at 2621.

30. *Id.* at 2618; *see also id.* at 2623 ("A failure of complete diversity, unlike the failure of some claims to meet the requisite amount in controversy, contaminates every claim in the action.").

31. *Id.* at 2622.

did not constitute contamination of the court's original jurisdiction over plaintiffs who do satisfy the requirement³² because that aspect could be analyzed on a "claim by claim" basis.³³ The majority found that such a reading logically comported with section 1367(b)'s list of exceptions to section 1367(a)'s grant of supplemental jurisdiction, because "[i]f the district court lacks original jurisdiction over a civil diversity action where any plaintiff's claims fail to comply with all the requirements of § 1332, there is no need for a special § 1367(b) exception for Rule 19 plaintiffs who do not meet these requirements."³⁴ Finding that "§ 1367 is not ambiguous," the Court rejected arguments that other interpretive tools, such as legislative history, should inform its interpretation of the statute, even if doing so might produce divergent results.³⁵

Justice Ginsburg dissented.³⁶ Although she found the majority's reading of section 1367 "surely plausible," she argued that any reading of the statute that failed to "incorporate the rules on joinder and aggregation tightly tied to § 1332 at the time of § 1367's enactment" was incomplete.³⁷ Although such an interpretation required the dismissal of litigants whose claims failed to meet the amount-in-controversy requirement, Justice Ginsburg found this outcome justified by section 1367's use of the phrase "civil action[s] of which the district courts have original jurisdiction."³⁸ This "less disruptive" interpretation of section 1367 better explained the statute's omission of Rule 20 plaintiffs and Rule 23 class actions among the exceptions listed in section 1367(b), because if section 1367 was read to incorporate both *Clark v. Paul Gray, Inc.*'s nonaggregation rule and *Zahn*, then "plaintiffs who do not meet the amount-in-controversy requirement would fail at the § 1367(a) threshold," thus mooted any need for Rule 20 or Rule 23 exceptions in section 1367(b).³⁹ Although Justice Ginsburg noted that her interpretation com-

32. *Id.* at 2622.

33. *Id.* at 2618.

34. *Id.* at 2624.

35. *Id.* at 2625.

36. Justices Stevens, O'Connor, and Breyer joined Justice Ginsburg's dissent. *Id.* at 2631.

37. *Id.* at 2637–38 (Ginsburg, J., dissenting).

38. *Id.* at 2638 (alteration in original) (quoting 28 U.S.C. § 1367(a) (2000)).

39. *Id.* at 2639; see *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 294–95 (1973); *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 589–90 (1939).

ported with evidence in the legislative history suggesting that Congress intended to adopt only “modest” and “noncontroversial” changes,⁴⁰ she took pains to clarify that her reading of section 1367 “d[id] not rely on the measure’s legislative history.”⁴¹

Justice Stevens issued a separate dissent,⁴² arguing that because section 1367 possessed both an “uncommonly clear legislative history” and, citing Justice Ginsburg’s alternate reading, could clearly be interpreted in multiple manners, the statute was rife with ambiguity.⁴³ Because such ambiguity, like beauty, was clearly “in the eye of the beholder,” Justice Stevens argued that as faithful agents judges were required to be “accountable to *all* reliable evidence of legislative intent,” regardless of whether the statutory text itself was ambiguous.⁴⁴ To do otherwise would be to “treat[] statutory interpretation as a pedantic exercise, divorced from any serious attempt at ascertaining congressional intent.”⁴⁵

Although clarification of section 1367’s grant of federal jurisdiction is important, *Allapattah*’s significance extends beyond this point of civil procedure. First, *Allapattah*’s three opinions present a basic primer on the various statutory interpretation methods employed by the current Justices. Second, *Allapattah* clarifies that when a statute the Court seeks to interpret is unambiguous, the Court, as a faithful agent, must approach the statute from a textualist perspective, disregarding secondary materials even if they contain specific statements of contrary intent. Third, by rejecting both intentionalist and purposivist readings of section 1367, but refusing to elucidate a standard for statutory ambiguity, *Allapattah* suggests that the Court views textualism as the best method for the judiciary, as the faithful agent of Congress, to fulfill its duty when interpreting statutes.

40. *Allapattah*, 125 S. Ct. at 2634 (Ginsburg, J., dissenting) (quoting H.R. REP. NO. 101-734, at 15–16 (1990)).

41. *Id.* at 2641 n.14.

42. Justice Breyer joined Justice Stevens’s dissent. *Id.* at 2628.

43. *Id.* at 2631 (Stevens, J., dissenting).

44. *Id.* at 2628; see also John Paul Stevens, *Judicial Predilections*, 6 NEV. L.J. 1, 2 (2005).

