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The Illusion and Allure of Textualism

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I. INTRODUCTION

THE recent revival of debate on statutory interpretation has often been credited to the efforts of Justice Antonin Scalia.[1]

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1. *See* Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 245 (1992) (classifying Justice Scalia as person who "triggered the revival of interest in this subject"). *But see* Earl M. Maltz, *Rhetoric and Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy*, 71 B.U. L. REV. 767, 767 (1991) (identifying scholarship and crediting Professor William N. Eskridge, Jr. with revival).

In this article, the words "interpretation" and "construction" will be used interchangeably. Some writers have made a distinction between the task of interpreting versus construing statutes. *See, e.g.*, REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 19 (1975) ("The distinction between the cognitive and the creative bears at least a superficial resemblance to that sometimes made, though now generally disregarded, between 'interpretation' and 'construction.' "). The distinction has also been made in the field of contracts. *See* Robert Childres, *Conditions in the Law of Contracts*, 45 N.Y.U. L. REV. 33, 36 (1969) ("In interpreting agreements, one is attempting to determine intention. In construing them, one is

This movement repeats and continues the cyclical surge of theoretical response to the courts' handling of statutes that they are called upon to interpret. Critical recognition has been given to an interpretive methodology dubbed "New Textualism."[2] These scholars contend that the current leading advocate, if not driving force behind this movement, is Justice Scalia.[3] The gist of textualist construction is that judges should be controlled by text and stay away

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attempting to prevent or to resolve controversies by asking how detached people would handle them in light of good faith dealing according to reasonable standards."). Black's Law Dictionary also acknowledges a distinction but recognizes a customary interchangeable use:

> [i]n the strict usage of this term, "construction" is a term of wider scope than "interpretation;" for, while the latter is concerned only with ascertaining the sense and meaning of the subject matter, the former may also be directed to explaining the legal effects and consequences of the instrument in question. Hence interpretation precedes construction, but stops at the written text . . . . These two terms are however, commonly used interchangeably.

See BLACK'S LAW DICTIONARY 817-18 (6th ed. 1990).

2. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (examining new textualism critically and historically); Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827 (1991); Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597, 1599 (1991) (explaining textualism "largely as a reaction against the legal process theory set forth by Henry Hart and Albert Sacks"); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295 (1990) (critiquing textualism as theory of statutory interpretation).

3. *See* Eskridge, *supra* note 2, at 640-56 ("Justice Scalia has aggressively criticized the traditional approach and has argued for disregard of legislative history in the great majority of cases . . . . Justice Scalia and Judge Easterbrook have essentially founded a new school of thought about legislative history."); *see also* Daniel J. Capra, *Discretion Must Be Controlled, Judicial Authority Circumscribed, Federalism Preserved, Plain Meaning Enforced, and Everything Must Be Simplified: Recent Supreme Court Contributions to Federal Civil Practice*, 50 MD. L. REV. 632, 633 (1991) (crediting Justice Scalia with "the most influential and powerful opinions" and "head-on style of jurisprudence" that will continue to be effective and influential); Mashaw, *supra* note 2, at 835 ("Indeed, one finds Justice Scalia, both the high priest of the new textualism and a traditional conservative."); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 281 (1990) (characterizing Justice Scalia as movement's "spiritual" leader).

Other Justices on the Supreme Court have subscribed to textualism from time to time and Judge Frank H. Easterbrook's writings also figure prominently in scholarship on this subject. Judge Easterbrook, like Justice Scalia, usually criticizes the value of legislative history. *See* Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87 (1984) (discussing problems of statutory interpretation in light of legislative process); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 539 (1983) ("To delve into the . . . legislative history . . . is to engage in a sort of creation. It is to fill in blanks. And without some warrant . . . for a court to fill it in, the court has no authority to decide in favor of the party invoking the blank-containing statute."); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988) (criticizing judges' use of legislative history for statutory interpretation).

from legislative history at all costs. Only in narrowly-defined situations should extratextual materials be considered and relied on.[4] Even then, such materials should be put to limited use. This new textualism also calls for more attention to the structure of statutes (context), greater reliance on canons of construction, routine consideration of other similar statutory schemes and increased use of judges' grammatical skills with the aid of a dictionary.[5]

Like other judges, Justice Scalia recognizes that the toughest part of his job is avoiding personal political values in the decision-making process.[6] Moreover, he contends that a text-focused approach reduces the potential for arbitrariness and abuse through judicial improvisation and the substitution of personal value judgments for that of Congress.[7] Besides the need for a "textual anchor," Justice Scalia argues that theoretical legitimacy must be taken as seriously[8] as consistency and logic to serve as necessary checks on judicial arbitrariness.[9] He also grounds his method in separation of powers principles.[10] At the same time, he recognizes

4. *See* Eskridge, *supra* note 2, at 623-24 ("The new textualism posits that once the Court has ascertained a statute's plain meaning, consideration of legislative history becomes irrelevant. Legislative history should not even be consulted to confirm the apparent meaning of a statutory text.").

5. *Id.*

6. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989).

7. Johnson v. Transportation Agency, 480 U.S. 616, 670-71 (1987) (Scalia, J., dissenting); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1185 (1989) (suggesting that judges need support from "solid textual anchor" to avoid appearance of legislating).

8. Scalia, *supra* note 6, at 862.

9. Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 588-89 (1989-90).

10. *See* Morrison Indep. Counsel v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) ("Without a secure structure of separated powers, our Bill of Rights would be worthless."); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983) (discussing doctrine of standing as "crucial and inseparable" element of separation of powers principle).

Two dissenting opinions by Justice Scalia help illustrate the basis for his approach when reviewing actions by coordinate branch members. In Morrison Independent Counsel v. Olson, 487 U.S. 654 (1988), he concluded that conduct classified as purely executive cannot be engaged in, controlled or affected by actions from the legislative or judicial branch. *Morrison*, 487 U.S. at 697-734 (Scalia, J., dissenting).

The *Morrison* case offers telling insights into Justice Scalia's statutory construction jurisprudence. In a passionate and lengthy dissent, Justice Scalia reveals strong separation of powers convictions that likely serve as the foundation and pillars for the powers he regards as vested in a Justice of the Supreme Court. *Id.* (Scalia, J., dissenting). The *Morrison* decision suggests that these convictions partly drive Justice Scalia's interpretive methodology more than a carefully crafted fresh theoretic construct.

In *Morrison*, a statutory scheme was pivoted against the United States Constitu-

tion. At issue was the Ethics in Government Act of 1978 (Act), 28 U.S.C. §§ 49, 591-599 (1988), which has provisions for the appointment of independent counsels, versus provisions in Articles II and III of the Constitution setting out separation of powers principles and providing the President with certain appointment powers. *Morrison*, 487 U.S. at 659-60 (citing U.S. CONST. art. II, § 2, cl. 2 (Appointments Clause); art. III).

In this case, three Department of Justice (DOJ) officials were accused of wrongdoing by a House Judiciary Committee. *Morrison*, 487 U.S. at 666. One official was accused of giving false and misleading testimony, while the other two were alleged to have wrongfully withheld documents. *Id.* The Judiciary Committee asked the Attorney General to seek the appointment of an independent counsel under the Act. *Id.* The Special Division, a court created by the Act for this purpose, appointed counsel. *Id.* at 667. Counsel was authorized to investigate and, if necessary, prosecute the official providing perjured testimony. *Id.* Counsel was also given authority to pursue "related matters." *Id.* Subsequently, Counsel asked the Attorney General to refer the allegations against the other two officials as "related matters." *Id.* The Attorney General refused but the Special Division ruled that its jurisdictional grant to Counsel was broad enough to encompass an investigation of the other two officials. *Id.* at 667-68.

The officials then challenged the Act's independent counsel provisions, arguing they were unconstitutional, and obtained an unfavorable district court ruling. *Id.* at 668. That decision was reversed by the United States Court of Appeals for the District of Columbia which held that the Act was unconstitutional and violative of the Appointments Clause. *Id.* at 669; *see also In re* Sealed Case, 838 F.2d 476 (D.C. Cir. 1988) (finding Act invalid for several reasons, including violation of Appointments Clause and limitations of Article III). Seven Justices of the Supreme Court reversed the court of appeals decision. *Morrison*, 487 U.S. at 669. Justice Kennedy did not participate in the decision and Justice Scalia wrote an extensive dissent. *Id.* at 697-734.

