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I. INTRODUCTION

IN his 1997 essay on interpretation,[1] Justice Scalia cites with approval Professors Hart and Sacks who say that "American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation."[2] It is just so. In the cases are many references to the meaning of text and to structure and to other contexts such as legislative history, traditions, and precedent. There are inferences about legislative purposes and what consequences are likely to be produced by alternative interpretations. Also appearing in statutory interpretation opinions are common sense rules for determining legislative meaning, including reliance on administrative interpretations, policy considerations, and avoiding constitutional issues. Rarely, however, is there discussion of a general theory on why the various sources are relevant or what should be their relative importance. At first glance, there appears to be nothing but a hodge-podge of ways to discover or resolve ambiguity in order to find legislative "intent." As Professor Jane Schacter has noted, "there are significant features in the court's interpretive jurisprudence that confound the interpretive divides that structure so much contemporary scholarship.[3]

There is no shortage of theories from which courts might choose. Scholarly articles on statutory interpretation have proliferated over the last ten to fifteen years, and there are at least half-a-dozen competing

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1. Antonin Scalia, *Common-Law Courts in Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, 3 (Amy Gutmann ed., 1997).

2. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994), *quoted in* Scalia, *supra* note 1, at 14.

3. Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 5 (1998).

models, including new textualism,[4] intentionalism,[5] "modified" intentionalism,[6] "legal process,"[7] public justification,[8] dynamic interpretation,[9] and public choice theories.[10]

Why has no single theory emerged? Are practical, policy, political, or ideological considerations relating to whatever particular subject matter is involved in a case more influential than interpretive methodology in determining whether the court finds ambiguity or departs from the apparent meaning of statutory language? If so, judges would understandably not want to be shackled by a general theory.

A plausible alternative explanation for the cacophony is that we have been asking the wrong question and searching for the wrong answer. By defining our search as a search for a theory of statutory interpretation, we implicitly assume (1) that the proper object of our search is *statutes*; (2) that the proper goal of our search is to define a set of principles telling us how to derive *meaning* from statutes; and (3) that it is possible to devise a set of principles which can be *objectively* and *reliably* applied by different judges to different statutes (since reproduceability is a necessary characteristic of any useful and valid theory).

These assumptions may be misplaced. First, statutory interpretation is a process engaged in by judges who are, after all, only human. The process of deriving meaning from words, which lies at the heart of statutory interpretation, is a peculiarly individual one. Computers can be programmed to mimic a process of interpretation, but that does not mean that each individual's process of interpretation is the same or can be made the same.

Second, a judge or court may not so much engage in a process of statutory interpretation as make a decision about the meaning of a statute. The difference is a subtle, but important one. "Statutory interpretation" makes it sound like a judge should take off his or her common law or constitutional interpretation hat and should put on a statutory interpretation hat where the object of the game is to find the meaning of a statute. But this assumes there actually are different hats for judges to wear. The reality may be that each appellate judge has developed a general style of decision-making that is applied, without significant modification, to all types of legal and factual situations. The style of decision-making may be

4. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

5. *See, e.g.*, Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983).

6. *See* REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES (1975).

7. *See* William N. Eskridge, Jr., *Symposium on Statutory Interpretations: Legislative History Values*, 66 CHI.-KENT L. REV. 365, 392-93 (1990).

8. *See* Bernard W. Bell, *Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 OHIO ST. L.J. 1 (1999).

9. *See* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

10. *See* Daniel A. Farber & Philip P. Frickey, *Symposium on the Theory of Public Choice: Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988).

essentially invariant whether the issue involves interpretation of a statute, a constitution, a contract, other judicial opinions, or even an appellate record. Instead of searching for a general theory of how meaning can be derived from statutes, we should be looking for a general theory of how judges make decisions.

This hypothesis—that actual methods of statutory interpretation used by judges are more closely aligned with a particular judge's overall approach to decision-making than with independent theories of statutory interpretation—can be tested by attempting to apply general theories of judicial decision-making to decisions that judges make about statutes. If there is a match between general theories of judicial decision-making and judicial decisions about statutes, it would suggest that decision-making is a more fundamental activity than statutory interpretation, and that theories of statutory interpretation ultimately fail as a practical matter because they conflict with more basic judicial characteristics.

A substantial body of scholarship has already identified major decision-making trends in our judicial history. In light of that scholarship, we can reasonably assert that American courts and judges have for the most part adhered to four competing theories of decision-making.[11] One or the other of the four theories has predominated during different eras of American legal history.[12] Insofar as they relate to statutory interpretation, the theories, differentiated according to what they seek to discover and implement, and arranged in the order of increasing use of non-textual sources, are as follows:

1. Formalism: Discover what the text means in its context, without reference to legislative history.

2. Holmesian: Discover what the text means in light of the legislature's underlying purposes.

3. Natural Law: Discover what reason suggests was intended in light of all reliable sources.

4. Instrumental: Discover what good results were intended by the legislature and help insure their reality.

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11. For further development of this theme, see R. RANDALL KELSO & CHARLES D. KELSO, STUDYING LAW: AN INTRODUCTION (1984). *See also* Charles D. Kelso & R. Randall Kelso, *Our Nine Tribunes: A Review of Professor Lusky's Call for Judicial Restraint*, 5 SETON HALL CONST. L. J. 1289 (1995); Charles D. Kelso & R. Randall Kelso, *Standing to Sue: Transformations in Supreme Court Methodology, Doctrine and Results*, 28 U. TOL. L. REV. 93 (1996); R. Randall Kelso, *Separation of Powers Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-Making*, 20 PEPP. L. REV. 531 (1993); R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121 (1994). For links between these judicial theories and politics see Charles D. Kelso & R. Randall Kelso, *Politics and the Constitution: A Review of Judge Malcolm Wilkey's Call for a Second Constitutional Convention*, 27 PAC. L.J. 1213 (1996).

12. This proposition was explored in GRANT GILMORE, THE AGES OF AMERICAN LAW 1, 11-12 (1977). Gilmore acknowledged that a similar theory had been advanced by Karl Llewellyn in *The Common Law Tradition* (1960). *See also*, Karl N. Llewellyn, *On the Current Recapture of the Grand Tradition, in* JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 215 (1962).

In terms of which theory has tended to predominate in American legal history, the pattern in statutory interpretation (as well as in constitutional law and common law development) is roughly as follows: natural law (1789-1872), formalism (1872-1937), Holmesian (1937-1954), instrumentalism (1954-1986), and modern natural law (1986-1999).

Today's Supreme Court cannot be expected to settle on a single approach because each theory has one or more adherents on the Court. Justice Scalia has described and employs textualism (which is an application of formalism). Justice Thomas likewise follows that methodology. Holmesianism (which views statutory interpretation as a search for meaning in light of its purpose) is today represented by Chief Justice Rehnquist. The lone survivor of the instrumentalist Court of the 60s and 70s (which sought for just results whenever possible) is Justice Stevens (though Justice Ginsburg sometimes also leans in this direction). The remaining Justices tend to reflect in their opinions the natural law approach of Chief Justice John Marshall (an approach in which all of the above sources are relevant and the goal is to reach a decision in accord with the dictates of reason). In view of the diverging of perspectives, there is little wonder that current cases include a number of instances in which the Justices criticize one another's use of a methodology for interpretation - particularly the extent to which legislative history and inferred purpose are used to shed light on the meaning of statutory language.

This article describes these theories, provides current examples of the theories at work and in opposition to one another, and concludes with general observations and evaluative suggestions. We conclude that statutory interpretation should be viewed by scholars as embedded within deeply ingrained methods of decision-making which confounds efforts to impose a single theory of statutory interpretation upon the courts.

II. THEORIES OF INTERPRETATION

A set of ideas on statutory interpretation, worthy of being called a *theory*,[13] should attempt to answer at least these four questions about the process:

1. What is its goal?
2. What evidence is relevant?
3. What is the hierarchy among rules of construction that are available for dealing with relevant material?

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13. In defining "theory" in this fashion, we have adopted a convention that traces back to Aristotle. He concluded that to know anything one must know its causes and that there are four kinds of cause.

> Ideally the four causes are used to explain any thing or situation, although on occasion only two or three may be accessible to investigation: the material cause out of which a thing comes to be (as the silver of a bowl); the form or definition (as the shape of the bowl); the efficient cause (as the hammering of the silversmith); and the final cause (as the purpose for which the bowl is intended).

ARISTOTLE, THE BASIC WORKS OF ARISTOTLE xx (Richard McKeon ed., 1941).

4. To what extent is an interpreter free to use his or her ideas of sound policy as a guide?

Below are answers to each question as provided by the four models of decision-making that at one time or another have been dominant in American legal history.

A. FORMALISM (TEXTUALISM)

Justice Scalia's 1997 essay on statutory interpretation undertakes explicitly to answer each of the four questions. According to Scalia, the goal of statutory interpretation is to find "a sort of 'objectified' intent - the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."[14] The reason justifying this goal, said Scalia, is that it would be incompatible with democratic government to have the meaning of law determined by what the lawgiver meant, rather than by what the lawgiver promulgated. He explained that "[t]he text is the law, and it is the text that must be observed."[15]

Relevant evidence of intent, according to Justice Scalia, includes the words and their context in the law. It does not include legislative history. Legislative history, including statements made in floor debates, committee reports, and committee testimony, "should not be used as an authoritative indication of a statute's meaning."[16] Justice Scalia objects to treating such material as relevant because (1) the intent of the legislature is not the proper criterion of law, (2) in view of today's methods for preparing staff reports and floor debate, legislative history is not a likely source of legislative intent, and (3) the separation of powers requires that "[w]hatever Congress has not *itself* prescribed is left to be resolved by the executive or (ultimately) the judicial branch."[17]

Rules of construction that may be used include all those which are common sense and do not load the dice for or against a particular result.[18] Finally, the interpreter should make an effort to insure that his or

14. Scalia, *supra* note 1, at 17. To the above, Scalia added, "As Bishop's old treatise nicely put it, elaborating upon the usual formulation: '[T]he primary object of all rules for interpreting statutes is to ascertain the legislative intent; *or, exactly, the meaning which the subject is authorized to understand the legislature intended.*" *Id.* (quoting JOEL PRENTISS BISHOP, COMMENTARIES ON THE WRITTEN LAWS AND THEIR INTERPRETATION 57-58 (1882)).

15. *Id.* at 22.

16. *Id.* at 29-30.

17. *Id.* at 35; *see id.* at 31-35.

18. Examples of dice-loading rules criticized by Justice Scalia include the rule that statutes in derogation of the common law are to be narrowly construed or that remedial statutes are to be liberally construed to achieve their purposes. Dice-loading rules that embody common sense are, to Scalia,

> merely an exaggerated statement of what normal, no-thumb-on-the-scales interpretation would produce anyway. For example, since congressional elimination of state sovereign immunity is such an extraordinary act, one would normally expect it to be explicitly decreed rather than offhandedly implied - so something like a "clear statement" rule is merely normal interpretation. And the same, perhaps, with waiver of sovereign immunity.

Id. at 29.

her views on policy do not intrude into the process. Considering what is the most desirable resolution of a case is the attitude of the common-law judge. This attitude is appropriate only in common law cases. The reason is found in the text of the Constitution, which says, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[19]

Examples of the methodology advocated by Justice Scalia are readily available in current opinions by Justices Scalia and Thomas on both statutory and constitutional interpretation. Drawing on what Scalia and Thomas have written for the Court (or in dissent or concurrence), it appears likely that their votes in all cases are formulated at least in large part from a textual perspective. Evidence will be presented below.

B. HOLMESIANISM

In the years 1937-1954, a majority of the Court followed such Holmesian ideas as the belief that great deference is owed to legislatures which deal with social and economic problems because this assures implementation of the people's will. Such deference requires looking for the intent of the legislature as embodied in its words in order to carry out its purposes. By applying such ideas to both the Constitution and New Deal legislation, the Court during the era of 1937-1954 was able to sustain and implement most of the later New Deal enactments.