45. *Allapattah*, 125 S. Ct. at 2629 (Stevens, J., dissenting). Justice Stevens “remain[ed] convinced that it is unwise to treat the ambiguity *vel non* of a statute as determinative of whether legislative history is consulted.” *Id.* at 2628.

Appreciating *Allapattah's* enunciation of modern statutory interpretation requires a basic understanding of faithful agency theory. The theory sprang from early courts' recognition that preserving the Founders' vision of equality between the branches of government required maintaining the separation of power between the legislative and judicial branches.⁴⁶ Courts thus began describing their relationship with Congress as that of an agent's duty to carry out the wishes of the principal.⁴⁷ Professor Manning has observed, "On that assumption, if Congress legislates within constitutional boundaries, the federal judge's constitutional duty is to decode and follow its commands, particularly when they are clear."⁴⁸ By strictly defining the judiciary's role, courts hoped to prevent judicial encroachment on the power of Congress to make laws. Such reasoning, however, was predicated on a dual set of expectations: Congress expects that the Supreme Court, acting as Congress's faithful agent, will remain true to the constitutional separation of powers by faithfully enforcing federal statutes, and in return, the Supreme Court expects Congress to manifest its intention through the law it creates.

Within most debates over how best to execute the courts' role as Congress's faithful agent in matters of statutory interpretation lurk arguments about the appropriate balance of power among the branches of government. When statutory language and legislative history concur, these theories rarely diverge on how to interpret the statute.⁴⁹ When courts confront

46. "[T]he dogma of separation of powers . . . refers lawmaking exclusively to the legislature and would limit the courts to interpretation and application." Roscoe Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940, 946 (1923); see also *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 630 (1818) ("[W]hen the legislature manifests this clear understanding of its own intention, which intention consists with its words, courts are bound by it").

47. See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 127 (2001). Supporters of faithful agency theory sprout from a diverse field of political views, yet consistently align on the principle that the Court's relationship to Congress is best thought of as a "partnership." See, e.g., STEPHEN BREYER, *ACTIVE LIBERTY* 86 (2005); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 63 (1994); Sunstein, *supra* note 8, at 415.

48. Manning, *supra* note 47, at 5.

49. Some scholars, however, doubt whether a court can ever infer the intent of Congress without "depend[ing] on a fiction of congressional unity." J.R. Deshazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1450 (2003).

disconnects between legislative history and statutory language, however, a host of fundamental issues blossom.⁵⁰

For most of the Twentieth Century, the Supreme Court resolved questions of federal statutory interpretation by defining the role of the faithful agent as a duty to discern the intent of the enacting majority.⁵¹ This theory of statutory interpretation, known as “classical intentionalism,”⁵² is quickly summarized: Where the language of the statute in controversy is ambiguous or vague, federal judges ought to look beyond the statutory text to the statute’s legislative history for clarification of legislative intent.⁵³ At first glance, such a methodology appears attractive because “[i]n a constitutional system predicated upon legislative supremacy (within constitutional boundaries), judges—as Congress’s faithful agents—must try to ascertain as accurately as possible what Congress meant by the words it used.”⁵⁴

Courts, however, quickly moved beyond considering legislative history when confronted with opaque statutory text to hold that any time statutory language and legislative history conflict, the potential vagaries of the text should yield to evidence of conflicting intent manifested in the legislative history.⁵⁵ Justice Stevens’s dissent in *Allapattah*, which found section 1367’s legislative history to be dispositive, exemplifies intentionalism’s manifest to be “accountable to *all* reliable evi-

50. See Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 361–68 (2005) (summarizing competing views); see also *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2626 (2005) (majority opinion) (noting that whether legislative history is a reliable guide for statutory interpretation is “a point on which Members of this Court have disagreed”).

51. Intentionalist theories of interpretation have tended to dominate Anglo-American jurisprudence. See WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 213 (2000); John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70, 71 (2006).

52. John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005).

53. Generally, intentionalists make extensive use of legislative history, which is embodied in committee reports, as well as statements by bill sponsors, floor managers, and other congressional gatekeepers. Justice Stevens, one of intentionalism’s most prominent supporters, has argued that “we do the country a disservice when we needlessly ignore persuasive evidence of Congress’ actual purpose.” *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 115 (1991) (Stevens, J., dissenting).

54. Manning, *supra* note 52, at 419; see also Manning, *supra* note 51, at 71 & n.2.

55. Manning, *supra* note 51, at 72 & n.8.

dence of legislative intent," regardless of the clarity of statutory text.⁵⁶

In recent years, however, certain influential judges have advanced a competing theory of statutory interpretation known as "textualism." Rather than relying on judges to capture the purpose of statutes by plumbing legislative histories for indicia of intent, textualism suggests that judges more readily fulfill their duty as faithful agents by employing a plain-meaning-based methodology.⁵⁷ Textualism's most prominent supporter, Justice Scalia, articulates the theory:

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.⁵⁸

Justice Kennedy's majority opinion in *Allapattah* thus presents what might be called a textbook application of textualism:⁵⁹ the majority read the text of section 1367 as a reasonable person

56. See *supra* notes 40–43 and accompanying text.

57. See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION 16–18, 29–37 (1997); Eskridge, *supra* note 7, at 655.

58. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring). Textualists generally agree, however, that "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (Rehnquist, J., for the Court).