The *Morrison* case is somewhat different from other statutory interpretation cases discussed herein because the constitutionality of the statute was at issue in addition to interpretation concerns. In his dissent, Justice Scalia followed a plain-meaning approach, with heavy emphasis on the words of the Constitution. *Id.* He noted that Article I, § 1 of the United States Constitution vests all legislative powers in Congress, Article II, § 1, cl. 1, vests all executive powers in the President, and Article III, § 1 vests all judicial powers in the courts. *Id.* at 697-98. He then argued that "all" means "all." *Id.* at 705. Therefore, once one concedes (as he found the Court must) that the independent counsel is performing any executive function, the conclusion that the statute is unconstitutional on separation of powers grounds is inevitable. *Id.*

Although standing on constitutional text, Justice Scalia placed heavy reliance on the Founding Fathers, citing their statements as confirmation of the text. *Id.* at 697-734. Such deference to the Framers and use of their extratextual materials to confirm constitutional language is curious in view of the politicized motivations and actions of the Framers. As a consequence, this view of plenary powers for officers of each branch of government offers some insight into Justice Scalia's interpretive methodology and gives credence to the contention that textualism is executive-enhancing. In *Morrison*, Justice Scalia argued that the executive, legislative and judiciary branches have complete and exclusive control of their respective functions, inclusive of the power to police themselves. *Id.* at 708-10. He cites, for example, an instance in which Congress passed a law exempting itself from certain laws. *Id.* at 710. As a parallel example, he noted that the Court had ruled on the constitutionality of a statute reducing the Justices' salaries. *Id.* (citing United States v. Will, 449 U.S. 200, 211-17 (1980)). Justice Scalia recognizes the potential for abuse of such a construct but feels that built-in checks will deter abuse. In any event, he feels that any harm resulting is part of the cost of constitutional government. *Id.*

that there is no agreed-upon cure-all theory of statutory construction.[11]

Justice Scalia's many critics contend that his interpretive methodology is executive-enhancing by design.[12] Critics argue that textualism does not operate as a restraint on interpretive abuses but has the contrary effect of giving the mostly Republican judiciary

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In Mistretta v. United States, 488 U.S. 361 (1989), Justice Scalia argued that Congress' work product is imprecise, and by implication, leaves a constitutionally permissible role for executive and judicial officers to exercise judgment or even make policy. *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting). For Justice Scalia, there is no question that executive and judicial officers can behave in this manner. The only constitutional constraint is one of degree. *Id.* at 415-17. This paradigm gives him total control when manning the walls around the executive and leaves congressional enactments vulnerable to incursions by actors from the coordinate branches.

Mistretta also offers glimpses of Justice Scalia's belief that Congress is imperfect and judges are intelligent. Of course, such an assessment serves as the perfect springboard for a broad grant of judicial discretion and responsibility when interpreting the law. Further, it advances Justice Scalia's model of interpretation which proceeds on the premise that judges should use their intellect and common sense, accept the responsibility of interpreting the law and where appropriate, make policy choices.

Once cast in such principled light, Justice Scalia zealously undertakes his statutory interpretation responsibilities which require that he dislodge himself from the discussions and compromises attendant to legislation drafting or Congress' "internal work product." For him, this information is of limited probative value because only the enacted words are the law, much as a Court decision is the law regardless of the competing views and opinions of the dissenting Justices whose comments accompany the decision. Because Congress' work is the text of a statute and judges have exclusive powers to interpret that text, judges must function as independent interpreters, not as conduits for legislative proposals or court officers working with a congressional handbook. *Id.* at 417. If judges consider the information that members of Congress relied on, they begin to slip into the legislators' territory, and therefore begin performing legislative functions. Justice Scalia realizes that he may sometimes give incorrect interpretations of statutes, but regards Congress' freedom to amend as an inherent check. In any event, Congress' failure to amend a statute to overrule an incorrect interpretation would be chalked up as part of the costs of our democratic system of government.

11. Scalia, *supra* note 6, at 865.

12. *See* Wald, *supra* note 3, at 308 ("[I]t should not pass unnoticed that the textualist version of statutory interpretation is, in fact, executive-enhancing."); Stephen F. Ross, *Reaganist Realism Comes To Detroit*, 1989 U. ILL. L. REV. 399 (arguing that Justice Scalia's view of separation of powers systematically favors executive branch over legislative branch); *see also* Michael Herz, *Textualism and Taboo: Interpretation and Deference for Justice Scalia*, 12 CARDOZO L. REV. 1663, 1680 (1991) (suggesting that textualism shifts power away from legislative and judicial branches to executive branch); Daniel N. Reisman, *Deconstructing Justice Scalia's Separation of Powers Jurisprudence: The Preeminent Executive*, 53 ALB. L. REV. 49 (1988) (arguing that Justice Scalia's "vision of a powerful and largely unchecked executive power — and not a neutral, textually based theory of separation of powers — is the transcendent guiding principle of his jurisprudence"); Arthur Stock, Note, *Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses*, 1990 DUKE L.J. 160 (arguing that failure to consult legislative history redistributes power from legislative branch to executive branch).

free reign to advance their personal reading of texts.[13] They add that what the Republicans did not get from a Congress controlled by Democrats, sympathetic judges provide through textualism that avoids legislative history dominated by unfavorable language.[14] As a result, Democrats lose twice. First, the Democrats lose by compromising their position to get bipartisan support for legislation,[15] and second, the Democrats lose through a narrow, politically-infected interpretation that abandons traditional (established) rules of construction that include consideration of legislative history.[16]

However, Justice Scalia's method has its supporters.[17] While it is conceded that his judicial record is conservative, supporters argue that his adjudicative methodology surmounts political convictions and charge his critics with superficial analysis.[18] One supporter traced Justice Scalia's interpretive methodology in constitutional cases to his religious roots and concluded that text and methodology control outcomes rather than political views or a desire to make policy.[19] Further, admirers point to his "unrepresentative" (liberal) opinions as weighty proof that his interpretive

13. *See* Ross, *supra* note 12, at 401 ("By ignoring indicia of actual legislative intent in favor of a meaning based on a judge's inevitably personal reading of the words of a statute, the judiciary inevitably tilts the process of interpretation in favor of its preferences and away from the legislature's."); Wald, *supra* note 3, at 304-05 ("Several opinions this past Term that eschewed legislative history replaced it with what sometimes looked like a free-form romp through the 'structure' of a statute, or it's 'evident design and purpose.' The phrase[ ] 'Congress must have meant this or that' . . . appear[s] without apparent source other than the writing judge's mindset."); *see also* Muriel M. Spence, *The Sleeping Giant: Textualism As Power Struggle*, 67 S. CAL. L. REV. 585 (1994) (arguing that textualism increases judicial power at Congress' expense).

14. *See* Ross, *supra* note 12 (arguing that judges can use textualism to support partisan interpretations). Now that Republicans control Congress, it would be worthwhile to revisit this issue in the future to evaluate the Court's response to Republican-initiated legislation.

15. Logically, this contention only has full force when the President is a Republican.

16. "Traditional rules of construction" refers to the long-standing practice of judges to start their interpretation with the statute's text and reserve wide latitude to consider extratextual materials (primarily legislative history) in their search for intent. *See* Maltz, *supra* note 1, at 769 (discussing traditionalist model of statutory interpretation).

17. *See* George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297 (1990) (examining theory, sources and results of Justice Scalia's constitutional methodology); Eskridge, *supra* note 2, at 621 (evaluating "New Textualism").

18. *See* Kannar, *supra* note 17, at 1299 (describing Justice Scalia as enigmatic figure whose judicial opinions often contradict his political philosophy); Eskridge, *supra* note 2, at 668-69 (finding that "Justice Scalia sometimes deploys his methodology to endorse a liberal interpretation of a statute, over the objections of traditional conservatives").

19. Kannar, *supra* note 17, at 1310-20. *But see* Donald L. Beschle, *Catechism or Imagination: Is Justice Scalia's Judicial Style Typically Catholic?*, 37 VILL. L. REV. 1329,

method is not driven by value judgments.[20]

Commentators have been successful at labeling Justice Scalia's work, detailing its frailties, proposing their own theories and above all, provoking discussion on statutory interpretation. Once Justice Scalia was dubbed a textualist, scholars neglected to check the evidence upon which that conclusion is grounded. The fact is, however, that any evaluation of Justice Scalia's interpretive work must be grounded in his judicial opinions. Too often, scholars rely on Justice Scalia's reputation and therefore cite few of his opinions. Some merely assume he is a textualist and thus avoid the task of studying his judicial opinions. Others go so far as to rely on available non-opinion data that is scant and superficial.[21] Reflection and reliance on educational, religious and social information, while useful in some contexts and for some limited purposes, are unreliable decoders of adjudicative methodology. They are unreliable because of their incompleteness and also because of their highly speculative nexus or relationship to the interpretive task. In fact, grounding Justice Scalia's methods to such extra-judicial roots is akin to substituting extra-textual data for text. The insistence on a textualist label, therefore, appears to be most beneficial to scholars because of its scholarship-enhancing capacity.

This article first studies Justice Scalia's statutory interpretation decisions to determine whether a coherent theory of construction can be identified. His opinions reveal consistent advocacy of a text-based approach which logically could be called textualism. Critique of his approach is provided throughout. This section also provides an example of Justice Scalia's deployment of the construction format he preaches.[22]

1347 (1992) (questioning Professor Kannar's religious theory and noting its reliance on anecdotal evidence).

20. Kannar, *supra* note 17, at 1299.

21. The available non-opinion data is typically short speeches on legal topics more notable for legal semantics and levity than ascertaining the origin of Justice Scalia's interpretive drives. *See, e.g.*, Scalia, *supra* note 10, at 881 (examining importance of judicial standing to principle of separation of powers); Antonin Scalia, *Morality, Pragmatism and the Legal Order*, 9 HARV. J.L. & PUB. POL'Y 123 (1986) (discussing interconnection between morality and distributive justice); Scalia, *supra* note 6 (discussing frailties and defects of nonoriginalism versus those of originalism); Scalia, *supra* note 7, at 1175 (exploring dichotomy between "general rule of law" and "personal discretion"); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (critiquing justifications for judicial deference to administrative interpretations of legislation); Scalia, *supra* note 9, at 581 (discouraging use of " lego-babble" phrases such as: "[r]emedial statutes are to be liberally construed").