Holmes himself always spoke of searching for the objective meaning of words used in a statute, and not for the legislature's subjective intent. He concluded that: "we ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used. . . ."[20]

The most complete statement of a Holmesian theory of statutory interpretation by a Supreme Court Justice appears in Justice Frankfurter's 1947 Columbia Law Review article.[21] Frankfurter said that "the function in construing a statute is to ascertain the meaning of words used by the legislature."[22] The meaning of words for him included the purposes they were intended to serve. Frankfurter expressed this idea in several ways. He approved of Judge Learned Hand's statement that the art of interpretation is the proliferation of purpose. He then rephrased that epigram as follows: "I should say that the troublesome phase of construction is the determination of the extent to which extraneous documentation and external circumstances may be allowed to infiltrate the text on the theory that they were part of it, written in ink discernible to the judicial eye."[23]

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19. U.S. CONST. art. I, § 1.

20. Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417-18 (1899).

21. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947).

22. *Id.* at 533.

23. *Id.* at 529. This central problem for any "plain meaning" rule is further explored in R. Randall Kelso & C. Kevin Kelso, *Appeals in Federal Courts by Prosecuting Entities*

The judicial eye could be aided by legislative history, although the judge must guard against "[s]purious use of legislative history."[24] Regarding the hierarchy of sources, canons of construction should be used rarely, with a recognition that they are not true rules of law but are, instead, what Justice Holmes called "axioms of experience."[25]

Frankfurter warned against the judicial rewriting of statutes. He said that "[w]hatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration."[26] A judge "must not read in by way of creation. He must not read out except to avoid patent nonsense or internal contradiction."[27]

This Holmesian approach can be found in opinions by former Justices Frankfurter, Burton, Vinson, Clark, Minton, Harlan, Whittacker, Stewart, and White. Today, the lone Holmesian on the Court is Chief Justice Rehnquist, as noted in examples provided below.

C. INSTRUMENTALISM

The instrumentalist approach is sometimes called a policy or result-oriented approach. Its premise is to assume that the legislature intended good results from its enactments and that the courts, in interpreting and applying legislation, should facilitate those good results. Judges who follow this approach rarely admit that this is what they are doing because of concern for appearing to violate the separation of powers with "judicial legislation." However, scholars have been less inhibited. John Hart Ely, then Dean of Stanford Law School, in a notable article[28] quoted Judge J. Skelly Wright as saying, "[t]he ultimate test of the Justices' work, I suggest, must be goodness."[29] Some academics have argued in favor of the method, saying that legislation should be interpreted in light of the needs and goals of present day society.[30]

Exemplars of this approach who formerly served on the Court are Justices Douglas, Warren, Brennan, Marshall, and Blackmun. Today only Justice Stevens remains as a reminder of the era when instrumentalists formed a majority on the Court and remade much of constitutional law along with creatively interpreting a great deal of legislation in order to reach good results.

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other than the United States: The Plain Meaning Rule Revisited, 33 HASTINGS L.J. 187 (1981).

24. Frankfurter, *supra* note 21, at 543.

25. *Id.* at 544.

26. *Id.* at 533.

27. *Id.*

28. John Hart Ely, *On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 16 (1978).

29. *Id.* at 16.

30. *See, e.g.*, Henry M. Hart & Alber M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (10th ed. 1958). The authors said that a court in interpreting a statute should: ask itself not only what the legislation means abstractly, or even on the basis of legislative history, but also what it ought to mean in terms of the needs and goals of our present day society.

Justice Stevens' views often put him at odds with today's Court. He is today the most frequent dissenter. For example, in the 1998 term, he filed dissents in three of the four 8-1 cases involving statutory interpretation. Further, in the six 7-2 cases he wrote one dissent and joined in another.

D. NATURAL LAW

In the days of Chief Justice John Marshall, there was an established tradition of statutory interpretation. The goal was to discover and carry out the intention of the legislature. That intent, according to both Blackstone's *Commentaries* and Rutherforth's *Institutes of Natural Law*, was the reason or final cause of the law, i.e., the end which the legislator intended to obtain or the effects intended to be produced by it.[31] A classic statement of the approach can be found in *Heydon's Case*,[32] decided in 1584. In that case, Lord Coke called for judges to suppress the mischief for which the common law did not provide and to add life to the cure and remedy, according to the true intent of the makers of the act.[33] In deciding whether to extend or restrain language, the court was to consider "equities" that, in the words of Professor Crosskey, "were derived from what was known diversely as 'the reason,' 'the purpose,' 'the spirit,' or 'the intention,' of a statute, or other writing, considered as a whole, and with reference to the circumstances in which it had been made, written, or adopted."[34] Such circumstances would of course include legislative history. And the Court may consider what other "experts" have to say, particularly agencies delegated authority to implement the law.

This method is reflected today in the opinions of Justices O'Connor, Kennedy, Souter, and, to an extent, Breyer and Ginsburg. In today's 5-4 and 6-3 cases, the formalists (Scalia and Thomas) tend to join with the Holmesian (Rehnquist). At the other extreme is the instrumentalist (Stevens), with whom Justice Ginsburg often agrees. The outcomes of most closely contested cases thus hinge on the natural law Justices, particularly Justice Kennedy or Justice O'Connor, who tend to join with the formalists and the Holmesian Chief Justice.

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31. *See* WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES, 366-67 (1950).

32. 3 Co. Rep. 7a, 76 Eng. Rptr. 637 (1584).

33. *See id.* Lord Coke said:

> [F]or the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered: 1st. What was the common law before the making of the Act? 2nd. What was the mischief and the defect for which the common law did not provide. 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. And, 4th. The true reason of the remedy, and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief . . . and to add force and life to the cure and remedy, according to the true intent of the makers of the Act . . . .

Id. at 638.

34. CROSSKEY, *supra* note 31, at 365.

III. THE THEORIES APPLIED IN THE 1998 TERM OF THE SUPREME COURT

To explore how the various approaches to statutory interpretation currently operate and interrelate, we have attempted in what follows to highlight the methodology used by various Justices during the 1998 term of the Supreme Court. During that term the Court decided seventy-five cases of which forty-one involved statutory interpretation in which an opinion was rendered by an identified Justice.[35] The extent to which the Court was unified or divided was as follows:

Vote on Main Point	Number of Statutory Interpretation Cases
9-0	20
8-1	4
7-2	5
7-1-1	1
6-3	3
5-4	7
5-3	1
Total:	41

Where the Court was closely divided there was, of course, more debate on interpretation methodology. However, even the unanimous cases provide interesting insights into the methodology used by an author without objection from his or her colleagues.[36] After trying several different ways

35. There was also one per curiam opinion in a statutory interpretation case: *Roberts v. Galen of Va., Inc.*, 119 S. Ct. 685 (1999). The opinion dealt with the duty of a hospital under 42 U.S.C. § 1395dd(b) (1999) to provide "such treatment as may be required to stabilize the medical condition" in emergency situations. 42 U.S.C. § 1395. The defendant hospital had transferred the injured plaintiff to another hospital without attempting to stabilize her condition. *See id.* at 686. The court held that plaintiff could recover for a violation without proving that there was an improper motive, such as indigency, race or sex, and that the text of the statute does not require an appropriate stabilization, nor can it reasonably be read to require an improper motive. *See id.* at 687. The Court noted that although it was not dispositive, a further indication of the correctness of the Court's decision was defendant's concession that the "motive test" applied by the court below lacked support in any of the traditional methods of statutory construction. *See id.*

36. When an opinion is written for a Court that has voted unanimously to support a certain result, the author knows that it should not ordinarily be difficult for a majority of the other Justices to join in an opinion. The case may not be complex and the decision may be supported by all of the various factors that are given weight by the various methodologies of interpretation. So long as the author sticks fairly close to textual interpretation, the opinion is not likely to generate a dissent. Justices who may use different methodologies than the author may tend to ignore the possibility of a methodological comment because there is no chance of changing the result, and the case may not justify the investment of time and energy. Debate on interpretation methodology is likely only where the Court is more sharply divided. In the sharply divided cases, a well-written opinion usually is necessary to hold a majority or to influence a contrary vote and thus change the majority. An attempt may be made to write a particularly persuasive opinion to influence future judges with respect to whether the case, as a precedent, should be treated narrowly or broadly, or, possibly, be overruled.

of organizing the materials, we have settled upon presenting the work of each Justice, according to the classification scheme discussed above. For each justice, we begin with dissenting or concurring opinions because that is where a justice has the fewest constraints in presenting his or her own views. As will be seen, each justice carries over into majority opinions elements of his or her decision-making process, with only limited adjustments and accommodations to other members of the majority. Where debate was sparked, we have suggested the terms in which it took place.

A. FORMALIST OPINIONS IN 1998

1. Justice Scalia

In the 1998 term, Justice Scalia filed only two dissenting opinions in statutory interpretation cases. As one might expect, in both instances he objected to the Court's departure from what he saw as the natural meaning of the words. In the first case, *Holloway v. United States*,[37] the Court, in an opinion by Justice Stevens, held seven to two that the federal car jacking statute, 18 U.S.C. § 2119, which criminalizes carjacking "with the intent to cause death or serious bodily harm," requires the Government to prove only that when the defendant took control of the driver's car, the defendant possessed the conditional intent to seriously harm or kill the driver if necessary to steal the car. According to the majority, the government does not have to prove an unconditional intent to kill or harm in all events. Justice Scalia, dissenting, said that:

> in customary English usage the unqualified word "intent" does not usually connote a purpose that is subject to any conditions precedent except those so remote in the speaker's estimation as to be effectively nonexistent - and it never connotes a purpose that is subject to a condition which the speaker hopes will not occur.[38]

Scalia noted that the Court did not claim that the word "intent" has acquired a "term-of-art" status giving it the conditional meaning ascribed by the Court.[39] He criticized the majority for ultimately resting its decision on the opinion that the purpose of the statute, to deter carjacking, is better served by including conditional intent.[40] He added that limits on the "means employed to achieve the policy goal are no less a 'purpose' of the statute than the policy goal itself."[41] Finally, he said that the Court can best judge what Congress intended by the words Congress enacted rather than by some intuition as to what it "obviously intended" to prohibit.[42] He would find the statute utterly unambiguous but, if ambiguity existed, the rule of lenity would require the ambiguity to be resolved in the defendant's favor.[43] Alluding to practical consequences, he closed his

37. 119 S. Ct. 966 (1999).
38. *Id.* at 972-73.
39. *See id.* at 973.
40. *See id.* at 975.
41. *Id.*
42. *See id.*
43. *See id.* at 976.

opinion by saying that it was "inadvisable to introduce the new possibility of 'conditional-intent' prosecutions into a modern federal criminal-law system characterized by plea bargaining, where they will be predictably used for in terrorem effect."[44]

Justice Scalia's other dissent was filed in *United States v. Rodriguez-Moreno*,[45] where he voiced a rare disagreement with Justice Thomas, who was writing for the Court. The Court held that venue in a prosecution under 18 U.S.C. § 924(c)(1) for using or carrying a firearm "during and in relation to any crime of violence" was proper in any district where a kidnapping was carried on, even if the defendant carried a gun only in a district other than that where prosecution was brought.[46] Justice Thomas explained that the crime consisted of distinct parts and, where that was so, precedent established that the whole may be tried where any part can be proved to have been done.[47] Justice Scalia, dissenting with Justice Stevens (a rare combination), said the two parts of the crime were tied together by the word "during." Scalia said that § 924(c)(1) was violated "only so long as, *and where*, both continuing acts are being committed simultaneously."[48] This conclusion was supported by an allusion to the Constitution:

> The short of the matter is that this defendant, who has a constitutional right to be tried in the State and district where his alleged crime was "committed," U.S. Const., Art III, § 2, cl.3; Amdt. 6, has been prosecuted for using a gun during a kidnapping in a State and district where all agree he did not use a gun during a kidnapping. If to state this case is not to decide it, the law has departed further from the meaning of language than is appropriate for a government that is supposed to rule (and to be restrained) through the written word.[49]

Scalia's disagreement was not over the method used by Justice Thomas, the other currently serving Justice whose opinions in statutory interpretation cases embody a textualist approach. The key difference was that Justice Thomas and seven other Justices perceived that the defendant was guilty of using a gun "during and in relation to" a kidnapping if at *any* time during the ongoing crime of kidnapping a gun had been used. According to Justice Thomas, the statute did not define a "point-in-time" offense, i.e., an offense committed only when and where the firearm was used.[50] Since the crime consisted of distinct parts, a kidnapping and using a gun during and in relation to that kidnapping, precedent allowed the crime to be tried where any part of the crime was committed.[51] Justice Thomas did not engage in any analysis of consequences.