59. See *supra* notes 23–32 and accompanying text. Although some critics have suggested that *Allapattah's* refusal to extend federal jurisdiction to plaintiffs who would destroy complete diversity represents inconsistency in the textualist argument, such criticism misunderstands textualism as relying solely on the statutory text. See Adam Steinman, *Sausage-Making, Pig's Ears, and Congressional Expansions of Federal Jurisdiction: Exxon Mobil v. Allapattah and Its Lessons for the Class Action Fairness Act*, 81 WASH. L. REV. (forthcoming 2006) (manuscript at 53, on file with author).

would,⁶⁰ examined the semantic context of the surrounding law,⁶¹ and refused to consider the statute's legislative history.⁶²

The third theory of statutory interpretation advanced in *Allapattah* is perhaps best labeled "modern purposivism." Building on the purposive method of statutory interpretation first outlined in the seminal *Legal Process* materials of Professors Hart and Sacks,⁶³ modern purposivists "feel the pinch of the statutory text more sharply than purposivists of the past . . . [and] conclude that text and purpose are both always relevant and that interpreters should proceed by calibrating how strong the respective textual and purposive cues appear in any particular interpretive case."⁶⁴ Although modern purposivism, like textualism, commences with textual analysis, the approaches diverge in their treatment of context:

[T]extualists and purposivists emphasize different elements of context. Textualists give precedence to *semantic context*—evidence that goes to the way a reasonable person would use language under the circumstances. Purposivists give priority to *policy context*—evidence that suggests the way a reasonable person would address the mischief being remedied. To be sure, practitioners of each methodology will consider both forms of contextual evidence in cases of ambiguity. But textualists give determinative weight to clear semantic cues even then [sic] they conflict with evidence from the policy context. Purposivists allow sufficiently pressing policy cues to overcome such semantic evidence.⁶⁵

Modern purposivists thus find that subordinating a statute's semantic details to its background purpose respects legislative

60. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2625 (2005) ("No other reading of § 1367 is plausible in light of the text and structure of the jurisdictional statute.").

61. *Id.* at 2622–23 (clarifying that, in light of section 1332, section 1367 did not permit extension of jurisdiction to parties whose presence would destroy complete diversity).

62. *Id.* at 2625 ("§ 1367 is not ambiguous.").

63. See, e.g., T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 26–28 (1988); William N. Eskridge, Jr. & Philip P. Frickey, *The Making of The Legal Process*, 107 HARV. L. REV. 2031, 2046–47 (1994).

64. Manning, *supra* note 51, at 75. Purposivism thus rests on what Professor Manning has conceded is a "serious intuition that legislators enact statutes to achieve policy aims, and that legislators simply do not focus on the semantic fine points of (what is often complex and lengthy) legislation." *Id.* at 76.

65. *Id.* at 76.

supremacy while promoting the normatively attractive goals of policy coherence and adaptability.⁶⁶

Justice Ginsburg's dissent in *Allapattah* can best be understood as an example of modern purposivism. Although she commenced her analysis of section 1367 by examining the text and recognized the majority's reading of section 1367 as "surely plausible," Ginsburg found the textualist interpretation of the statute overly broad for "detach[ing] § 1367(a) from its context and attempt[ing] no reconciliation with prior interpretations of § 1332's amount-in-controversy requirement."⁶⁷ Clarifying that her dissent was not predicated on section 1367's legislative history,⁶⁸ Justice Ginsburg instead found the existence of other judicially developed doctrines, specifically "pendent and ancillary jurisdiction," extremely relevant.⁶⁹ Her alternate, "less disruptive," reading of section 1367 was thus preferable because it was "essentially . . . a codification of those doctrines, placing them under a single heading, but largely retaining their substance."⁷⁰

Further differentiating her analysis from the majority's endorsement of textualism, Justice Ginsburg noted that her reading of section 1367 comported with the statutory interpretation method of sympathetic textualism,⁷¹ which instructs the Court to engage in a "'sincere and sympathetic effort' to uncover the meaning of a statute," but employs the guiding principle that "statutes rarely produce unannounced but revolutionary changes in the law."⁷² Although modern purposivism accepts

66. *Id.* Professor Manning suggests that the two approaches do share common ground. Modern textualists must, because of their reliance on context, at times resort to "extrastatutory—and thus unenacted—contextual cues." In such cases, textualists believe that evidence of purpose, so long as it is not derived from legislative history, plays a material role in statutory interpretation. Possible convergence between the two theories is dashed, however, by Professor Manning's additional argument that employing textualism captures values that purposivism cannot. *Id.* at 75–76.

67. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2637 (2005) (Ginsburg, J., dissenting).

68. *Id.* at 2641 n.14.

69. *Id.* at 2638 (citing *Finley v. United States*, 490 U.S. 545 (1989)).

70. *Id.* at 2638–39.

71. *Id.* at 2638 (citing E. James Pfander, *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism*, 148 U. PA. L. REV. 109, 114 (1999)).

72. Pfander, *supra* note 71, at 113–14 (quoting David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 926 (1992)).

such policy-based contextual evidence, the textualist approach endorsed by the *Allapattah* majority rejects interpretive presumptions that would construe a jurisdictional statute to be “narrower than what the text provides.”⁷³ Textualism’s response when policy and text conflict is clear: “When contextual evidence of semantic usage points decisively in one direction, that evidence takes priority over contextual evidence that relates to questions of policy.”⁷⁴

Although its role as a primer is useful to students of statutory interpretation, *Allapattah*’s more direct contribution to the canons of statutory interpretation is to clarify that when a statute is unambiguous, the duty of the faithful agent is to rely solely upon the language of the statute as written, regardless of relevant legislative history or ostensible purpose.⁷⁵ In employing strong language in support of the text—“the authoritative statement is the statutory text, not the legislative history or any other extrinsic material”—the Court’s rejection of intentionalism and modern purposivism is clear.⁷⁶ Lower courts have not struggled to apply this lesson as they interpret statutes in the aftermath of *Allapattah*. For example, in *Jacobs v. Bremner*,⁷⁷ an Illinois district court applying *Allapattah* explained,

[E]ven affirmative statements of specific intent in congressional committee reports are impotent in the face of unambiguous statutory language. [*Allapattah*] addressed a conflict between unambiguous statutory language and an unambiguous statement of congressional intent Its approach to that conflict dictates the outcome here . . . [and] forecloses any possibility of using Section 36(a)’s clear legislative history to create a private right of action where the unambiguous statutory language creates none.⁷⁸

73. *Allapattah*, 125 S. Ct. at 2620 (majority opinion).

74. Manning, *supra* note 51, at 92–93.

75. *Allapattah*, 125 S. Ct. at 2625 (“No other reading of § 1367 is plausible in light of the text and structure of the jurisdictional statute.”).

76. *Id.* at 2626.

77. 378 F. Supp. 2d 861 (N.D. Ill. 2005)

78. *Id.* at 865–66; *see also* Davis v. Bailey, Civil Action No. 05-cv-00042-WYD-OES, 2005 WL 3527286, at *5 (D. Colo. Dec. 22, 2005) (“I find that the statute is not ambiguous . . . [t]herefore, I cannot rely on the legislative history or any other extrinsic materials to imply such a right.”); Hernandez v. Citifinancial Servs., Inc., No. 05 C 2263, 2005 WL 3430858, at *6 (N.D. Ill. Dec. 9, 2005) (“[I]t would be improper to consider legislative history here because plaintiffs have failed to point to any textual ambiguity in § 1681m(h)(8) and the court cannot identify

Allapattah does not provide such clear direction for determining whether statutes are ambiguous enough to justify consultation of extratextual sources. The Court merely indicated that it does not find the existence of alternate interpretations enough to signify a statute's potential ambiguity.⁷⁹ If the consensus of four Supreme Court Justices fails to establish a statute's ambiguity, *Allapattah* seems to signal that the Court will be reluctant to find any statute's text ambiguous. When paired with *Allapattah's* clarification that when a statute is unambiguous, the Court must employ only a textualist theory of interpretation to discern congressional intent, *Allapattah* appears to create a default presumption of textualism in all cases of statutory interpretation.

Textualism best promotes the values of publicity, predictability, and certainty that faithful agency theory seeks to protect. How quickly these benefits accrue will depend on how courts weave *Allapattah* into their decisions. If *Allapattah* is read only to clarify that unambiguous statutes must be interpreted from a textualist perspective, the benefits of textualism will spring forth only where the courts find unambiguous statutes. If *Allapattah* is read to create a presumptive application of textualism to all statutory interpretation cases, however, then the Court has offered meaningful guidance to the lower courts, the faithful agents of statutory interpretation, and struck a powerful blow against the competing theories.

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any." (quoting *Murray v. Household Bank*, 386 F. Supp. 2d 993, 998–99 (N.D. Ill. 2005))).

79. *Allapattah*, 125 S. Ct. at 2625 ("Even if we were to stipulate, however, that the reading these proponents urge upon us is textually plausible, the legislative history cited to support it would not alter our view as to the best interpretation of § 1367.").