22. For an example of Justice Scalia's deployment of the construction format, see *infra* notes 55-72 and accompanying text.

The second section of this article focuses on Justice Scalia's infidelities to the brand of textualism he preaches in order to highlight patent interpretive inconsistencies evidenced in his decisions.[23] It will also explore in some detail the allegation that Justice Scalia's textualism is nothing more than a front for conservative majoritarian thought. This will be done by dissecting Justice Scalia's work on several controversial statutes and monitoring whether he is following articulated rules consistently or deviating in an unprincipled manner. This section shows selective and tortured use of rules that clearly disassociates Justice Scalia from the theoretical and practical foundations of textualism. At the same time, this section consistently reveals conservative values as Justice Scalia attempts, often successfully, to narrow or eliminate statutory protection for disadvantaged individuals.

The third section of this article discusses the value of theories of construction and legislative history in the interpretive process.[24] It suggests that the theories spawned by "new textualism" will not help because they are grounded in the false premise that judges want a mechanism that creates lab conditions and produces correct results. This section observes that theories and rules have not perfected the interpretive process because personal preferences, whether driven by morality or reason, remain dominant. This is compounded by the indeterminacy of human interpreters. Finally, this section suggests that Congress may be the best check on judicial abuse by illustrating how the unprincipled advocacy of a Justice's ideological perspective can endanger that Justice's "constituents" by exposing them to more stringent responses from Congress.

II. JUSTICE SCALIA'S THEORY OF TEXTUALISM

As a general proposition, textualism is an attractive theoretic construct that could potentially improve the quality of statutory interpretation if for no other reason than because it gives judges a determinate philosophy and framework of interpretation.[25] However, textualism, like other theories, is not an equation with finite

23. For a discussion of Justice Scalia's infidelities to his textualist approach, see *infra* notes 73-171 and accompanying text.

24. For a discussion of the value of theories of construction and legislative history in the interpretive process, see *infra* notes 162-95 and accompanying text.

25. *See* DICKERSON, *supra* note 1, at 163 (noting that widespread use of legislative history by judges is partly attributable to "lack of a coherent philosophy of judicial 'interpretation,' broad naivete about the general principles of communication, and a general ignorance of the realities of the legislative process").

variables that judges can mechanically apply to text.[26] In practice, it is a malleable theory subject to variation and manipulation and can be applied with as much or as little consistency as a particular judge chooses.[27] This reality returns us to a doctrinal quandary because the theory can only be evaluated by looking at how individual judges choose to apply it, not in its pure theoretical form. Add to this the judge's changing identity triggered by subject matter, training, experience and the interpretive process, and an opinion may seem irrational or arbitrary.

Justice Scalia vigorously advocates and *sometimes* practices textualism.[28] His admonition against the use of legislative history in interpreting statutes reverberates throughout his opinions.[29] Schol-

26. *See* Richard M. Fischl, *Some Realism About Critical Legal Studies*, 41 U. MIAMI L. REV. 505, 508-09 (1987) (discussing and rejecting "idealist" image of judges as robots applying legal rules to facts and partly crediting "skeptic's" view that judges are political and insert their personal values when applying law).

27. RICHARD A. POSNER, THE FEDERAL COURTS, CRISIS AND REFORM 287 (1985) ("[T]he irresponsible judge will twist any approach to yield the outcomes that he desires.").

28. *See* City of Chicago v. Environmental Defense Fund, 114 S. Ct. 1588, 1591-94 (1994) (concluding that plain meaning of Resource Conservation and Recovery Act does not exempt municipal waste combustion ash generated by petitioner); West Virginia Univ. Hosp. v. Casey, 499 U.S. 83, 98 (1991) ("The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous . . . we do not permit it to be expanded or contracted by the statements of individual legislators or committees." (citation omitted)); Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 135 (1989) (holding that Warsaw Convention's clear text does not eliminate limitation on damages if air carrier fails to inform passengers in writing of limitation); Pittston Coal Group v. Sebben, 488 U.S. 105, 122 (1988) (concluding that text of Black Lung Benefits Reform Act of 1977, in 30 U.S.C. § 902(f)(2) (1944), could not support restrictive meaning embraced by Secretary of Labor); Pierce v. Underwood, 487 U.S. 552, 573-74 (1988) (concluding that language and structure of governing statute required awarding of attorneys' fees exceeding hourly cap); Kungys v. United States, 485 U.S. 759, 771-74 (1988) (using textual analysis to determine whether Kungys' misrepresentations were "material" under governing statute); United Sav. Ass'n v. Timbers of Inwood Forest, 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme — because the same terminology is used elsewhere in a context that makes its meaning clear."); United States v. Fausto, 484 U.S. 493, 501 (1988) (using statutory language and construction to conclude that certain employees under Civil Service Reform Act were not entitled to judicial review); Lukhard v. Reed, 481 U.S. 368, 379-83 (1987) (applying textual analysis to conclude that personal injury awards are "income," not "resources," under statute governing Aid to Families with Dependent Children program). In these opinions, Justice Scalia essentially maintains advocacy of text-focused analysis that lends some credence to the claim that he is a textualist. More importantly, these opinions reveal an inconsistent application, and what at times appears to be manipulation of the textualist format to achieve particular results. A juxtaposition of his interpretive format in *Lukhard* to that in *Pierce* reveals flagrant contradictions developed later in this article.

29. Because the other Justices have not fully converted to Justice Scalia's

ars have had no difficulty concluding that Justice Scalia is a textualist, although they routinely go on to identify and critique the ideological and practical weaknesses of his brand of textualism.[30] For example, although one commentator finds the constitutional

brand of textualism and still rely in many instances on legislative history, Justice Scalia spends a great deal of time writing concurring opinions. Although he often agrees with the result reached by the Court, he frequently disagrees with the Court's use of legislative history as a means of reaching that result. *See* Conroy v. Aniskoff, 113 S. Ct. 1562, 1567 (1993) (Scalia, J., concurring) (stating that Court should not have consulted legislative history once it concluded that statute was unambiguous and unequivocal because "[t]hat is not merely a waste of research time and ink; it is a false and disruptive lesson in the law"); Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 738 (1989) (Scalia, J., concurring) (agreeing with holding except to extent it relied on legislative history); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (arguing that statements of handful of legislators in Congress ought not determine meaning of statute's text); United States v. Stuart, 489 U.S. 353, 371 (1989) (Scalia, J., concurring) (arguing that preratification materials such as floor debates and committee reports are irrelevant when interpreting plain text of Convention); Blanchard v. Bergeron, 489 U.S. 87, 97 (1989) (Scalia, J., concurring) (concurring in judgment except where majority relies on court decisions cited in statute's legislative history); United States v. Taylor, 487 U.S. 326, 344 (1988) (Scalia, J., concurring) (arguing that consideration of legislative history is unnecessary when statute's text is susceptible to independent construction by Court); Rose v. Rose, 481 U.S. 619, 640 (1987) (Scalia, J., concurring) (arguing Court's decision that purposes of statute can surmount its text is error); INS v. Cardoza-Fonseca, 480 U.S. 421, 452 (1987) (Scalia, J., concurring) (suggesting that lengthy analysis of legislative history is unnecessary when meaning can be determined from text and structure of statute).

Sometimes Justice Scalia's concurring opinions offer more categorical statements on statutory construction. *See, e.g.*, United States v. R.L.C., 503 U.S. 291, 307 (1992) (Scalia, J., concurring in part and judgment) (arguing that if criminal statute is ambiguous, under rule of lenity, more lenient interpretation should be applied); Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 840 (1990) (Scalia, J., concurring) (arguing that unless text of statute clearly provides otherwise, non-penal legislation can only be applied prospectively); NLRB v. United Food & Commercial Workers Union, 484 U.S. 112, 133 (1987) (Scalia, J., concurring) (suggesting that when statute is silent or ambiguous, courts should defer to agency's interpretation).

Other concurring opinions evidence disagreement with the Court's factual conclusions or interpretive approach. *See, e.g.*, K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 318 (1988) (Scalia, J., concurring) (arguing that Court's plain meaning construction and reliance on dictionary is contextually defective); Thompson v. Thompson, 484 U.S. 174, 188 (1988) (Scalia, J., concurring) (disagreeing with Court's broad definition of context in its attempt to ascertain intent); Citicorp Indus. Credit, Inc. v. Brock, 483 U.S. 27, 40 (1987) (Scalia, J., concurring) (offering broader interpretation of statute's text than Court); California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 295 (1987) (Scalia, J., concurring) (disagreeing with Court's contextual analysis of civil rights statutes).