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44. *Id.* at 977.
45. 119 S. Ct. 1239 (1999).
46. *See id.* at 1244.
47. *See id.*
48. *Id.* at 1245 (emphasis added).
49. *Id.* at 1245-46.
50. *See id.* at 1244.
51. *See id.*

Justice Scalia concurred in the hotly contested case in which the Court held that 13 U.S.C. § 195 prohibits the use of sampling in calculating the population for purposes of apportionment, *Department of Commerce v. United States House of Representatives*.[52] Scalia, with Justices Thomas, Rehnquist, and Kennedy, first disassociated himself from the portions of Justice O'Connor's majority opinion which supported the result by considering remarks of individual legislators and committees and what they did not say. The main thrust of Scalia's opinion, however, was that it is doubtful whether the constitutional requirement of an "actual Enumeration" is satisfied by statistical sampling.[53] In support of this doubt he cited definitions contained in roughly contemporaneous dictionaries and the long standing tradition adopted by Congress which forbade the use of sampling techniques in conducting the apportionment census. Again concluding with a practical look at consequences, Justice Scalia said that "[t]o give Congress the power . . . to select among various estimation techniques . . . [would] give the party controlling Congress the power to distort representation in its own favor. [G]enuine enumeration may be the most accurate way of determining population with minimal possibility of partisan manipulation."[54]

In the 1998 term, each Justice wrote at least one unanimous opinion in a statutory interpretation case.[55] We begin at the formalist end of the spectrum, with the three opinions in unanimous cases written by Justice Scalia. In each opinion he gave as the first and primary reason for the Court's holding that it was the "more natural" reading of the words. He went on, however, in two of the cases to justify that reading by reference to other matters. Specifically, he referred to precedents dealing with the same or similar legislation or to principles that did not load the dice but which set up presumptions for interpreting words one way or another. In two of the cases, Justice Scalia concluded his opinion by alluding to what he considered as the likely unfortunate practical consequence of deciding the case other than by using the meaning he attributed to the statutory language. Thus, even though he appeared to give first and heaviest weight to the text and did not once refer to legislative history, he did mention some of the variables which tend to weigh more heavily in the opinions of other Justices. It is not clear whether he did so out of respect for the views of Justices who hold such matters highly relevant, or to hold votes in place, or whether his own reading of the language was influenced by those matters. Here are details on these relatively easy cases:

52. 119 S. Ct. 765 (1999).

53. *See id.* at 781.

54. *Id.* at 787.

55. The tradition has been that when the Chief Justice is in the majority, he assigns the opinion to be written. When the Chief Justice is not in the majority, the next most senior Justice who is in the majority will assign the opinion. Current seniority begins with Justice Stevens and continues with Justices O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer.

In *Wright v. Universal Maritime Service Corp.*,[56] Justice Scalia wrote for a 9-0 Court held that the National Labor Relations Act authorized a union-negotiated waiver of employees' statutory right to a judicial forum for claims of employment discrimination only if the waiver was clear and unmistakable. To support the clarity requirement, Scalia drew by analogy on *Metropolitan Edison Co. v. NLRB*,[57] where the Court had held that only by clear and unmistakable language could a union waive its *officers's* statutory right to be free of antiunion discrimination. In accordance with his essay on interpretation, Scalia made no reference to legislative history, context, interpretive maxims, or substantive policies to justify the clarity rule or to support his finding that the collective bargaining agreement did not contain a clear waiver.

Another 9-0 Scalia opinion appeared in *United States v. Sun-Diamond Growers of California*.[58] The case was a prosecution for violating a federal statute which made it illegal to give anything of value to a public official "for or because of any official act performed or to be performed by such public official."[59] The District Court was held in error for instructing that the government need not prove that the gratuity was linked to a specific or identifiable official act or to any act at all. Justice Scalia found four reasons why a link had to be established between the gift and a specific official act. His reasons were consistent with a search for meaning in the overall context of the law, although he also mentioned an undesirable consequence of an alternative interpretation:

1. Linkage seemed the "more natural" meaning.

2. The government's reading would go too far, as for example by making it illegal for the President to receive token gifts from championship sports teams invited to the White House.

3. When Congress has wanted to create broadly prophylactic criminal prohibitions on gift giving, it has done so in precise fashion.

4. In the intricate web of laws dealing with the giving and receipt of gifts, where precisely targeted prohibitions are common-place, and more general prohibitions are qualified by numerous exceptions, a statute that can be interpreted as either broad or narrow should reasonably be interpreted narrowly.[60]

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56. 119 S. Ct. 391 (1998). In this case the defendant employer claimed that an arbitration clause in a collective bargaining agreement (CBA) prevented plaintiff employee from filing a federal court action for violation of the Americans with Disabilities Act of 1990. Citing precedents, Justice Scalia said that not only is there no presumption of arbitrability with respect to the meaning of a federal act, but, in addition, any CBA requirement to arbitrate must be perfectly clear. That was not true of the CBA involved here because its provision for arbitrating "matters under dispute" could be read to indicate matters in dispute under the contract (rather than being a clear and unmistakable waiver of covered employees' rights to a judicial forum for federal claims of employment discrimination). Left open was the question whether a CBA can waive employees' rights to a judicial forum. *See id.* at 396.

57. 460 U.S. 693, 708 (1983).

58. 119 S. Ct. 1402 (1999).

59. 18 U.S.C. § 201(c)(1)(A).

60. *See Sun-Diamond*, 119 S. Ct. at 1407-08.

The third of Justice Scalia's opinions for a unanimous Court was *Your Home Visiting Nurse Serv., Inc. v. Shalala*.[61] There he relied on the natural meaning of words, followed up by deference to an interpretation given by the responsible administrator and concern about interference with legislative purpose that would be produced by any other decision. In the case, a health services provider was dissatisfied with the initial reimbursement decision of a fiscal intermediary (acting as agent for the Secretary of Health and Human Services). The provider was also dissatisfied with the intermediary's refusal to reopen its determination despite new and material evidence. The question was whether the provider had a right to appeal to the Provider Reimbursement Review Board. That Board has jurisdiction to review a "final determination. . . as to the amount of total program reimbursement due the provider. . . ."[62] The Court agreed with the Secretary that the statutory phrase defining jurisdiction did not include a refusal to reopen because such action is not a final determination on amount, but rather is a refusal to make a new determination.[63] Justice Scalia gave three reasons:

1. It seems the more natural reading.
2. Since it is within the bounds of reasonable interpretation, the decision of the Secretary is entitled to deference under *Chevron*.[64]
3. This result is consistent with *Califano v. Sanders*,[65] where judicial review of a reopening denial would, as here, frustrate the time limits placed on alternative ways of seeking review of administrative decisions.[66]

Several other opinions for which Justice Scalia wrote the majority opinion were more complex. Again, however, in those opinions he did not refer to legislative history and he relied primarily on the surface meaning of words. For example, artful dealing with words was apparent when Scalia wrote for the Court in the 8-1 case of *Reno v. American-Arab Anti-Discrimination Committee*.[67] In this case several aliens resisted deportation proceedings by filing suit in a district court. They alleged unconstitutional selective enforcement of immigration laws in violation of the First and Fifth Amendments. While their suit was pending, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),[68] which narrowed federal jurisdiction. One provision,

61. 119 S. Ct. 930 (1999).
62. *Id.* at 933.
63. *See id.*
64. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45 (1984) (deference is owed to an interpretive decision of those responsible for administering an Act, if the interpretation is reasonable).
65. 430 U.S. 99 (1977).
66. 119 S. Ct. at 933-34. Justice Scalia also held that this position was not inconsistent with the duty of the Secretary to provide for suitable retroactive corrective adjustments. And, the Medicare Act forbade judicial review of the refusal to reopen. Nor could a mandamus issue since petitioner had not shown the violation of a clear nondiscretionary duty.
67. 119 S. Ct. 936 (1999).
68. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-28, 110 Stat. 3009.

Section 309(c)(1), provided that in the case of an alien who is in exclusion or deportation proceedings, the new amendments shall *not* apply to deportation proceedings already underway. However, Section 306(c)(1) provided that Section 1252(g) *should apply* without limitation to claims arising from all past, pending or future proceedings. Arguably, this was a contradiction. However, by taking a close look at the words of Section 1252(g), Justice Scalia reconciled the two sections and held that Section 1252(g) should apply. It said that:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claims by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.[69]

Justice Scalia said that the mention of three discrete events along the road to deportation was not a shorthand way of referring to all claims arising from deportation proceedings.[70] He backed up this conclusion by noting first that there was no other instance in the United States Code where language such as this has been used to impose a general jurisdictional limitation. Second, he pointed out that the three kinds of decisions specified in Section 1252(g) were subject to the discretion of the Attorney General. There would be unfortunate interference with that discretion if actions could be brought in situations where the Attorney General chose not to exercise the discretion. For such cases, Congress would want the withdrawal of jurisdiction provided in Section 1252(g) to apply even to pending cases.[71]

The most complex decision written for the Court by Justice Scalia in the 1998 term was *AT&T Corp. v. Iowa Utilities Bd.*.[72] In that 5-3-1 case the questions included whether the Federal Communications Commission had the authority to implement pricing regulations for local phone service companies that are required to share their network with competitors under the Telecommunications Act of 1996. Alluding to the fact that the 1996 Act expressly provided that it was to be inserted into the old Communications Act of 1934, Justice Scalia held that the FCC had authority to design a pricing methodology for sharing. His basic premise was the fact that the 1938 amendment to Section 201(b) of the 1934 law provided in general terms that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."[73] With reference to that language Justice Scalia said, "We think that the grant in § 201(b) means what it says. . . ."[74] Justice Scalia acknowledged that 47 U.S.C. § 152(b) withdrew FCC jurisdic-

69. 8 U.S.C. § 1252(g) (1994 & Supp. III).
70. 119 S. Ct. at 943.
71. *See id.* at 943-45.
72. 119 S. Ct. 721 (1999).
73. Act of May 31, 1938, ch. 296, 52 Stat. 588 (1938) (codified as amended at 47 U.S.C. § 201(b) (1994)).
74. *Id.* at 730.

tion over "charges, classifications, practices, services, facilities, or regulations" with respect to "intrastate communication services. . . ."[75] He replied, however, that this statutory language did not include pricing regulations with respect to local competition.[76] Justice Breyer, in a separate concurring opinion, agreed with Justice Thomas, but went on to stress the Act's purpose to encourage greater local service competition, a purpose that he said doesn't require or suggest reading the Act to change radically the scope of local regulator's traditional rate-setting powers.[77]

From a review of his recent opinions in statutory interpretation cases, it would appear that Justice Scalia is closely adhering to the theory he advanced in his essay on interpretation—with the possible qualification that he adverts to consequences more readily than the essay suggests.

2. *Justice Thomas*

Justice Thomas is the other currently serving formalist on the Court. His most thorough discussion of interpretation methodology was his concurrence, with Justice Scalia, to the Court's judgment in *Bank of America v. 203 N. Lasalle St. Partnership*.[78] The majority opinion by Justice Souter began discussing the statute by characterizing its language as inexact.[79] That was followed by an extended discussion of legislative history. Justice Thomas critically asserted that, as in *Dewsnup v. Timm*,[80] the Court had found ambiguity simply because the litigants and *amici* had offered competing interpretations of the statute. This approach, said Thomas, enabled any good idea from earlier practice or legislative history to be

75. *Id.* (quoting 47 U.S.C. § 152(b) (1994)).

76. In one respect Justice Scalia found that the FCC had gone beyond its statutory authority. In determining what network elements of local telephone companies should be made available to competitors, Section 251(d)(2) of the statute called for the FCC to consider what was "necessary" or what failures to provide access would "impair" the ability of the carrier seeking access to provide the services it seeks to offer. In considering what was "necessary" and what might "impair," the FCC did not consider the availability of elements outside a local network. Scalia said this was "not in accord with the ordinary and fair meaning of these terms." *Id.* at 735. If Congress had wanted to give blanket access to local networks, Scalia reasoned, it would not have included a requirement that necessity and impairment be considered. *See id.* Once again, Scalia did not refer to legislative history.