30. For example, Professor Eskridge concluded that constitutional formalism does not support Justice Scalia's theory, nor has it been demonstrated that limited judicial discretion is mandated by separation of powers principles. *See* Eskridge, *supra* note 2, at 671-77. Further, Professor Eskridge argues that textualism does not necessarily give Congress clear interpretive rules that can assist it in legislation drafting. Moreover, Eskridge argues that this new theory has not proven to be a total constraint on judges. *Id.*

foundation for this "new" theoretic construct lacking or weak and details some of its operational limitations, he nonetheless concludes that Justice Scalia's brand of textualism "has already been a valuable intellectual contribution to theoretical literature on statutory interpretation."[31]

Stimulating theoretic literature may be a beneficial attribute of Justice Scalia's textualism, particularly for legal academics. However, the real benefits or dangers of textualism lie with its custodian or molder, the judge. Hence, focus on the expansion of theoretic literature should be balanced with critical review of the theory's susceptibility to manipulation. Although Justice Scalia's views on statutory construction are the subject of a growing body of literature, there remains several critical concerns that have not been fully developed or discussed in legal scholarship.[32] Even more, Justice Scalia's decisions deserve a rigorous across-the-board scrutiny, in view of the broad-based conclusions reached by scholars.

A. *Plain Text*

Justice Scalia believes that the text of a statute is its true body or corpus. Legislation is the text of a treaty, statute, regulation or rule.[33] It is the language approved in final form by Presidents, Con-

31. *Id.* at 666. Based on a study of Justice Scalia's opinions in the area of statutory construction, a more accurate conclusion is that it is too early to tell whether he is making any contribution, much less a valuable contribution, to this area. Through a review of most of Justice Scalia's opinions on this subject, this article will show many contradictions that likely defeat the conclusion that there is widespread adherence to the textualist theory.

32. *See, e.g.*, Wald, *supra* note 3, at 298-99 (arguing that judges need context when interpreting statutes and legislative history plays important role in statutory interpretation). Judge Wald also suggested that Justice Scalia's approach may simply be a design to enhance the powers of the Republican *qua* conservative executive branch. *Id.* at 308; *see also* Ross, *supra* note 12, at 402 (suggesting that new textualism is conservative ploy to enhance power and discretion of judiciary heavily populated by Republican appointees and empowers agency heads promulgating Republican-friendly regulations).

In response to the indictments handed down by Judge Wald and Professor Ross, Professor Eskridge, for example, responded that their allegations do not "interest" him. *See* Eskridge, *supra* note 2, at 669. But not only are these allegations interesting, but they have a basis in fact. In fact, although Professor Eskridge suggested that his critique was grounded in different concerns from Judge Wald and Professor Ross, his conclusions that textualist methodology can potentially undo the work of Congress goes to the core of these commentators' critique. *Id.* at 673-76.

33. *See, e.g.*, *R.L.C.*, 503 U.S. at 309 (Scalia, J., concurring in part and judgment) ("The only thing that was authoritatively adopted *for sure* was the text of the enactment; the rest is *necessarily* speculation."); *Green*, 490 U.S. at 528 (Scalia, J., concurring) ("The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which mean-

gresses and agencies.[34] Negotiations and legislative histories are not law.[35] As such, judges must enforce the text's literal language. When the language is plain, it is unwise to consult legislative history, even if such consultation is to *confirm* the plain meaning of the text.[36] Justice Scalia has consistently been spilling ink to dissuade his colleagues on the Court from consulting legislative history after they concluded that a statute's text is clear. Because Justice Scalia believes that the use of extratextual information to confirm plain text is inappropriate, its use for any other purpose when the text is plain is logically sacrilegious.[37]

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ing is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute . . . and (2) most compatible with the surrounding body of law into which the provision must be integrated . . . . I would not permit any of the historical and legislative material discussed by the Court . . . to lead me to a result different from the one that these factors suggest."); *Stuart*, 489 U.S. at 373 (Scalia, J., concurring) ("Treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties. Had it been the intention to commit the administration of estates of citizens of one country, dying in another, exclusively to the consul of the foreign nation, it would have been very easy to have declared that purpose in unmistakable terms.") (quoting Rocca v. Thompson, 223 U.S. 317 (1912)); *see also* Chan v. Korean Air Lines, 490 U.S. 122, 134 (1989) ("[W]here the text is clear, as it is here, we have no power to insert an amendment."); *Blanchard*, 489 U.S. at 97 (Scalia, J., concurring) (objecting to Court's analysis of cases cited in Committee Report instead of focusing on text of statute); *Taylor*, 487 U.S. at 345 (Scalia, J., concurring) ("[W]e should not look to the legislative history at all. This text is eminently clear, and we should leave it at that.").

34. *See Green*, 490 U.S. at 528 (Scalia, J., dissenting) (arguing that terms of statute are words entire Congress voted on); *Blanchard*, 489 U.S. at 98 (Scalia, J., concurring) ("Congress is elected to enact statutes rather than point to cases, and its Members have better uses for their time than poring over District Court opinions."); *Stuart*, 489 U.S. at 374-75 (Scalia, J., concurring) (suggesting that treaty embodies terms approved by signatories empowered to enter into such arrangement and does not include preratification information that may have been understood by only one party).

35. *Taylor*, 487 U.S. at 345-46. Justice Scalia suggested in *Stuart*, however, that extra textual materials such as negotiations history, that reflect mutual understanding, may be consulted. *Stuart*, 489 U.S. at 374 (Scalia, J., concurring). The general tenor of Justice Scalia's concurring opinion in *Stuart* indicates that such materials would not be considered as an original matter, but rather, would be consulted upon a finding of ambiguity. *Id.* at 371 (Scalia, J., concurring). If that is the case, it represents a somewhat different textualist format for interpreting treaties than for statutes.

36. *See Stuart*, 489 U.S. at 373 (Scalia, J., concurring) ("Even, however, if one generally regards the use of preratification extrinsic materials to confirm an unambiguous text as an innocuous practice, there is special reason to object to that superfluous reference in the present case.").

37. *Id.* at 371 (Scalia, J., concurring) (arguing that if text is plain, Court cannot confirm with preratification materials); INS v. Cardoza-Fonseca, 480 U.S. 421, 453 (1987) (Scalia, J., concurring) (arguing that if text is plain, Court should not refer to legislative history); California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S.

There is widespread agreement that the words which survive the legislative process and obtain the President's approval constitute the primary legal component of a statute. If those words are plain, they should be given their effect. Justice Scalia recognizes that legislation is the product of compromises which likely affect the clarity of a statute's final language and accommodates competing interests.[38] With social legislation, this reality is magnified. In fact, when the legislation is controversial, language is sometimes purposefully left ambiguous to facilitate passage of an Act in spite of unresolved conflicts.[39] Add to this any frailty in draftsmanship, and the malleability and imperfections of English words, the likelihood that one would find plain language diminishes dramatically.[40]

272, 295 (1987) (Scalia, J., concurring) (contending that if statute has specific language on subject, Court should not consider general language).

38. *See* Johnson v. Transportation Agency, 480 U.S. 616, 671 (1986) (Scalia, J., dissenting) ("To make matters worse, [the majority] assays the current Congress' desires *with respect to the particular provision in isolation*, rather than (the way the provision was originally enacted) as part of a total legislative package containing many *quids pro quo*.").

39. *E.g.*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991). To secure passage of the Civil Rights Act of 1991 (Act), Congress left at least two key issues, affirmative action and retroactivity, unresolved. *Id.* Congress left affirmative action open-ended by providing that "[N]othing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law." *Id.* § 116, 105 Stat. at 1079. With respect to retroactivity, the 1991 Act provides that "[E]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." *Id.* § 402(a), 105 Stat. at 1099. However, the Act further provides that it will not apply retroactively in certain cases. Section 402(b) of the statute provides: "Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983." *Id.* § 402(b), 105 Stat. at 1099. Further, § 109 which deals with the statute's extraterritorial application provides: "The amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act." *Id.* § 109(c), 105 Stat. at 1078. The retroactivity issue was eventually settled when the Supreme Court rendered the Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994), and Rivers v. Roadway Express, Inc., 114 S. Ct. 1510 (1994) decisions. In both decisions, the Court held that the 1991 Act does not apply retroactively. *Landgraf*, 114 S. Ct. at 1508 ("The presumption against statutory retroactivity is founded upon sound considerations of general policy and practice, and accords with long held and widely shared expectations about the usual operation of legislation."); *Rivers*, 114 S. Ct. at 1519 (holding that Congress had no intent to reach pre-enactment conduct). In evaluating the statute's text in *Landgraf*, the Court concluded that Congress did not clearly provide when the Act applies and in all likelihood left this issue unresolved as part of the legislative compromises that helped secure the Act's passage. *Landgraf*, 114 S. Ct. at 1494-96.

40. *Compare* Pacific Gas and Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641 (Cal. 1968) (holding that judges must turn to extrinsic evidence to discern plain meaning of contracts) *with* Trident Ctr. v. Connecticut Gen. Life Ins. Co., 847 F.2d 564 (9th Cir. 1988) (allowing use of extrinsic evidence, but arguing

Justice Scalia typically concludes that language is plain and amenable to literal enforcement. The foundation for this conclusion is grounded in a broad definition of "plain" and his periodically declared confidence in the drafters.[41] In instances when he determines that the drafters were not effective, his intellectual skills are brought to bear on the language.[42] This sometimes allows him to find the language "plain" or its meaning obvious even when the statute does not specifically address the question before the Court.[43] By broadening the definition of "plain," Justice Scalia avoids both textual and legislative context by giving priority to common sense, the dictionary or other statutes instead of working with the statute's language, its purpose or reliable elements of legislative history. As a result, common sense, literal meaning (which may not be actual meaning because it is detached from context) and the text of other statutes are deemed more reliable than the communicative device chosen by the legislators.

Justice Scalia's broad definition of "plain" presents many problems. In *United States v. Taylor*[44] and *Green v. Bock Laundry Machine Co.*,[45] broad grammatical definitions assigned to words allowed Justice Scalia to use personal assumptions and speculation in interpreting statutory language. Logically, as the definition of "plain" gets broader, the likelihood of a conclusion of vagueness or ambiguity diminishes. By foreclosing a conclusion of vagueness or ambiguity, Justice Scalia rationalizes his reliance on interpretive devices that may not have been considered or relied on in the legislative process. The danger of result-oriented analysis thus increases markedly.

Justice Scalia argues that his plain text approach prevents judges from substituting their personal value judgments for that of Congress more effectively than reliance on legislative history. He also argues that only by working primarily with the text can judges

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that its use undermines basic principle of language as binding constraint on public and private conduct); *see also* T. Alexander Aleinikoff and Theodore M. Shaw, *The Costs of Incoherence: A Comment on Plain Meaning*, West Virginia Univ. Hosp. v. Casey, *and Due Process of Statutory Interpretation*, 45 VAND. L. REV. 687, 696 (1992) (arguing that Justice Scalia's misapplication of plain meaning rule in *Casey* stemmed from his failure to "understand the linguistic variations" of fee-shifting statutes he considered).

41. *See Johnson*, 480 U.S. at 657 (Scalia, J., dissenting) (calling Title VII of Civil Rights Act of 1964 "a model of statutory draftsmanship").

42. *E.g.* United States v. Taylor, 487 U.S. 326, 344 (1988) (Scalia, J., concurring) (substituting his personal assumptions for vague text).

43. *Id.*

44. 487 U.S. 326 (1988).

45. 490 U.S. 504 (1989).

respect separation of powers principles and avoid engaging in legislative functions. Although respecting plain text is desirable or even mandated, Justice Scalia's idea of "plain" makes his approach no more reliable than one that relies on legislative acts which have little or no probative value. His definition of "plain," which broadens the text that survived the legislative process, belies any claim of respect for deferring to legislative conclusions.

B. *Plain Text but Absurd Result*

An interesting methodology is proposed by Justice Scalia for language plain on its face but produces absurd results when applied. In such cases, one might reflexively want to consider legislative history to determine what Congress desired or intended, in order to breathe meaning into the language. This is not allowed under Justice Scalia's approach. Under his methodology, you *can* consult legislative history, but not for the purpose of finding out what the language means. Legislative history may be consulted solely to confirm that the language *does not* mean what it says.[46] Once such confirmation is obtained, the judge's grammatical skills take over with guidance from a dictionary.[47] This allows Justice Scalia to use his personal views to contextualize the statute rather than seek context from enactment data such as purpose clauses, drafting changes or committee reports.

C. *Ambiguous Text*

When confronted with ambiguous text, Justice Scalia approves consultation of extratextual materials.[48] But that does not mean that one should instantly resort to legislative history. It means ana-

46. *Id.* at 527-30 (Scalia, J., concurring) (arguing that Court wrongfully consulted Committee and Conference Reports and floor debates to determine what text meant, instead of using such materials to confirm that word "defendant" in text could not have been meant literally).

47. *See* Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 128 (1989) (analyzing language of Warsaw Convention); Pittson Coal Group v. Sebben, 488 U.S. 105, 113 (1988) (using dictionary and analysis of section's sentence structure to interpret statute); Pierce v. Underwood, 487 U.S. 552, 564 (1988) (analyzing connotations of word "substantial"); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 284-89 (1988) (analyzing regulation's words and phrases within their context).

48. *Pierce*, 487 U.S. at 563-68 (looking first at House Committee report to interpret phrase but then rejecting report because it is not authoritative interpretation); *K Mart*, 486 U.S. at 318 (Scalia, J., concurring in part and dissenting in part) (arguing that one need only determine whether Customs Service's interpretation of statute is reasonable); INS v. Cardoza-Fonseca, 480 U.S. 421, 452 (1987) (Scalia, J., concurring) (arguing that it would have been sufficient for Court to look to legislative history only to determine if there was "clearly expressed legislative intent").

lyzing the structure of the statute, using canons of construction and considering similar schemes to reconcile the ambiguity.[49] If two plausible meanings evolve, other similar schemes can help to identify the most accepted view.[50] Resort to legislative history is only appropriate if a clear congressional command can be found in pre-enactment data.[51]

In principle, Justice Scalia's formulation on ambiguity appears attractive. Statutory structure, canons and similar statutory schemes may assist in providing context in the search for meaning. However, the potential for manipulation is ever-present. For example, after Justice Scalia consults these textual and non-textual sources, he may still choose a meaning that the average or intended reader would reject. Such occurrences suggest that Justice Scalia may have been searching less for meaning than a means of manipulating meaning.

D. *Justice Scalia's Textualism Deployed*

In *Pierce v. Underwood*,[52] Justice Scalia used typical textualist doctrine. A provision of the Equal Access to Justice Act (EAJA)[53] was before the Court which stated that prevailing parties may recover attorney's fees from the United States unless the court finds that the position of the United States was "substantially justified."[54] At issue was whether the lower court's finding that the government's position was not substantially justified, constituted an abuse of discretion.[55]

The United States Court of Appeals for the Ninth Circuit concluded that the test to determine the meaning of "substantially justified" was whether the government "had a reasonable basis both in law and in fact" for its decision.[56] This meaning was adopted al-

49. *Pierce*, 487 U.S. at 552; *K Mart*, 486 U.S. at 318 (Scalia, J., concurring in part and dissenting in part); *Cardoza-Fonseca*, 480 U.S. at 452.

50. *Pierce*, 487 U.S. at 565. In *Pierce*, Justice Scalia sought guidance in interpreting the Equal Access to Justice Act, 28 U.S.C. § 2412(d) (1988), from the Administrative Procedure Act, 5 U.S.C. § 706(2)(E) (1988), and the Federal Rules of Civil Procedure 37(a)(4), (b)(2)(E), because of their "substantial evidence," and "substantially justified" standard, respectively. *Pierce*, 487 U.S. at 565.

51. *See Pierce*, 487 U.S. at 566 (analyzing House Committee Report that gives guidance on how to interpret ambiguous language of Equal Access to Justice Act).

52. 487 U.S. 552 (1988).

53. 28 U.S.C. § 2412(d) (1988).

54. *Pierce*, 487 U.S. at 556.

55. *Id.* at 557.

56. Underwood v. Pierce, 761 F.2d 1342, 1346 (9th Cir. 1985); Underwood v. Pierce, 802 F.2d 1107 (9th Cir. 1986) (amending Underwood v. Pierce, 761 F.2d 1342 (9th Cir. 1985)), *cert. granted*, Pierce v. Underwood, 487 U.S. 552 (1988).

most verbatim from the EAJA's legislative history. In its brief to the Supreme Court, the government argued that "substantially justified" means "some substance and a fair possibility of success."[57] Respondents argued that the phrase required a standard higher than reasonableness and called for a "strong showing."[58]

Justice Scalia wrote that "substantially justified" is the text of the statute that also operates as the governing legal standard or test.[59] Further, the statute gave courts explicit authority to interpret and enforce these words.[60] As such, no other formulation could be substituted.[61] The Court's job is to determine the meaning of the phrase. For this, he looked to the grammatical use of the word "substantial" and with the assistance of a dictionary, determined that it had two almost conflicting meanings.[62] He found that on the one hand it could mean "considerable," and on the other, it refers to the "substance" or essence of a thing.[63] Faced with competing grammatical choices, he sought guidance from other schemes using the word "substantial." The Administrative Procedure Act (APA)[64] was consulted because of its use of the phrase "substantial evidence."[65] Justice Scalia determined that this phrase, as used in the APA, meant relevant, adequate evidence — not "large" or "considerable" evidence.[66] He then considered the "substantially justified" language of the Federal Rules of Civil Procedure.[67] This language was found to mean "genuine dispute" not

57. *Pierce*, 487 U.S. at 564 (citing Brief for Petitioner, at 16).

58. *Id.* (citing Brief for Respondents, at 24).

59. *See id.* (" 'Substantially justified' is the test the statute prescribes, and the issue should be framed in those terms.").

60. *See* 28 U.S.C. § 2412(d)(1)(A) (1988) ("[A] court shall award to a prevailing party other than the United States fees and other expenses . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.").

61. *See Pierce*, 487 U.S. at 564 ("In addressing this issue, we make clear at the outset that we do not think it appropriate to substitute for the formula that Congress has adopted any judicially crafted revision of it — whether that be 'reasonable basis in both law and fact' or anything else.").