Justice Souter agreed with Justice Scalia that the FCC had jurisdiction but would give *Chevron* deference to its decisions on access. They were within what he considered the bounds of reasonableness since the words "necessary" and "impair" are ambiguous in being susceptible to a fairly wide range of meanings. Justice Thomas, writing a rare dissent to a Scalia opinion, with Chief Justice Rehnquist and Justice Breyer, said that the FCC's regulatory authority did not extend beyond intrastate services because, applying *ejusdem generis*, the Section 201(b) grant of power to the FCC is limited by the specific restriction in 201(a) to "interstate or foreign communication by wire or radio." Even if there was an ambiguity, Thomas reasoned, it should be resolved on the assumption that Congress intended to preserve local authority (which, historically, had been exercised over the telephone industry by the states). *See id.* at 743-45. Thus did federalism play an important role in support of Justice Thomas' reasoning on the meaning of statutory language.

77. *See id.* at 746-48.

78. 119 S. Ct. 1411 (1999).

79. *Id.* at 1417.

80. 502 U.S. 410, 416 (1992).

crammed into the statute. He would begin interpretation not with external sources but with the text itself. The question in this bankruptcy case was whether a plan which impaired the interest of certain bondholders could be approved if persons who owned equity interests in the debtor (i.e., its stockholders) received any property under the plan "on account of" their junior interest. Looking to common understandings of the phrase, Justice Thomas said the statutory language obviously denotes no more than that there must be some type of causal relationship between the junior interest and the property received or retained. However, Thomas asserted that the Court had applied a judgmental and balancing test in answering the question.[81]

Justice Thomas agreed with Justice Scalia's dissent in *Holloway v. United States*,[82] the case which approved a conditional intent reading of the federal carjacking statute. Thomas said that absent a more settled tradition in criminal law holding that the specific intent to commit an act may be conditional, it cannot be presumed that Congress was familiar with such usage when it enacted the statute.[83]

In his second dissent in a statutory interpretation case, filed in *Cedar Rapids Community School District v. Garret F.*,[84] Justice Thomas, joined by Justice Kennedy, referred first to textual interpretation and then said his textual interpretation was supported by the statute's structure and purpose. The issue was whether the "medical services" exclusion from a school district's duty to provide disabled children with special education and related services is limited to services that must be performed by a physician, as held by the majority, or whether the medical services exclusion includes more broadly all services medical in nature and, specifically, health-related services that cannot be performed by school nurses as part of their normal duties.[85] Justice Thomas said that the broader meaning of the exclusion was clear, and deference to a contrary agency regulation would not be appropriate because "[i]f the intent of Congress is clear, that is the end of the matter. . . ."[86]

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81. 119 S. Ct. at 1421. Justice Souter, for the majority, after reciting a need to reconcile congressional purposes of preserving going concerns and maximizing property available to satisfy creditors, said that fairness and equity doesn't require that creditors always be paid in full before stockholders can retain equity interests. Thus, causation between the old equity holdings and subsequent property should not be found by the absolute rule suggested by Justice Thomas. Instead, the Court should ask whether old equity's later property came at a price that failed to provide the greatest possible addition to the bankrupt estate or the equity holders obtained or preserved an ownership interest for less than someone else would have paid. *See id.* at 1421-22.

82. 119 S. Ct. 966 (1999).

83. *See id.* at 977 (Thomas, C., dissenting).

84. 119 S. Ct. 992 (1999).

85. *See id.* at 996.

86. *Id.* at 1000. As a supporting argument, Justice Thomas said that to require a school system to hire an additional employee, as would be required by the majority, would saddle the state with an obligation that it did not anticipate when agreeing to participate in the federal spending program involved in the Individuals with Disabilities Education Act. Thomas said that when Congress places conditions on the receipt of federal funds it must

Justice Thomas wrote an opinion for the Court in one unanimous statutory interpretation case during the Court's 1998 term, *Hughes Aircraft Co. v. Jacobson*.[87] Thomas's opinion contained a strong endorsement of reliance upon statutory text. The Court decided that the defendant employer's amendments to a defined benefit plan did not violate the Employment Retirement Income Security Act of 1974 (ERISA) or transform the employer into a fiduciary. No Justice objected to the textualism implicit in Justice Thomas's opening words on interpretation: "As in any case of statutory construction, our analysis begins with 'the language of the statute.'"[88] And where the statutory language provides a clear answer, it ends there as well.[89]

Justice Thomas went on to find the relevant language of ERISA clear and not violated because, although the employer had ceased contributing to the plan, the plan had become overfunded and the employer's amendments did not deprive employees of their accrued benefits or jeopardize the fund.[90] Nor was it a sham transaction.

It seems clear from his current opinions that Justice Thomas adheres to the theory described in Justice Scalia's essay (although both he and Justice Scalia make reference to consequences to a greater degree than the essay suggests).

B. Holmesian Work in 1998

1. Chief Justice Rehnquist

Chief Justice Rehnquist's opinions in statutory interpretation cases, like those of Justices Scalia and Thomas, give heavy weight to the textual meaning of legislative language. Rehnquist seems, however, to give somewhat more weight than the other two Justices to traditions he finds supported by precedents.

The Chief Justice was joined by Justices Scalia and Thomas when he dissented in *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*,[91] one of three 6-3 statutory interpretation cases in the 1998 term. Justice Rehnquist opened his opinion by complaining that the Court had done "little to explain why the plain language of the statute should not control. . . ."[92] However, it was clear that the Chief Justice was also giving weight to a judicially-established tradition. In *Murphy*, the Court held that the phrase "receipt by the defendant, *through service or otherwise*," (in order to start running the thirty-day period for requesting removal of a state case to a federal court) did *not* include receipt of a file-stamped com-

do so unambiguously, and it follows that Spending Clause legislation should be interpreted narrowly. *See id.* at 1002-03.

87. 119 S. Ct. 755 (1999).

88. *Id.* at 760 (quoting Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475, (1992)).

89. *Id.* (citing Connecticut Nat. Bank v. Germain, 503 U.S. 249 (1992)).

90. *See id.* at 764.

91. 119 S. Ct. 1322 (1999).

92. *Id.* at 1330 (Rehnquist, J., dissenting).

plaint. Instead, the period could begin only after service of process.[93] The result in the case was that the party who sought removal was held to have made a timely filing of the necessary papers even though the filing was more than 30 days beyond receiving a file-stamped copy of the complaint. Justice Rehnquist, dissenting, said that in so holding the Court had departed from its practice of strictly construing removal and similar jurisdictional statutes.[94]

In the three statutory interpretation opinions that the Chief Justice wrote for a unanimous Court in the 1998 term, judicially established traditions tended to give the statutory language either a narrowed or a broadened meaning. A case where the words were narrowed was *Department of the Army v. Blue Fox, Inc.*[95] There, an unpaid subcontractor on an army project sued in federal court for an equitable lien on funds available to the project and for an order directing payment of those funds to the unpaid plaintiff. Plaintiff claimed that the United States, in Section 702 of the Administrative Procedure Act, had waived sovereign immunity. That Section allows a person who has suffered a legal wrong because of agency action to sue in federal court for "relief *other than money damages*."[96] The Chief Justice rejected the waiver argument by noting first that in accord with precedent, a waiver of sovereign immunity is to be strictly construed and must be unequivocally expressed. He then said that the drafters of Section 702 must have had in mind the time-honored distinction between damages (which are compensatory or substitute relief) and specific relief. A claim for an equitable lien was not for specific relief since it was essentially a claim for the recovery of money. Not content to leave the result supported only by analysis of language, the Chief Justice said that the Court's holding was in accord with precedent holding that "sovereign immunity bars creditors from attaching or garnishing funds in the Treasury or enforcing liens against property owned by the United States."[97] Answering the last of the plaintiff's arguments, the Chief Justice distinguished language in several prior cases as not involving direct claims against the government.

In contrast to the narrowing interpretation given statutory language in *Blue Fox*, a broadened meaning was discovered in *Haddle v. Garrison*.[98] In that 9-0 case an action was brought under the Civil Rights Act of 1871,[99] against conspirators who tried to deter a plaintiff from testifying at a federal criminal trial and who sought to have plaintiff fired from his at-will job for obeying a federal grand jury subpoena. The statute created such an action where there is a conspiracy to injure such party or witness

93. *See id.* at 1326-27.
94. *Id.* at 1330.
95. 119 S. Ct. 687 (1999).
96. *Id.* at 691 (quoting 5 U.S.C. § 702 (1994)).
97. *Id.* at 692.
98. 119 S. Ct. 489 (1998).
99. 42 U.S.C. § 1985(2) (1994).

"in his person or property."[100] The defendants contended that since the plaintiff had no constitutionally protected interest in continued employment his discharge did not constitute an actual "injury" under the statute. Citing Blackstone and several treatises on torts dating back to 1906, the Chief Justice said that the kind of harm alleged by the petitioner has long been a compensable injury under tort law. Nothing in the language or purpose of the proscriptions in Section 1985(2) or its remedial provisions suggested the need for a constitutionally protected interest to be injured.

Chief Justice Rehnquist's third opinion in a statutory interpretation case was rendered in *Neder v. United States*.[101] There he gave great weight to tradition in resolving the question of whether materiality is an element of a "scheme or artifice to defraud" under the federal mail fraud, wire fraud, and bank fraud statutes.[102] Justice Rehnquist admitted that, based solely on a natural reading of the full text, materiality would not be an element of federal fraud statutes criminalizing "any scheme or artifice to defraud."[103] However, he cited precedent stating that if terms employed in a statute had at the time of its enactment a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense. Judicial and scholarly materials on the common law disclosed that the well-settled meaning of "fraud" required a misrepresentation or concealment of *material* fact.[104] Hence, the Court could not infer from the absence of an express reference to materiality that Congress intended to drop that element from its fraud statutes.

C. INSTRUMENTALISM IN 1998

1. Justice Stevens

We now turn to the opposite extreme and consider recent work of Justice Stevens, whom we have identified as an instrumentalist. Justice Stevens will use textual analysis where he considers the text unambiguous - at least where the textual meaning carries forward the purposes of the legislature. An example occurred in Justice Stevens's dissent in *Department of Commerce v. United States House of Representatives*,[105] where a 5-4 Court held that the Census Act prohibited a proposed use of statistical sampling in connection with the decennial census for calculating the population for apportionment purposes. The majority relied on 13 U.S.C. § 195. It provides that: "Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary may where he deems it appropriate, authorize the use of the statistical method known as 'sampling' in carrying out

100. *Id.* at 491 (quoting 42 U.S.C. § 1985(2) (1994)).
101. 119 S. Ct. 1827 (1999).
102. *Id.* at 1840-41.
103. *Id.*
104. *See id.*
105. 119 S. Ct. 765 (1999).

the provisions of this title."[106] The majority found this section to be the continuation of a long tradition of barring use of statistical sampling in determining the population for apportionment purposes.[107]

Justice Stevens, dissenting with Justices Souter and Ginsburg, relied on 13 U.S.C. § 141(a). It provides that the Secretary of Commerce shall take a decennial census of population on the first day of April each tenth year, "in such form and content as he may determine, including the use of sampling procedures and special surveys."[108] According to Justice Stevens, when Sections 141(a) and 195 are considered together the law unambiguously authorizes sampling procedures but only commands their use when the determination is not for apportionment purposes. Stevens reasoned that the clear authorization to use sampling, given in 13 U.S.C. § 141(a), is not limited by Section 195, which requires sampling for purposes other than apportionment, if it is feasible. Justice Stevens said this was constitutional as it will make the census more accurate.[109]

Justice Stevens's lone 5-4 opinion for the Court in a statutory interpretation case during the 1998 term was written in *NASA v. F.L.R.A.*[110] The Court there held that an investigator, employed in NASA's Office of Inspector General, is a "representative" of NASA when examining a NASA employee, who feared the investigation could result in discipline against him, so that the employee could invoke a right to union representation.[111] NASA contended that the term "representative" was limited to persons who were part of NASA's management. The Court's opinion rejected this contention in light of the contrary position taken by the Federal Labor Relations Authority, the fact that there was no central office coordinating work of inspectors general in a number of federal agencies, the fact that in many cases there would be cooperation between an inspector and management-level personnel, and the policy consideration that a procedural safeguard for employees who are under investigation by their agency can only strengthen the morale of the federal workforce, facilitate the fact-finding process, and lead to a fair resolution of the investigation—or at least Congress must have thought so.[112] Justice Thomas, dissenting with the Chief Justice and Justices O'Connor and

106. *Id.* at 777 (quoting 13 U.S.C. § 195 (1994)).