62. *Id.* Justice Scalia conceded that both the government's and Respondents' interpretations were plausible depending on the connotation the word is given. *Id.* This conclusion left the Court with flexibility to choose between competing meanings. Exclusive reliance on a judge's view or value judgment at this point, without guidance from legislative sources, facilitate judicial substitution of policy that may contravene congressional intent.

63. *Id.*

64. 5 U.S.C. § 706(2)(E) (1994).

65. *Pierce*, 487 U.S. at 564.

66. *Id.* at 564-65.

67. *Id.* at 565 (citing FED. R. CIV. P. 37(a)(4); (b)(2)(E)).

"justified to a high degree."[68] Armed with this information and faced with two competing common connotations, he concluded that the most *natural* meaning of substantial is "justified in substance or in the main."[69]

Justice Scalia further rejected the analysis of those courts that relied on a House Committee Report in concluding that "substantially justified" means a higher standard than reasonableness.[70] Starting from the textualist premise that enacted legislation is the exclusive embodiment of the law, Justice Scalia noted that interpretive responsibility then fell on courts, not Committees of the House of Representatives.[71] As such, reliance on a Committee's interpretation is essentially an abdication of judicial responsibility to interpret the statute. Although he concluded that clear congressional command found in the legislative history may sometimes surmount common connotation, the potential for such an occurrence is daunted by his countervailing rationale that only judges can interpret the law.[72]

III. JUSTICE SCALIA'S TEXTUALIST MALPRACTICE

In many instances, Justice Scalia departs from the *Pierce* format by relying on the very construction approaches he condemns, although he is careful to couch his analysis in textualist terms. In fact, his departure from text-focused analysis is so flagrant at times that his decisions become irreconcilable. Justice Scalia's infidelities to textualism are very clear in the civil rights area.[73] Several decisions he wrote or participated in which affect disadvantaged individuals provide sound examples. Take for example *Independent Federation of Flight Attendants v. Zipes*,[74] an opinion Justice Scalia authored, in which he interpreted the fee-shifting provision of Title VII. At issue was whether plaintiffs can receive attorney's fees from

68. *Id.* (quoting FED. R. CIV. P. 37(a)(4) (1970 advisory committee's notes)).

69. *Id.*

70. *Id.* at 566-67.

71. *Id.* at 566 ("[I]t is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means.").

72. *Id.*

73. The Court's narrow interpretation of civil rights statutes has been cited in the past as some evidence that textualism may be a ploy to derail liberal legislation. *See* Mashaw, *supra* note 2, at 834. Further, inconsistencies in Justice Scalia's interpretation of the Constitution have been noted. *See* Bryan H. Wildenthal, *The Right of Confrontation, Justice Scalia, and The Power and Limits of Textualism*, 48 WASH. & LEE L. REV. 1323, 1384-87 (1991).

74. 491 U.S. 754 (1989).

losing intervenors.[75] The provision, section 706(k), provided in relevant part, that a "court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."[76]

The prevailing party provision in section 706(k) does not appear to be ambiguous. It is unlikely that a reader of these words will find grammatical conflict. The instruction to a reviewing court is clear. The words are written in directory as opposed to mandatory language. In everyday usage, "may" is commonly used and understood as a grant of permission. It is also defined that way in the dictionary[77] and has the same meaning in legal parlance.[78] The same is true of the use and understanding of the phrase "prevailing party" in the legal context. It is generally understood to mean the individual who successfully advocates his or her claim in litigation.[79] Hence, the actual and literal meaning appears to be the same. One can fairly conclude this language is "plain" without reference to dictionaries. Even more, consulting a dictionary inevitably leads to the same conclusion as an analysis confined exclusively to text. Therefore, a determination that this language is "plain" seems unavoidable.

Justice Scalia, however, found that the language of section

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75. *Id.* at 755.

76. *Id.* (citing 42 U.S.C. § 2000e-5(k) (1988)).

77. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 734 (1986) (defining "may" as, among other things, having permission, power, or ability to do a particular thing).

78. BLACK'S LAW DICTIONARY 979 (6th ed. 1990). The word "may" is defined as:

> [a]n auxiliary verb qualifying the meaning of another verb by expressing ability, competency, liberty, permission, possibility, probability or contingency. [The w]ord 'may' usually is employed to imply permissive, optional, or discretional, and not mandatory action or conduct. Regardless of the instrument, however, whether constitution, statute, deed, contract or whatever, courts not infrequently construe 'may' as 'shall' or 'must' to the end that justice may not be the slave of grammar. However, as a general rule, the word 'may' will not be treated as a word of command unless there is something in context or subject matter of act to indicate that it was used in such sense. In construction of statutes and presumably also in construction of federal rules word 'may' as opposed to 'shall' is indicative of discretion or choice between two or more alternatives, but context in which word appears must be controlling factor.

Id. (citations omitted).

79. *Id.* at 1188. Black's Law Dictionary notes the importance of interpreting this phrase in civil rights cases, and defines it as "[t]he party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention. The one in whose favor the decision or verdict is rendered and judgment entered." *Id.* (citation omitted).

706(k) was *not* plain.[80] It is important to be mindful of the fact that as a textualist, he uses a broad definition of "plain"[81] and had remarked on at least one occasion, that Title VII was "a model of statutory draftsmanship."[82] By determining that the language was not "plain," he was able to trump the text with judicial canons of construction. To advance his interpretation, Justice Scalia relied on the American Rule that winners are not usually entitled to fees from losers and the principle that fee liability and merits liability run together.[83] Additionally, he cited case law for the proposition that losing parties' interests may sometimes take precedence over the interests of a prevailing party and supplied his own assessment that the text did not say that the prevailing party's interest is first and foremost.[84]

Undaunted, Justice Scalia worked further destruction to the text by inverting the permission evidenced by the word "may" and converting it to "may not," thereby disregarding congressional hostility to categorical rules in the fee shifting area.[85] He continued his interpretation "in light of the competing equities that Congress normally takes into account,"[86] arguing that his interpretation served "congressional policy in favor of 'vigorous' adversary proceedings."[87] Rather than be governed by the statute's "prevailing party" standard, Justice Scalia substituted his own test for determining the losing intervenor's liability. He interpreted the statute to

80. Independent Fed'n of Flight Attendants v. Zipes, 491 U.S. 754, 758 (1989).

81. *See, e.g.*, Unites States v. Taylor, 487 U.S. 326, 344 (1988) (Scalia, J., concurring) (suggesting that text may be "plain" without specific language relevant to issue).

82. Johnson v. Transportation Agency, 480 U.S. 616, 657 (1987) (Scalia, J., dissenting). Chief Justice Burger made the same observation about Title VII in his dissent in United Steelworkers v. Weber, 443 U.S. 193 (1979), by stating that Title VII is a "statute of extraordinary clarity." *Weber*, 443 U.S. at 216 (Burger, C.J., dissenting).

83. *Zipes*, 491 U.S. at 758 (stating that "[i]n the United States the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser").

84. *Id.* at 760 (citing Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 418 (1978), for proposition that conceded statutory goals must compete with *other* considerations to determine what statute means).

85. *See id.* at 760-61.

86. *Id.* at 761. The consideration of matters that Congress typically considers is a bitter irony, because Justice Scalia is unwilling to rely on information coming directly from Congress. His ability to discern what the *entire* Congress normally considers is questionable, and his willingness to utilize factors that went into the enactment of the statute raised questions of the judicial policymaking he so vigorously cautions against.

87. *Id.* at 766 (citing Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 418 (1978)).

require frivolous, unreasonable or unfounded behavior on the part of intervenors, before they may be held responsible for plaintiffs' attorney's fees.[88] He concluded that his interpretation was warranted even if it frustrated Congressional goals, because the losing party in this case did not violate the law.[89]

Not only did Justice Scalia substitute interpretive guides and his personal judgment for that of plain text, but his assessment of congressional goals was not grounded in any specific evidence. On this matter, there was probative legislative history that established that Congress intended to confer discretion on trial court judges with the objective of making discrimination victims whole.[90] Congress ranked plaintiffs highest in the fee recovery scheme and provided them with a source of fees to facilitate vindication of their rights.[91] "By contrast, several fee-shifting statutes outside the civil rights field specify that attorney's fees are available only upon a showing of injury in violation of the underlying statute."[92] Justice Scalia's placement of intervenors on the same level as plaintiffs upset congressional ranking, although he was aware that intervenors essentially function as plaintiffs' adversaries in Title VII proceedings.[93] Hence, he placed rules of construction over text, context and reliable historical evidence of purpose and goals. This methodology is obviously arbitrary, particularly because it is grounded in an equally unreasonable conclusion that the language is not "plain."

In another case, *Lorance v. AT&T Technologies*,[94] Justice Scalia rejected "a plausible, and perhaps even the most natural reading of

88. *Id.* at 761 (holding award of attorney's fees, under Title VII, against losing intervenors is only applicable when "intervenors' action was frivolous, unreasonable or without foundation").

89. *See id.* at 762. Literal disregard of congressional goals appears to be a greater abdication of judicial responsibility than reliance on legislative history to achieve congressional goals that plain text controverts.

90. *Id.* at 773 n.2 (Marshall, J., dissenting).

91. *Id.* at 773 (Marshall, J., dissenting) (citing Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968)).