107. *See id.*

108. 119 S. Ct. 765, 786 (1999) (Stevens, J., dissenting) (quoting 13 U.S.C. § 141(a) (1994)).

109. *See id.* at 789. Justice Stevens, joined by Justice Ginsburg, filed a partial dissent in *United States v. Haggar Apparel Co.*, 119 S. Ct. 1392 (1999). He praised the majority opinion of Justice Kennedy which held that certain regulations of the Customs Service were reasonable and deserved *Chevron* deference, i.e., controlling weight as statutory interpretations. *See id.* at 1402. However, he would not remand the case to the lower courts for a determination as to whether the baking of garments in Mexico to impart permapressing was less incidental to the assembly process than a duty-free pressing-only operation. Stevens thought the answer to this question was clear and since the Court had granted certiorari on the point the Court should simply reverse the judgment below. *See id.*

110. 119 S. Ct. 1979 (1999).

111. *Id.* at 1989.

112. *See id.* at 1985-89.

Scalia, said that in light of the independence guaranteed to Inspectors General by statute and commonly understood as a practical reality, they would not represent agency management in the typical case and should not be so considered.[113]

Justice Stevens wrote only one statutory interpretation opinion during the 1998 term for a unanimous Court. The case was *Pfaff v. Wells Electronics, Inc.*[114] The words requiring interpretation were in Section 102(b) of the Patent Act of 1952. It provides that no person is entitled to patent an "invention" that has been "on sale" more than one year before a patent application is filed.[115]

The question was whether the commercial marketing of a new conception may identify the beginning of the one-year period even though the "invention" has not yet been reduced to practice (i.e., has not been successfully performed). In *Pfaff*, the inventor had entered into a purchase order concerning a new device for mounting and removing semi-conductor chip carriers. The deal was based on detailed engineering drawings regarding design, dimensions, and materials. The inventor contended that he should not be considered to have created an "invention" until he had reduced his concepts to practice. The Court rejected what it called his "nontextual argument."[116] However, the rejection came not because the argument was nontextual, as might have been the case if Justices Scalia or Thomas had written the opinion. Instead, Justice Stevens reasoned that the patent system represents a carefully crafted bargain that encourages the creation and public disclosure of new and useful advances in technology, in return for an exclusive monopoly for a limited period of time. In light of that bargain, "invention" must refer to a concept that is complete. Reduction to practice ordinarily provides the best evidence that an invention is complete. However, such proof is not always necessary, as illustrated by *The Telephone Cases*.[117] The Court concluded that, in light of the competing policies involved in the balance, two conditions must be satisfied before the critical date: product must be the subject of a commercial offer for sale, and the invention must be ready for patenting—as shown by reduction to practice or the preparation of drawings or other descriptions sufficiently specific to enable a person skilled in the art to practice the invention. Both conditions were satisfied here more than one year before application, so the plaintiff's patent was invalid.[118] [Note that the test created by the Court in the Stevens opinion was its own invention - a device intended to accommodate the conflicting policies identified by the Court but not explicitly enacted by Congress.]

113. *See id.* at 1994.
114. 119 S. Ct. 304 (1998).
115. *Id.* at 307 (quoting 35 U.S.C. § 102(b) (1994).
116. *Id.* at 310.
117. *See id.* at 309 (citing *The Telephone Cases*, 126 U.S. 1 (1887) (Alexander Graham Bell had a patentable invention even though he had never at the time of application actually transmitted spoken words that could be distinctly heard and understood at the receiving end of his line)).
118. *See id.* at 311-12.

The first of two statutory interpretation opinions for the Court in 7-2 cases penned by Justice Stevens came in *Holloway v. United States*.[119] With Justices Scalia and Thomas dissenting, Stevens wrote that the crime of carjacking "with the intent to cause death or serious bodily harm"[120] could be found where defendant had only the conditional intent to kill or harm if necessary to effect the carjacking. Stevens began his opinion with a nod toward language, saying that the Court typically begins the task of statutory construction by focusing on words that the drafters have chosen. However, the opinion quickly departed from textualism by saying that "[I]n interpreting the statute at issue, '[w]e consider not only the bare meaning' of the critical word or phrase 'but also its placement and purpose in the statutory scheme.'"[121]

> Two considerations, he said, strongly support the conclusion that a natural reading of the text is fully consistent with a congressional decision to cover both species of intent. First, the statute as a whole reflects an intent to authorize federal prosecutions as a significant deterrent to a type of criminal activity that was a matter of national concern. Because that purpose is better served by construing the statute to cover both the conditional and the unconditional species of wrongful intent, the entire statute is consistent with a normal interpretation of the specific language that Congress chose.[122]

Second, said Justice Stevens, it is reasonable to presume that Congress was familiar with cases and scholarly writings which have recognized that the "specific intent" to commit a wrongful act may be conditional.[123]

Justice Stevens' second opinion for a 7-2 Court was in *Cedar Rapids Community School District v. Garret F.*[124] There he wrote that the Individuals with Disabilities Education Act (IDEA), in calling on schools to provide "special education and related services," requires a public school district in a participating state to provide a ventilator-dependent student with nursing services during school hours.[125] In so holding he followed *Irving Independent School District v. Tatro*,[126] where the Court had held that the "medical services" exclusion from what schools must provide referred only to services that must be performed by a physician. He said that Congress, in the IDEA, "intended to 'open the door of public education' to all qualified children and require participating States to educate handicapped children with non-handicapped children whenever possible."[127] This includes continuous services that may be more costly and may require additional school personnel. [It appears that Steven's interpretation of this statute was far more influenced by a desire to implement

119. 119 S. Ct. 966 (1999).
120. *Id.* at 968 (quoting 18 U.S.C. § 2119 (1994 & Supp. III)).
121. *Id.* at 969 (quoting Bailey v. United States, 516 U.S. 137, 145 (1995)).
122. *Id.* at 970-71.
123. *See id.* at 971.
124. 119 S. Ct. 992 (1999).
125. *Id.* at 995.
126. 468 U.S. 883 (1984).
127. *Id.* at 999.

congressional policy than to carry out a meaning that might be attached to the statutory language without giving weight to an inferred purpose.]

D. MODERN NATURAL LAW

1. Justice O'Connor

We now turn to opinions written by Justices who generally adhere to the methodology used by Chief Justice Marshall - a methodology which accepts as relevant any source that will contribute to a reasoned result. When used by these Justices we call it modern natural law. The Justices are O'Connor, Kennedy, Souter, Breyer, and Ginsburg.

Most of Justice O'Connor's opinions clearly reflect this approach. However, in two cases, she did not go beyond the text of the statute. In the only statutory interpretation opinion she wrote for a unanimous Court during the 1998 term, *Marquez v. Screen Actors Guild, Inc.*,[128] she began with the language of § 8(a)(3) of the National Labor Relations Act, and she did not find it necessary to go beyond that language, as interpreted in previous cases.[129]

The second "text-only" opinion by Justice O'Connor for the Court came in *Sutton v. United Air Lines*,[130] which arose under the Americans with Disabilities Act. The plaintiffs in *Sutton* were twin sisters, both of whom had severe myopia. Each of the sisters' uncorrected visual acuity was 20/200 or worse in her right eye and 20/400 or worse in her left eye. Both had 20/20 vision with the use of corrective lenses. However, United Air Lines had established a minimum uncorrected vision requirement of 20/100 or better, and the plaintiffs could not meet that requirement.

The issue was whether the sisters were disabled in light of the fact that their bad vision was correctable by the use of glasses. The ADA defines a disability in part as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."[131] It is not entirely clear from this language whether a disability is supposed to be measured with or without considering corrective or mitigating measures. Several federal agencies had enacted regulations indicating that a

128. 119 S. Ct. 292 (1998).

129. *See* National Labor Relations Act of 1947, § 8(a)(3) 61 Stat. 140 (codified at 29 U.S.C. § 158(a)(3) (194)). The National Labor Relations Act allows an employer and union to require employees to become "member[s]" of the union as a condition of employment. As interpreted in previous cases, however, it requires only that employees pay dues but does not permit unions to exact dues or fees from employees for activities not germane to collective bargaining, grievance adjustment, or contract administration. *Marquez*, 119 S. Ct. at 296. Justice O'Connor first held that it was not a breach of the duty of fair representation for a union to negotiate a union security clause in the language of the statute, without an explanation of the judicially inferred limitations regarding dues and union functions, unless the union's conduct was irrational or intended to mislead. *See id.* at 299-302. A second holding, on an unrelated matter, was that issues arising from an alleged violation of a 30-day-grace period contained in the collective bargaining agreement were within the exclusive jurisdiction of the NLRB absent facts suggesting that the union violated the statute by conduct that was arbitrary, discriminatory, or in bad faith. *See id.* at 302-03.

130. 119 S. Ct. 2139 (1999).

131. 42 U.S.C. § 12102(2)(A) (1994).

disability is determined without considering corrective or mitigating measures, but the majority held that the act did not give any agencies authority to interpret the term "disability," so the court did not have to defer to those agency regulations.[132]

Sutton is one of those rare cases where it really makes a difference whether legislative history may be consulted to determine legislative intent. Justice Stevens's dissent points out that the legislative history (the Senate and House reports) pretty clearly answers the question the same way that the federal agencies answered the question: a disability is determined without considering corrective measures.[133] But the Court refused to even look at the legislative history. According to Justice O'Connor, "Because we decide that, by its terms, the ADA cannot be read in this manner, we have no reason to consider the ADA's legislative history."[134]

Justice O'Connor gives three reasons for her conclusion that the text does not permit an alternative interpretation. First, she notes that the phrase "substantially limits," which appears in the ADA's definition of disability, demonstrates that corrective measures must be taken into account because the phrase "substantially limits" is "in the present indicative verb form."[135] Because it is in the present indicative verb form, O'Connor says that "the language is properly read as requiring that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability."[136]

Second, she argues that the definition of disability requires that disabilities be evaluated "with respect to an individual" and be determined on whether an impairment limits the "major life activities of such individual."[137] She argues that because the determination is statutorily required to be an "individualized inquiry," this means corrective and mitigating measures must be taken into account.[138]

The first two reasons are arguably good enough for a true formalist, but probably would not be thoroughly convincing for a natural law proponent who ordinarily would want to confirm the reasoning with reference to other relevant sources. The third reason for sticking to the text is somewhat stronger. Justice O'Connor argues that Congress enacted findings in the ADA that are inconsistent with an interpretation of disability as meaning uncorrected conditions. Congress enacted nine findings in support of the ADA. The first finding was that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older."[139] Although the Court could not locate the exact source for the forty-three million figure,

132. *See Sutton*, 119 S. Ct. at 2145-46.
133. *Id.* at 2153-56 (Stevens, J., dissenting).
134. *Id.* at 2146.
135. *Id.*
136. *Id.*
137. *Id.* at 2147 (quoting 42 U.S.C. § 12102(2) (1994)).
138. *Id.*
139. *Id.* (quoting 42 U.S.C. § 12101(a)(1) (1994)).

it was clear, based on a variety of reports that were before Congress at the time the ADA was enacted, that the forty-three million figure must have *excluded* persons whose impairments are largely corrected by medication or other devices. According to the reports, if disability was defined to include all persons with substantial impairments, even impairments that were corrected, the number should have been in the range of 160 million.[140] Thus, since the finding was consistent with a narrow interpretation of disability and inconsistent with a broader definition, the Court felt obliged to adopt the narrower interpretation and to ignore contrary indications in the legislative history.[141] Even if the majority had consulted the legislative history, it would have felt compelled to follow the direction set by the statutory findings.

Opinions on statutory interpretation by natural law Justices give weight to whatever aspect of the situation best supports a reasonable result. Often that is the text, but not always so. In *Lopez v. Monterey County*,[142] an 8-1 case, the Court held that a covered county must obtain federal preclearance under the Voting Rights Act of 1965 when it "seeks to administer" a voting change even if its action is a nondiscretionary act needed to comply with the law of its noncovered state.[143] Justice O'Connor said that for this interpretation she relied primarily on the face of the law. She pointed out that according to several dictionaries, the phrase "seeks to administer" suggests non-discretionary terms.[144] However, Justice O'Connor also found relevant a common practice to request preclearance for the administration of laws by partly-covered States before those laws take effect in covered jurisdictions. She added that it was especially relevant that the Attorney General read the law as does the Court, because the Attorney General has a central role in implementing the law and the Court has traditionally given substantial deference to the Attorney General's interpretation of Section 5.[145] Justice O'Connor went on to indicate that the Attorney General's application of Section 5 did not violate principles of federalism since the Voting Rights Act was enacted pursuant to Congress' power to legislate under the Fifteenth Amendment.[146]

In her opinion on census sampling, Justice O'Connor began her discussion by reciting the historical background of the Act's present text.[147] She later turned to the debate and discussions surrounding the 1976 amendments to the Act (the portion of her opinion to which, not surprisingly,

140. *Id.* at 2148.
141. *See id.* at 2149. Justice Ginsburg concurred, explaining that "[t]hese declarations are inconsistent with the enormously embracing definition of disability petitioners urge." *Id.* at 2152 (Ginsburg, J., concurring).
142. 119 S. Ct. 693 (1999).
143. *See id.* at 700-01.
144. *See id.* at 701.
145. *See id.* at 701-02.
146. *See id.* at 704.
147. *See* Department of Commerce v. United States House of Representatives, 119 S. Ct. 765 (1999).

Justice Scalia objected in his concurrence). The key fact for the majority was that prior to 1972, the Congress had clearly prohibited the use of sampling in matters relating to apportionment. Justice O'Connor said that changes made in 1972 did not clearly seek to abolish that tradition. Instead, the drafters merely changed a provision that permitted the use of sampling for purposes other than apportionment into one that required sampling to be used for such purposes, if "feasible."[148]

In *Kolstad v. American Dental Association*,[149] Justice O'Connor, writing for a 5-4 majority, considered the availability of punitive damages under Title VII. Until 1991, Title VII did not permit an award of punitive damages. It was amended that year to expand its remedies, but punitive damages were limited to cases in which the employer had engaged in intentional discrimination "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[150] In rejecting the lower court's holding that punitive damages could be awarded only in cases involving "egregious" misconduct, Justice O'Connor relied upon the text of the statute (which did not mention "egregiousness" and was focused on the employer's state of mind instead of on the employer's conduct), the Court's interpretation of punitive damages under Section 1983 (on which Congress relied in enacting Section 1981a), and the Court's assessment of the traditional common law standards for awarding punitive damages.[151] In a second part of the opinion dealing with an employer's vicarious liability for punitive damages based upon a manager's conduct, Justice O'Connor began with common law agency principles and then imposed an additional "good faith efforts" limitation in order to make punitive damage vicarious liability consistent with Title VII's goal of encouraging employers to prevent discrimination in the workplace, to adopt antidiscrimination policies, and to educate employees on Title VII's prohibitions.[152] Her interpretation was clearly informed by a consideration of more than the statutory text and took account of broad, underlying legislative policies and a commonsense assessment of how employers were likely to respond to the Restatement's broad standards on vicarious liability for managerial misconduct.

Perhaps the most interesting statutory interpretation opinion by Justice O'Connor for the Court during the 1998 term was in *Davis v. Monroe County Bd. of Educ.*[153] In that 5-4 decision, Justice O'Connor moved away from the group of Justices with whom she is most often associated, i.e., Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas. She and Justices Stevens, Souter, Breyer, and Ginsburg read Title IX to create a private right of action against a school board in cases of student-on-student harassment. Justice O'Connor relied primarily on *Gebser v.*

148. *Id.* at 777.
149. 119 S. Ct. 2118 (1999).
150. 42 U.S.C. § 1981a(b)(1).
151. *Kolstad*, 119 S. Ct. at 2124-26.
152. *Id.* at 2129.
153. 119 S. Ct. 1661 (1999).

Lago Vita Indeprndent School District,[154] which held that a school which is a recipient of federal education funds may be liable in damages under Title IX where the school is deliberately indifferent to known acts of sexual harassment by one of its teachers.[155]

Justice Kennedy dissented, with Chief Justice Rehinquist and Justices Scalia and Thomas. Kennedy found no congressional intent to create an action where recipients have such little control over harassment as schools have over student behavior. He predicted dire financial burdens on local school districts. That was so counter to his concepts of federalism that he could not believe Congress so intended, absent clear statutory language.

Replying to Justice Kennedy's dissent, Justice O'Connor said the action was limited to situations where the recipient of federal funds has responded to known peer harassment in a manner that is clearly unreasonable - as where the recipient is deliberately indifferent even though it exercises substantial control over both the harasser and the context in which known harassment occurs. Justice O'Connor added that the harassment must be so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit. Since there is no clear statutory basis for this complex test, one is tempted to attribute it primarily to a strong sense of antipathy toward sexual harassment shared by a majority of the Court.[156]

2. *Justice Kennedy*

One of Justice Kennedy's two statutory interpretation decisions for a unanimous Court in the 1998 term was readily decided by using the *Chevron* doctrine[157] to support deference to an administrative interpretation. Specifically, in *I.N.S. v. Aguirre-Aguirre*,[158] Justice Kennedy wrote that the *Chevron* principles of deference to administrative interpretations applied to regulations giving concrete meaning to ambiguous statutory terms. The relevant interpretations had been promulgated by the Board of Immigration Appeals (BIA) using power delegated by the Attorney General to whom, in turn, such power was expressly given by Congress.[159]

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154. 524 U.S. 274 (1998).

155. *See id.*

156. A final opinion by Justice O'Connor is not worth mentioning in the text. Writing for a unanimous Court in *Martin v. Hadix*, 119 S. Ct. 1998 (1999), Justice O'Connor applied a "traditional presumption" against retroactivity to hold that the federal prison Litigation Reform Act of 1995, which sets new limits on attorney fee awards to inmates who sue over prison conditions, applies only to legal work performed after the law's effective date. *Id.* at 2008.

157. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Under *Chevron*, an agency's construction of a statute which it administers is given great weight and is accepted if reasonable. *Id.* at 865.

158. 119 S. Ct. 1439 (1999).

159. *See id.* at 1445-46. Justice Kennedy said that the BIA had reasonably interpreted the exception to withholding deportation of an alien whose life or freedom would be threatened by a return where the alien had committed a "serious nonpolitical crime

In *United States v. Haggar Apparel Co.*,[160] Justice Kennedy held that the Court of International Trade must apply *Chevron* principles of deference to a Customs Service regulation.[161] So deciding, he remanded for decision below on whether a reasonable decision had been made by administrative authorities below in holding that baking garments to induce permapressing was an "operation incidental to the assembly process."[162]

In *Amoco Prod. Co. v. Southern Ute Indiana Tribe*,[163] Justice Kennedy did reach a final interpretation decision when writing for a 7-1-1 Court (Justice O'Connor not participating and Justice Ginsburg dissenting). Kennedy held that when the United States transferred to the Southern Ute Indian Tribe all of the "coal" under certain lands that the United States had reserved to itself under the Coal Lands Acts of 1909 and 1919, the transfer did not include coalbed methane gas (CBM gas).[164] Thus, the holders of the land, which had been patented to setters under the 1909 and 1910 Acts (minus reserved "coal"), could grant leases to oil and gas companies for producing CBM from some 200,000 acres in which the Tribe owned the "coal." Justice Kennedy did not rely on current understanding of the meaning of "coal." Instead, he applied the rule that "[u]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning at the time Congress enacted a statute."[165] The Court was persuaded that when Congress passed the 1909 and 1910 Acts the common conception of "coal" was the solid rock substance that was the country's primary energy resource at that time. At that time, CBM was regarded as a dangerous waste product which posed a serious threat to mine safety. It was only after the Arab oil embargo in the early 1970s that the federal government began to encourage the pro-

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outside the United States prior to arrival in the States." *Id.* at 1448. The BIA's interpretation was that an act should be considered a serious nonpolitical crime if the act was disproportionate to the objective. The Ninth Circuit had erred by seeking to impose additional tests, such as the risks of prosecution, whether the acts were "grossly" out of proportion or were of an atrocious nature, and whether they were politically "necessary" and met with "success." *Id.* The Court approved the BIA approach which allowed the criminal element of an offense to outweigh its political aspect even if none of the acts were deemed atrocious and without considering necessity or success beyond asking whether they were disproportionate to political objectives.

160. 119 S. Ct. 1392 (1999).

161. *Id.* at 1395. The regulation had interpreted a statutory exemption of duties for articles assembled abroad which have not been advanced in value or improved except by being assembled and except by "operations incidental to the assembly process such as cleaning, lubricating, and painting." 19 U.S.C. § 1202 (1994). The regulation provided that examples of operations not considered incidental include "permapressing." The Court remanded to the Court of International Trade to determine how *Chevron* deference should be applied where the process involved was the baking of trousers in order to activate a permapressing process. *See id.* at 1401.

162. *See Haggar*, 119 S. Ct. at 1401. Dissenting was Justice Stevens, joined by Justice Ginsburg. Stevens said the regulation below was a reasonable elaboration of the statute and should stand. *Id.* at 1402.

163. 119 S. Ct. 1719 (1999).

164. *Id.* at 1727.

165. *Id.* at 1724.

duction of CBM gas.[166]

3. Justice Souter

Several opinions by Justice Souter clearly evidence the natural law decision-making style of using any and all sources to discover what reason suggests was intended. In *El Paso Natural Gas Co. v. Neztsosie*,[167] Justice Souter wrote for a 9-0 Court that the "comity considerations" which ordinarily allow Tribal Courts, in the first instance, to determine whether they have jurisdiction over a claim, did not apply where Congress, in the Price-Anderson Act, had provided in the interest of speed and efficiency that "any legal liability action arising out of or resulting from a nuclear accident" was within the jurisdiction of federal courts.[168] Justice Souter also ruled that such cases brought in a state court could be removed to a federal court. He said that the terms of the Act were underscored by legislative history in which concern was expressed about the multitude of separate cases that might be brought in various courts. Failure to provide for tribal-court removal was most likely an inadvertence because no instance of nuclear testing labs or reactors in Indian lands appears to have been brought to the attention of Congress.

Justice Souter also wrote for a 9-0 Court in *Clinton v. Goldsmith*.[169] There, it was held that the Court of Appeals for the Armed Forces (CAAF) did not have authority to enjoin the executive action involved in dropping a commissioned officer from the rolls. The reason given was that such a writ wasn't "necessary or appropriate in aid of the court's jurisdiction," as required by statute. Justice Souter pointed out that the act creating the CAAF limited its power so that it could act only with respect to the findings and sentence of a court martial. Further, both precedent and leading treatises affirmed that the All Writs Act did not enlarge the CAAF's jurisdiction.[170] Justice Souter's third unanimous opinion of this genre appeared in *Albertsons, Inc. v. Kirkingburg*.[171] In this case, the Court allowed an employer to fire a driver who could not meet the basic vision standards promulgated by the Department of Transportation (DOT). The driver contended that this violated the Americans with Disabilities Act because he had applied for a waiver of those re-

166. Justice Ginsburg, dissenting, would apply the canon that ambiguities in land grants are construed in favor of the sovereign—so that the United States in reserving "coal," had also reserved CBM. *Id.* at 1728. Justice Kennedy replied that the Court need not consider that canon since it had decided that the most natural interpretation of "coal" did not include CBM gas (i.e., there was no ambiguity). *See id.* at 1727.

167. 119 S. Ct. 1430 (1999).

168. *See id.* at 1437 (quoting 42 U.S.C. §§ 2014, 2210(n)(2) (1994)).

169. 119 S. Ct. 1538 (1999).