> [W]hile the majority pays lipservice to the objectives of Title VII, it is guilty of establishing its own "judge-made ranking of rights." By elevating intervenors to the same plane as Title VII plaintiffs, the majority undermines Congress' determination that Title VII plaintiffs alone are "the chosen instruments" for vindicating the national policy against discrimination.

Id. at 774 n.3 (Marshall, J., dissenting).

92. *Id.* at 776 n.4 (Marshall, J., dissenting).

93. *See id.* at 763 n.4 (acknowledging that intervenors enter lawsuits to defend their own statutory or constitutional rights).

94. 490 U.S. 900 (1989).

section 703(h)"[95] of Title VII, in favor of Court precedent. In *Lorance*, Justice Scalia also interpreted the statute of limitations provision of section 706(e) that required plaintiffs to file a charge "within three hundred days after the alleged unlawful employment practice occurred."[96] At issue was a facially neutral seniority policy that had discriminatory effects.[97] Because the policy was fair in form, employees were unaware of its potential consequences as implemented. Justice Scalia had to determine when the wrongful practice "occurred."[98]

In interpreting section 706(e), Justice Scalia did not conclude that the text was plain. This conclusion seems reasonable because the word "occurred" is not self defining. This is particularly true for the use of the word *occurred* in legal settings. Justice Scalia recognized that in enacting the legislation, Congress had to engage in a value judgment between two competing interests.[99] He phrased the competing interests in neutral legal terms as a balance between the rationales for allowing valid claims and barring stale ones.[100] This meant weighing the interest of employees to be free from discrimination and the interest of employers to be free from the sanctions of antidiscrimination laws.[101] Justice Scalia interpreted section 706(e) to mean that the statute of limitations begins to run from the time the policy was adopted,[102] even though employees may not be aware, affected or harmed at that time. For context, he used the National Labor Relations Act (NLRA)[103] and case law interpreting it, concluding that the similarities of the two statutes supported this approach.[104] Curiously, this approach facilitated an avoidance of the purposes and goals of Title VII to protect discrimination victims. It also served as a rationale for rejecting the continuing violation rule, a doctrine that was developed and accepted by most courts and recognized as a reliable rule.[105]

95. *Id.* at 908.

96. *Id.* at 904 (quoting 42 U.S.C. § 2000e-5(e) (1988)).

97. *Id.* at 903.

98. *Id.*

99. *Id.* at 911.

100. *Id.* Justice Scalia recognized the general purpose of § 706(e) which is to provide a "value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale" claims. *Id.*

101. *Id.* at 911-12.

102. *Id.*

103. 29 U.S.C. §§ 151-169 (1988).

104. *Lorance*, 490 U.S. at 909-10.

105. *Id.* at 905-07; *see* Bazemore v. Friday, 478 U.S. 385, 386-87 (1986) (holding that pattern or practice that would have constituted violation of Title VII be-

In *Patterson v. McLean Credit Union*,[106] Justice Scalia joined Justice Kennedy's opinion interpreting 42 U.S.C. § 1981 which provides that:

> [a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.[107]

At issue in *Patterson* was whether section 1981's prohibition of discrimination in the makeup and enforcement of contracts protected workers from on-the-job discrimination.[108]

Although § 1981 is not a model in draftsmanship, Justice Scalia joined the Court's opinion which found that the language of § 1981 was "plain." He adopted the Court's construction that "make" means "form," and therefore, § 1981 only policed discriminatory refusals to contract or offers to contract on discriminatory terms.[109] He also agreed that "enforce" means "redress," and therefore, § 1981 only policed a discriminatory ban to legal processes.[110] Further, he joined the Court's conclusion that neither semantics nor logic supported a different interpretation.[111]

Readers of § 1981 will likely be surprised to learn that it is so clear. The text does not say make "employment" contracts, and the words "sue," "be parties," and "give evidence," that come after "enforcement" may logically be read as additional rights, as opposed to

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came violation upon Title VII's effective date, and to extent that employer continued prohibited practice, liability attached); Havens Realty Corp. v. Coleman, 455 U.S. 363, 380-81 (1982) (declaring that claims based not solely on isolated incidents, but rather on continuing violations manifested in numerous incidents are timely under § 812(a) of Fair Housing Act of 1968, 42 U.S.C. §§ 3601 (1988), provided that one incident is asserted to have occurred within 180-day period); Corning Glassware v. Brennan, 417 U.S. 188, 208 (1974) (finding continuing violation of Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (1988), when employer, after effective date of Act, continued to pay female day inspectors less than male night inspectors for equal work).

106. 491 U.S. 164 (1989).

107. 42 U.S.C. § 1981 (1988).

108. *Patterson*, 491 U.S. at 170-71.

109. *Id.* at 176-77 (interpreting right to "make" contracts to mean "formation" of contracts).

110. *Id.* at 177-78.

111. *Id.* at 177.

a description of enforcement rights.[112] The remainder of the text is even more cumbersome. The Court's finding that the text is "plain," is therefore quite curious. Semantics and logic become especially useful when interpreting controversial legislation such as civil rights laws. But even more critical is honesty in admitting that language is cloudy and that it requires readers to resort to reliable legislative guides for clarification.

Other issues of construction had to be resolved in *Patterson.* It was clear to the Court that there was some overlap between § 1981 and Title VII.[113] To resolve the overlap, the Court utilized its own rule that an earlier statute (§ 1981) should not be read broadly when this would circumvent the detailed remedial scheme of a later statute (Title VII).[114] The court chose this over the more recognized rule that when statutes overlap, a court is not at liberty " 'to infer any positive preference for one over the other.' "[115] The Court decided that its construction made the two statutory schemes coherent, and observed that in the event it was wrong, Congress could change the language.[116]

Congress obliged in the Civil Rights Act of 1991.[117] The Justices in *Patterson* refused to work diligently with frail language and instead infused their personal sense of what the legislation meant. They also avoided compelling rules of construction and abandoned probative historical context in an apparent quest to limit employees' civil rights.[118] To achieve this goal, the Court had to reject the construction that "make" arguably covers postformation conduct by the employer "that demonstrates that the contract was not really made on equal terms at all."[119] The Court also had to sidestep expansive legislative history of textual evolution showing that Congress rejected an amendment to Title VII that would have fore-

112. 42 U.S.C. § 1981 (Supp. V 1993).

113. *Patterson,* 491 U.S. at 181 (finding conduct that is covered by both § 1981 and Title VII leads to some necessary overlap).

114. *Id.* at 181.

115. *Id.* (quoting Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 461 (1975)).

116. *Id.* at 182.

117. 42 U.S.C. § 1981 (Supp. V 1993).

118. *See Patterson,* 491 U.S. at 206 (Brennan, J., dissenting) ("The legislative history of § 1981 — to which the Court does not advert — makes clear that we must not take an overly narrow view of what it means to have the 'same right . . . to make and enforce contracts' as white citizens.").

119. *Id.* at 207 (Brennan, J., dissenting). Justice Brennan noted the majority's rejection of § 1981 coverage of postformation conduct and rejected it on the grounds that the language of § 1981 is "quite naturally" read as extending to such postformation coverage. *Id.*

closed the use of § 1981 to remedy employment discrimination claims, and further that Congress specifically noted that the two statutes protected similar rights, although detailing different prerequisites for filing.[120]

In addition to *Patterson*, Justice Scalia has demonstrated similar proclivities in other cases that further substantiate the claims of his critics that his methodology is more a tool for manipulation than the mandate of textualism. Another case that effectively highlights Justice Scalia's interpretive practices is *Lukhard v. Reed*.[121] *Lukhard* presented ideal facts for a true textualist. At issue was a federal statute which required that a family's "income" and "resources" be considered in determining its eligibility for benefits under the Aid to Families with Dependent Children (AFDC)[122] program. The Virginia Department of Social Services, through implementing regulations, decided to treat personal injury awards as income as opposed to resources.[123] Personal injury award recipients adversely affected by the regulation sued, utilizing a textualist methodology of statutory construction.[124]

The recipients (respondents) argued that income should be given its ordinary meaning which did not include personal injury awards.[125] For support, they turned to common speech through which income is understood as a gain or profit.[126] In addition, respondents pointed to a dictionary definition that also defined income as a form of gain or profit.[127] Further, they demonstrated that legal sources also regard income as a gain.[128] Logically, respondents concluded that personal injury awards could not be income because it was compensatory in nature and therefore does not involve gain.[129] For a true textualist, the matter would have ended here with a ruling in favor of respondents. Justice Scalia was not persuaded.

Respondents proposed other arguments to persuade the Court. They consulted analogous statutory schemes and other pro-

120. *Id.* at 209 (Brennan, J., dissenting).
121. 481 U.S. 368 (1987).
122. 42 U.S.C. §§ 601-615 (1988).
123. *Lukhard*, 481 U.S. at 373.
124. *Id.*
125. *Id.*
126. *Id.* at 374.
127. *Id.* at 375.
128. *Id.*
129. *Id.* at 374.

visions utilizing the word "income."[130] Specifically, they referenced the Internal Revenue Code (IRC),[131] the Food Stamp Program,[132] and United States Department of Health and Human Services (HHS) guidelines.[133] All three schemes exempted personal injury awards from their definitions of income.[134] This substantial showing of the meaning of income under other schemes would have persuaded even a hybrid textualist to agree with the respondents' interpretation. Such a conclusion was especially compelling because the respondents identified schemes that regulated the "needy," making those schemes textually and structurally similar to the scheme before the Court. However, Justice Scalia remained unconvinced.