170. Justice Souter concluded that use of the All Writs Act was not necessary or appropriate because power under that Act was essentially equitable and should therefore not be generally available to provide a remedy if adequate alternatives were available at law, as was true here. *See id.* at 1543. The Court did not reach the question of whether executive action removing an officer from the rolls based on a statute enacted after the officer's conviction was unconstitutional under the Ex Post Facto or Double Jeopardy Clauses.

171. 119 S.Ct. 2162 (1999)

quirements under an experimental DOT program. Delving into legislative history, Justice Souter pointed out that the waiver scheme had been proposed as a means of obtaining information bearing on whether it was justifiable to revise the standards already in place.[172] He said the DOT's intent was not to modify the content of the general visual acuity standards in any way or to require an employer to accept the hypothesis and participate in the Government's experiment.[173] Justice Thomas, concurring, said "he preferred to hold that the [driver,] as a matter of law was not qualified to perform the job he sought within the meaning of the ADA."[174]

Balancing in light of legislative purpose was used by Justice Souter in the 8-1 case of *Bank of America v. 203 N. Lasalle St. Partnership*.[175] In this case, the majority approved the refusal of a district court to accept a bankrupt reorganization plan which gave existing shareholders an exclusive right to contribute new capital and thereafter to receive ownership interests in the reorganized company.[176] Justice Souter examined legislative history to find that the statute could be interpreted to have abandoned the traditional "absolute priority rule" which required that creditors be paid before the stockholders could retain equity interests for any purpose whatsoever.[177] Further, even if today's version of the statute could be read to permit old equity to retain an interest if the greatest possible addition to the bankrupt estate had been obtained, the plan before the Court must fail because no opportunity had been extended to others to compete for the equity or to propose a competing reorganization plan.[178]

A 5-4 case in which the Court did not divide along conventional ideological or methodological lines was *Jones v. U.S.*[179] In that case, the majority opinion, written by Justice Souter, was joined by Justices Stevens, Scalia, Thomas, and Ginsburg. Justice Kennedy filed a dissent, in which Chief Justice Rehnquist and Justices O'Connor and Breyer joined. For the majority, Justice Souter referred to the "better reading" of the statute, reinforced by applying the rule of resolving interpretive uncertainty to avoid serious questions about unconstitutionality. The statute in question, 18 U.S.C. Section 2119, provided that whoever, possessing a firearm, takes a motor vehicle in interstate commerce from another by force or

172. *Id.* at 2171.
173. *Id.* at 2172-74.
174. *Id.* at 2175.
175. 119 S. Ct. 1411 (1999).
176. *See id.*
177. *Id.* at 1417-19.
178. Justice Stevens dissented. Drawing on views of Justice Douglas, he proposed a different test, one which in light of what is fair, would create greater flexibility than suggested by the majority. Stevens said that "[w]henever a junior claimant receives or retains an interest for a bargain price, it does so 'on account of' its prior claim. On the other hand, if the new capital that it invests has an equivalent or greater value than its interest in the reorganized venture, it should be equally clear that its participation is based on the fair price being paid and that it is not 'on account of' its old claim or equity." *Id.* at 1427.
179. 119 S. Ct. 1215 (1999).

violence shall - (1) be fined or imprisoned not more than fifteen years, or both, (2) if serious bodily injury results, be fined or imprisoned not more than twenty-five years, or both, and (3) if death results, be fined or imprisoned for any number of years up to life, or both.[180] The jury found the defendant guilty under an instruction which did not mention bodily injury. The issue was whether the second and third paragraphs were sentencing considerations, solely for the judge, or whether they were elements of an offense, each of which must be charged by indictment, proven by the prosecution beyond a reasonable doubt, and submitted to a jury for its verdict.

Justice Souter opened his opinion by concluding that the "look" of the statute, as a list of elements followed by three sentencing guides, was not a reliable guide in view of the further facts that condition longer prison sentences.[181] His opinion went on to rely on a backdrop of state practice and other federal statutes which have defined serious bodily injury as an element in the offense of aggravated robbery. Justice Souter then rejected the government's reliance on several statements by legislators which described subsection (2) as providing a "penalty enhancement."[182] Souter said that there were other statements suggesting an assumption that subsection (2) established an element that had to be proven at trial. The matter not having been conclusively established either way, Justice Souter relied on the doctrine of interpreting to avoid constitutional doubt. The doubt arose from the fact that there was

> a question under both the Due Process Clause of the Fourteenth Amendment and the jury guarantee of the Sixth: when a jury determination has not been waived, may judicial factfinding by a preponderance of the evidence support the application of a provision that increases the potential severity of the penalty for a variety of a given crime?[183]

Justice Souter, looking at judicial history, found indications of efforts to give juries more control over the ultimate verdict.[184]

Justice Kennedy's dissent characterized the majority as having given the statute a strained reading, according to which a single statutory section prohibits three distinct offenses. Kennedy said the first reading or initial look of the statute, which suggests that clauses (1) - (3) are sentencing factors, is confirmed by further study of structure and legislative history. However, Justice Kennedy was far more concerned with what he thought was misuse of the constitutional doubt rule. The reason is that he read *Almendarez-Torres v. United States*[185] as clearly holding that Congress could establish serious bodily injury and death as sentencing factors

180. *Jones*, 119 S. Ct. at 1218 (citing 18 U.S.C. § 1219 (1988 & Supp. V)).
181. *Id.* at 1219.
182. *Id.* at 1221.
183. *Id.* at 1224.
184. Justice Scalia concurred because he had arrived at the considered view that it was unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed. *Id.* at 1229.
185. 523 U.S. 224 (1998).

rather than offense elements.[186] He concluded that the Court's holding would create confusion in the states, many of which have given vast discretion to the trial judge, when the issue relates to the consequences of a completed criminal act or, in death penalty cases, where the state has the judge rule on the aggravated character of the defendant's conduct. Justice Souter replied that the Court's repeated emphasis on the distinctive significance of recidivism in *Almendarez-Torres v. United States* made clear that the Court regarded recidivism as potentially distinguishable for constitutional purposes from other facts that might extend the range of possible sentencing.

In *California Dental Ass'n v. F.T.C.*,[187] Justice Souter held, on a 9-0 vote, that nonprofit professional associations are subject to FTC jurisdiction. However, he garnered only five votes to hold that more than a "quick look" had to be taken at the dental association's restrictions on price and quality advertising to determine whether they had anticompetitive effects.[188] Thus, the "quick look" judgment below was vacated and remanded.[189]

Dissenting, Justice Breyer, for himself and Justices Stevens, Kennedy, and Ginsburg, said that the anticompetitive aspects of restricting truthful advertising about lower prices is obvious, the dental association had not shown that a redeeming virtue existed in practice, and the Court below, in its "quick look," had therefore correctly applied the rule of reason.[190]

4. Justice Ginsburg

Justice Ginsburg's most important statutory interpretation case was *Olmstead v. Zimring*,[191] where the Court construed the anti-discrimination provision contained in the public services portion of the Americans with Disabilities Act of 1990.[192] The main issue in the case was whether the Act's prohibition against discrimination required, in some cases, placement of persons with mental disabilities in community settings instead of in institutions. In support of the conclusion that the Act did cover such discrimination, Justice Ginsburg relied upon the consistent position taken by the Department of Justice,[193] that the history of other measures enacted by Congress "to secure opportunities for people with developmental disabilities to enjoy the benefits of community living,"[194] and the commonsense conclusions that placement of an individual in an institution can be stigmatizing and reduces the individual's ability to participate in everyday life activities.[195] Her approach, which attempted to

186. *See Jones*, 119 S. Ct. at 1231.
187. 119 S. Ct. 1604 (1999).
188. *Id.* at 1607.
189. *Id.* at 1618.
190. *Id.* at 1622-24.
191. 119 S. Ct. 2176 (1999).
192. 42 U.S.C. § 12132.
193. *See Olmstead*, 119 S. Ct. at 2185.
194. *Id.* at 2186.
195. *See id.* at 2187.

put the language in the statute in its historical context, is usefully contrasted with Justice Thomas' dissent in the case, joined by Justice Scalia and Chief Justice Rehnquist, which focuses virtually all of its cannon fire upon crafting a definition of the word "discrimination" that would be essentially invariant regardless of the statutory context in which the word is used.[196]

In the 1998 term, Justice Ginsburg was assigned to write three nine to zero opinions for the Court. In *National Collegiate Athletic Ass'n v. Smith*,[197] a unanimous Court held that the receipt of dues from federally funded member institutions did not bring the NCAA within the scope of Title IX, which provides for private actions based on sexual discrimination. The decision was based on applying a rule established by Supreme Court precedent.[198]

In *Humana, Inc. v. Forsyth*,[199] the Court held that allowing the defrauded beneficiaries of a health group insurer to sue for treble damages under Rackateer Influenced and Corrupt Organizations Act (RICO) would not "impair" Nevada's less generous remedies for fraud by insurance companies and, thus, was not barred by the McCarran-Ferguson Act (which precludes application of federal law that would "impair" state law regulating the business of insurance).[200] Justice Ginsburg first recited the history which brought the McCarran-Ferguson Act into existence. She then turned to dictionaries, more direct ways for Congress to preempt the field than to speak of "impairing," and analogy to tax laws.[201] Finding a line between field preemption by the states and a congressional green light for any federal regulation that does not collide head on with state regulation, Justice Ginsburg articulated a new test: "[w]hen federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application [of federal law]."[202] Justice Ginsburg sup-

196. *See id.* at 2194-95.

197. 119 S.Ct. 924 (1999).

198. The Court had previously held that a school falls under Title IX if it enrolls students who receive federal funds earmarked for educational purposes. *See* Grove City College v. Bell, 465 U.S. 555 (1984). However, the Court had also held that commercial air carriers are not within title IX even if airport operators received federal funds for airport construction. United States Dep't of Trans. v. Paralyzed Veterans of Am., 477 U.S. 597 (1986). In *Paralyzed Veterans*, the Court said that application of Title IX against all who benefit economically from federal assistance would yield almost limitless coverage. *Id.* at 608. Justice Ginsburg wrote that entities that receive federal assistance, whether directly or through an intermediary, are recipients within the meaning of Title IX; entities that only benefit economically from federal assistance are not. *Id.* at 612. Applying that test, Justice Ginsburg said that the NCAA's receipt of dues demonstrates only that it indirectly benefits from the federal assistance afforded its members. The Court did not go on to decide an issue not dealt with below, namely, that when a recipient cedes controlling authority over a federally funded program to another entity, the controlling entity is covered by Title IX regardless whether it is itself a recipient. *See* NCAA v. Smith, 199 S.Ct. at 924 (1999).

199. 119 S. Ct. 710 (1999)

200. *Id.* at 716.

201. *Id.* at 717.

202. *Id.* at 717.

ported that new rule by analogy to cases finding other state laws not pre-empted by a variety of federal laws not intended to "impair" state laws.

The third unanimous opinion in 1998 on statutory interpretation was written by Justice Ginsburg in *Unum Life Insurance Co. of America v. Ward*.[203] An insurance company, which had issued an employee's long-term group disability policy, refused the employee's disability claim because it had not been furnished to the insurance company within the time allowed by policy terms—one year and 180 days after onset of the disability. The employee sued under section 502(a) of the Employee Retirement Income Security Act of 1974 (ERISA). ERISA preempts state laws to the extent they "relate to any employee benefit plan," provided that exempted from the preemption is "any law of any State which regulates insurance."[204] The employee relied on the California rule that an insurer cannot avoid liability because of an untimely proof of claim unless the insurer shows it was prejudiced by the delay. The Court held that this California rule "regulated insurance" and so had not been pre-empted by ERISA.[205]

An 8-1 opinion was written by Justice Ginsburg in *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*.[206] The plaintiff, who sued under New York tort law, had been subjected to a humiliating search upon debarking from defendant's airline.[207] It was agreed by the parties, and accepted by the Supreme Court, that under the Warsaw Convention, which governs air carrier liability for all international transportation, there had not been an "accident" (for which the treaty expressly provides the only remedy), or "wilful misconduct" (for which the treaty does not limit remedies).[208] Justice Ginsburg began her search for interpretation premises by stating that since a ratified treaty was "not only the law of the land but also an agreement among sovereign powers," the Court has "traditionally considered as aids to its interpretation the negotiating and drafting history," the reasonable views of the Executive Branch, the opinions of sister signatories, and the Convention's text, purpose, and overall structure.[209] Each

203. 119 S. Ct. 1380 (1999).

204. ERISA section 502(a) (1974).

205. *Unum*, 119 S. Ct. at 1385. Justice Ginsburg supported the result by reference to precedent which advised the Court first to consider a "common-sense view" of the matter. *Id.* at 1386. Then to apply three factors in determining whether the regulated practice (1) transfers or spreads policyholder risk; (2) is an integral part of the policy relationships between the insurer and the insured, and (3) is limited to entities within the insurance industry. *Id.* Applying its rules the Court said that although barring for untimely proof does not transfer risk, the rule regulating insurance meets all of the other tests. *See id.* at 1389. Further, the rule complements rather than conflicts with substantive provisions of ERISA. *See id.* Finally, the Court held that a California rule, which would make the employer an agent of the insurance company and, trump a policy provision denying that the policyholding employer is an agent of the insurance company, was a law relating to employee benefits plans but not one that regulates insurance. *Id.* at 1385. Thus, the California agency rule was contrary to ERISA, which would enforce the policy provision. *Id.*

206. 119 S. Ct. 662 (1999).

207. *See id.* at 667.

208. *Id.* at 670.

209. *Id.* at 671.

of those sources pointed to the Convention providing exclusively for liability, as did a later Protocol recently ratified by the Senate.[210]

Justice Stevens' dissent would have allowed the plaintiff to recover. He first said that "a treaty, like an Act of Congress, should not be construed to preempt state law unless its intent to do so is clear."[211] He added that the treaty goal of "uniformity would not be significantly impaired" by allowing New York law to apply in this case since only a tiny sliver of cases arise in which there is injury on debarkation which is not the result of an accident or wilful misconduct.[212] Justice Ginsburg replied that the Court's usual "home-centered preemption analysis" should not be "applied mechanically in construing our international obligations."[213]

5. Justice Breyer

It appears from his 1998-99 opinions that Justice Breyer, more so than his colleagues, analyzes consequences in his search for legislative intent. He wrote a 9-0 opinion in *Nynex Corp. v. Discon, Inc*,[214] an action for Sherman Act antitrust violations. The Court held that the *per se* rule in a "boycott context" is limited by precedents to situations involving "horizontal agreements among direct competitors."[215] Hence the *per se* rule did not apply where a single buyer favored one seller over another, even for an improper and not a competitive reason.[216] Justice Breyer supported this holding by analyzing social and business consequences. He said that extending the "*per se* rule" to this situation "would discourage firms from changing suppliers even where the competitive process itself [would] not suffer."[217] He also said that a boycott agreement does not amount to a conspiracy to monopolize in the absence of a showing that the agreement harmed the competitive process.[218]

Again for a 9-0 Court, Justice Breyer wrote the opinion in *Cleveland v. Policy Management Systems Corp*.[219] The Court held that pursuing and receiving Social Security disability benefits, for which a person is eligible only if unable to do previous work or other kind of substantial gainful work, does not automatically estop the recipient from pursuing an action for disability discrimination under the Americans with Disabilities Act (ADA).[220] The reason is that a person is entitled to ADA protection if the person, with "reasonable accommodation," could "perform the essential functions" of the recipients job. The Social Security disability pro-

210. *See id.* at 674-75.
211. *Id.* at 677.
212. *Id.* at 677.
213. *Id.* at 675.
214. 119 S. Ct. 493 (1998).
215. *Id.* at 498.
216. *Id.*
217. *Id.*
218. *Id.* at 500.
219. 119 S. Ct. 1597 (1999).
220. *Id.* at 1602.

gram contains no such qualification.[221] Justice Breyer went on to hold that although there was no estoppel, the recipient must explain, to survive a motion for summary judgment, why the essential functions of his or her job could be performed, at least with "reasonable accommodation."[222] In explanation of this method for accommodating the two Acts, Justice Breyer noted that both seek to help individuals with disabilities, but in different ways. He could see several situations where the two claims do not inherently conflict, e.g., where reasonable accommodation is possible (since SSDI doesn't take that into account); during an SSA nine-month trial-work period; after changes in a disability over time; or during the pendency of an SSDI claim.[223]

A six to three statutory interpretation case written for the Court by Justice Breyer during the 1998 term was *Richardson v. United States*.[224] There the Court dealt with the continuing criminal enterprise statute, 21 U.S.C. section 848(a).[225] The statute punishes a violation of federal drug laws if "such violation is a part of a continuing series of violations" undertaken in concert with five or more others from which the defendant obtains substantial income or resources.[226] The Court held that each individual "violation" is an element upon which a jury must unanimously agree.[227] Each violation was not merely a means by which members of the jury could find a "continuing series." Justice Breyer said that the word "violations" imports an element. Further, there is sufficient danger of unfairness in interpreting it as merely a means that the Court should apply the rule of avoiding constitutional questions if reasonable alternative interpretations are available.

Justice Kennedy dissented, with Justices O'Connor and Ginsburg. He said that "[n]owhere in the text of the statute or legislative history does Congress showed an interest in the particular predicate violations constituting the continuing series."[228] Congress' purpose was to punish drug king pins. Justice Kennedy concluded that this would be made very difficult if individual violations had to be proved.[229] Nor was there any constitutional problem where the government had to prove not only a continuing series but also action in concert with five or more persons and substantial income or resources derived from the continuing series.[230]

A second six to three Justice Breyer opinion appeared in *Dickinson v. Zurko*.[231] In this case, the Court held that judicial review of findings of fact made by the Patent and Trademark Office (PTO) should be governed

221. *Id.*
222. *Id.* at 1604.
223. *Id.* at 1603.
224. 119 S. Ct. 1707 (1999).
225. *See id.* at 1709.
226. *Id.* at 1709, 1713.
227. *Id.* at 1713.
228. *Richardson*, 114 S. Ct. at 1715.
229. *See id.* at 1716.
230. *Id.*
231. 119 S. Ct. 1816 (1999).

by the "substantial evidence" standard of the Administrative Procedure Act (APA) rather than the somewhat stricter "clearly erroneous" standard used for judicial review of judicial findings of fact.[232] The APA in Section 559 says that it does "not limit or repeal additional requirements . . . recognized by law."[233] It was argued that the court/court standard was such an additional requirement. Rejecting this contention, Justice Breyer reviewed dozens of precedents to conclude that they did not reflect a well-established stricter court/court standard for review of PTO fact finding. Conceding that the choice of standards probably would not make much difference in practice, the Court preferred not to create a precedent that would permit other agencies to depart from uniform APA requirements.[234]

Another Breyer opinion apparently based in large part on an analysis of consequences was delivered in *National Federation of Employees v. Department of Interior*,[235] a 5-4 case. Justice Breyer's opinion was joined by Justices Kennedy, Souter, Stevens, and Ginsburg. Justice O'Connor dissented with Chief Justice Rehnquist and, in part, she was joined by Justices Scalia and Thomas. The majority decided that there was ambiguity as to whether midterm bargaining was required by the Federal Service Labor-Management Relations Statute, 5 U.S.C. section 7114(a)(4).[236] This Act provides that federal agencies and the unions that represent their employees must "meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement."[237] The majority held that Congress delegated to the agency charged with administering the statute (the Federal Labor Relations Authority of FLRA), the power to determine whether, when, where, and what sort of midterm bargaining is required.[238]

Justice O'Connor, dissenting, said that the language of the statute, as well as the context in which it is used, demonstrates that the statute unambiguously imposes only a duty to negotiate for the purpose of arriving at a collective bargaining agreement - which means a basic agreement and not a midterm modification or supplementation to the primary agreement. She said this law stands in stark contrast to the National Labor Relations Act which calls for midterm bargaining by language which imposes a duty to bargain about, "the negotiation of an agreement, or any question arising thereunder."[239] Justice O'Connor said the federal labor statute was aimed at promoting effective and efficient government. This would not result if a union could keep raising new issues and by bargaining to impasse, putting them in the hands of the Federal Service Impasses

232. *Id.* at 1823.
233. 5 U.S.C. § 559 (1994).
234. 119 S. Ct. at 1823.
235. 119 S. Ct. 1003 (1999).
236. *National Federation*, 119 S. Ct. at 1007.
237. *Id.* at 1012.
238. *National Fed'n of Employees*, 119 S. Ct. at 1011.
239. *Id.* at 1013.

Panel. Even if there was an ambiguity, little deference was owed to the FLRA's current interpretation that there is a duty to bargain midterm since the agency had reversed course on this matter in light of a holding by the D.C. Circuit. Justice Breyer replied to the policy argument by asking whether, without midterm bargaining, "will it prove possible to find a collective solution to a workplace problem, say a health or safety hazard, that first appeared midterm?"[240]

Another 5-4 opinion of Justice Breyer, which relies heavily on analysis of consequences, appears in *West v Gibson*.[241] In that case the majority decided that the Equal Employment Opportunity Commission (EEOC) possesses the legal authority to require federal agencies to pay compensatory damages when they discriminate in employment because of the statutory language "authority to enforce . . . through appropriate remedies," and because of purposes and history.[242] Referring to the word "appropriate," Justice Breyer said that: "Words in statutes can enlarge or contract their scope as other changes, in law or in the world, require their application to new instances or make old applications anachronistic."[243] He concluded that to deny an EEOC compensatory damages award would undermine the general purpose of remedying discrimination in federal employment by forcing into court matters that the EEOC might have resolved.[244]

IV. CONCLUSION

The above review may be used as background for some general observations on the law of statutory interpretation, strategy for advocates in interpretation cases, and reflections on the quality of the Court's work.

The law appears to be roughly as follows: If statutory text is held to be unambiguous, and not unconstitutional, it will be applied. However, ambiguity is readily perceived when suggested by any of a variety of sources including other words in the Act, legislative history, the application of interpretive canons, interpretations by an agency charged with administering the Act, and the Court's conclusions about the purpose of the law and whether a particular interpretation would serve that purpose. Indeed, it appears that some Justices will find ambiguity if a result suggested by the text is not absurd but is merely at odds with prevailing practice or with policies a Justice perceives are called for by a reasonable rule of law. The Court is often willing to forgo an authoritative full-scale

240. *Id.* at 1008-09.
241. 119 S. Ct. 1906 (1999).
242. *Id.* at 1908.
243. *Id.* at 1910.
244. *Id.* Justice Kennedy, dissenting with the Chief Justice and Justices Scalia and Thomas, concluded that a waiver of the sovereign immunity of the United States must be made in unequivocal statutory language and the phrase "appropriate remedies" does not constitute such a waiver. *Id.* at 1913. Further, said Justice Kennedy, it is well-settled that a "statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text." *Id.* at 1915 (quoting Lane v. Pena, 518 U.S. 187 (1996)).

inquiry if the agency charged with administering a law has promulgated a reasonable interpretation or if a particular interpretation would raise plausible constitutional issues.

The consequence for advocates is that any proffered interpretation needs to be supported not only by an analysis of the statutory language but also by efforts to show that the suggested meaning is in accord with context, including other portions of the same statute, legislative history, and any purposes the Justices may infer were intended by the legislature to be accomplished. A suggested interpretation may also be strengthened if it is the view taken by an agency authorized to administer the law or if it avoids a substantial constitutional issue.

Is it unsettling for the Supreme Court to have given us little more than the above by way of law for statutory interpretation? If the Congress and other legislatures were drafting legislation in light of settled expectations concerning one theory of statutory interpretation, the situation would not be desirable. However, today there is no set tradition for drafting legislation. Where that is so, each of the approaches has some claim for legitimacy.

Our view is that the modern natural law method is best suited for today. The reason is that where there is no set tradition for drafting legislation, an effort to look at all sources when determining the existence of ambiguity and legislative intent seems a rational method for dealing with problems of interpretation. Perspectives which look only at the words, which give great emphasis to "goodness" in results, or which concentrate on the meaning of words rather than the purposes of the legislature, seem to us less likely to carry out what the legislature has intended to enact by its statutory language. We do not expect, however, that Justices who adhere to a different perspective are likely to be looking for reasons to change. And, perhaps in an increasingly diverse society, it is just as well that no one view has captured the allegiance of the entire Court.