Respondents went even further to prove their point. They cited clear administrative command by noting that HHS had always taken the position that personal injury awards were not income.[135] Furthermore, Congress knew of HHS' position when it used the word income in the statute.[136] Justice Scalia was still unpersuaded. His resolve is particularly troublesome because the statute provided plain language that neatly addressed personal injury awards. The word "resources" in the statute appeared plainly designed as a category capturing personal injury awards and this interpretation comfortably fits with common understanding of income and non-income awards.[137]

Not only did Justice Scalia fail to follow textualist command, he engaged in textualist-forbidden conduct. First, he refused to concede to the commonly-accepted interpretation that income is gain and instead offered his personal explanation that personal injury awards are in some respects compensation for *loss of gain*, and at least to that extent, must also be income.[138] With respect to respondents' contextual reference to statutory schemes, Justice Scalia simply turned the analysis on its head. He concluded that because these other schemes specifically excluded personal injury awards from income, congressional silence in the AFDC statute was evi-

130. *Id.* at 376-77.

131. *Id.* at 376 (citing 26 U.S.C. § 104(a) (1988)).

132. *Id.* (citing 7 U.S.C. § 2104(d)(8) (1994)).

133. *Id.* (citing 48 Fed. Reg. 7,010-11 (1983)).

134. *Id.* (noting that all three provisions expressly provide that "personal injury awards are not to be treated as income").

135. *Id.* at 377.

136. *Id.* at 379.

137. *Id.* at 374.

138. *Id.* at 375.

dence of legislative intent to include such awards.[139] In effect, he allowed congressional silence to trump text, common usage and similar schemes, which is an unworkable proposition for a textualist faced with plain text. He then rejected clear congressional mandate by finding that although Congress used the word income with knowledge of its administrative interpretation, that interpretation was not frozen in place.[140]

Second, Justice Scalia committed another textualist sin in *Lukhard* by relying on postenactment statements to support the interpretation he favored.[141] He stated, "[o]lder documents *demonstrating* the existence of a longstanding interpretation would of course be better evidence than are recent documents *asserting* its existence. But in the absence of any contrary evidence, the latter form of evidence is certainly sufficient to support a conclusion that the interpretation existed."[142] This conclusion is the antithesis of his position in *Pittston Coal Group v. Sebben*,[143] where he dispensed with postenactment statements by writing, "[s]ince such statements cannot possibly have informed the vote of the legislators who earlier enacted the law, there is no more basis for considering them than there is to conduct postenactment polls of the original legislators."[144] Coincidentally, in *Sebben*, Justice Scalia rejected interim Department of Labor regulations implementing The Black Lung Benefits Reform Act of 1977,[145] by opting for the dictionary definition of the word "criteria" used in the statute, instead of the interpretation "medical criteria" for which the legislative history showed clear congressional mandate.[146]

More importantly, Justice Scalia appears poised to use *his* textualism to undermine some civil rights statutory precedents. For example, in *Johnson v. Transportation Agency*,[147] Justice Scalia called on the Court to reconsider and overrule *United Steelworkers v. Weber*.[148] The *Weber* Court had determined that Title VII did not forbid voluntary affirmative action plans.[149] At issue in *Weber* were sections

139. *Id.* at 376.
140. *Id.* at 379.
141. *Id.* at 378.
142. *Id.* at 378 n.4.
143. 488 U.S. 105 (1988).
144. *Id.* at 118-19.
145. 30 U.S.C. §§ 901-945 (1988).
146. *Sebben*, 488 U.S. at 113-15.
147. 480 U.S. 616 (1987).
148. 443 U.S. 193 (1979).
149. *Id.* at 203-04 (quoting H.R. REP. NO. 914, 88th Cong., 1st Sess., pt. 1, at 18 (1963)). In *Weber*, the Court stated that: "[g]iven this legislative history, we

703(a) and (d) of Title VII,[150] which provide that it shall be an unlawful employment practice for an employer or union to discriminate against "any individual" because of his race.[151] Urging the rejection of *Weber*, Justice Scalia argued that the language of Title VII is unambiguous in its protection of any individual, black or white.[152] Justice Scalia interpreted the text of the statute as outlining a color-blind and gender-blind scheme.[153] Further, he argued that overturning *Weber* would not violate principles supporting deference to statutory precedents.[154]

In *Johnson*, Justice Scalia chided the *Weber* Court for upholding a negotiated affirmative action plan between a company and union designed to remedy the exclusion of blacks caused by craft unionism, arguing that the Court's interpretation was grounded in naivete.[155] He accused the Court of relying on "intangible guides" such as the statute's spirit and legislative history to reach a result at odds with "plain" text.[156] Justice Scalia added, that "rudimentary principles of political science" rebuffed the Court's premise that congressional inaction supported its interpretation.[157]

Justice Scalia's construction does not tell the whole story. Although the words of sections 703(a) and (d) appear to be clear, a literal application can lead to absurd results. The *Weber* Court's reliance on statutory structure (context) and legislative history to support a conclusion that voluntary affirmative action plans are permitted was not simply judicial substitution of judgment for that of Congress. Rather, the Court's use of legislative history and context to circumvent text parallels Justice Scalia's model for plain text that produces absurd results when literally applied.

That *Weber* can survive textualist scrutiny is easily demonstrated by utilizing Justice Scalia's textualist format outlined in *Green.*

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cannot agree with respondent that Congress intended to prohibit the private sector from taking effective steps to accomplish the goal that Congress [desired]." *Id.*

150. 42 U.S.C. § 2000e-2(a), 2(d) (1988).

151. *Id.*

152. Johnson v. Transporation Agency, 480 U.S. 616, 669-77 (1987) (Scalia, J., dissenting). The Court had previously held that blacks and whites are afforded Title VII's protections. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 n.8 (1976) ("Title VII tolerates *no* racial discrimination, subtle or otherwise.").

153. *Johnson*, 480 U.S. at 670 (Scalia, J., dissenting).

154. *See id.* at 672-73 (Scalia, J., dissenting) (stating that "stare decisis ought not to save *Weber*" because *Weber* has provided "little guidance" as to Title VII interpretation).

155. *See id.* at 673-74 (Scalia, J., dissenting) (stating that *Weber* decision is "rooted so firmly in naivete" that it must be incorrect).

156. *Id.* at 670 (Scalia, J., dissenting).

157. *Id.* at 671-72 (Scalia, J., dissenting).

Under the *Green* approach, a court is allowed to consult legislative history to confirm that the statute does *not* mean what it says.[158] A review of the legislative history in *Weber* would reveal that the statute was enacted to remedy the plight of African-Americans in the workplace and not as a guarantee of job opportunities for whites.[159] Having confirmed that the text could not mean what it says, that is, that the interest of whites is first and foremost or the only interest to consider, the Court is free to utilize the rule that when literal interpretation of "plain" language would lead to absurd or harmful results, such language will not be given effect.[160] Such is the case in *Weber*, where, if Justice Scalia's interpretation is adopted, a statute designed to protect a particular group would serve as an instrument to deny the same group employment opportunities.[161]

Unfortunately, the defects in a philosophy that turns its back on plain text are apparent no matter how laudable its goals. Whether parleyed under the guise of textualism, or purposes and goals interpretation, text loses pre-eminence and subordinate communications dominate. This is not necessarily bad because the legislature may be presumed not to have intended an absurdity. However, if the issue is one that the legislature had not foreseen, the potential for judicial abuse begins to emerge.

IV. THEORIES, LEGISLATIVE HISTORY AND JUDICIAL MANIPULATION

Long before the phrase "new textualism" was coined, theories have attempted to exorcise judges' personal philosophies and biases from the interpretive process. Ironically, theories tend not to focus on the holder of the bias, but rather on the tools being used and legal limitations on their use. As such, theories do not regulate judges, they are only interpretive tools. Manipulation, therefore, is limited only to the extent that judges lack creativity in utilizing their arsenal of tools.

A. *Formalism, Textualism and Legislative History*

The new textualism associated with Justice Scalia can be re-

158. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring).

159. United Steelworkers v. Weber, 443 U.S. 193, 202-03 (1979). The *Weber* Court opined that "it was clear to Congress that '[t]he crux of the problem [was] to open employment opportunities for negroes.' " *Id.* at 203 (quoting 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey)).

160. Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 403 (1950).

161. *Weber*, 443 U.S. at 202-03.

garded as a type of formalist thought with a twist. Early formalism as a legal theory employed a deductive methodology whereby specific results could be deduced from abstract theories.[162] Applied in this deductive fashion, formalists leave no room for consideration of individual or unique factors or underlying policies.[163] Formalists argue that the law must always be applied in a logical, systematic way without involving the judge's personal philosophies or experience.[164]

Formalism emerged from legal formalism as a theory of statutory construction.[165] Modern formalists argue that consulting legislative history in interpreting statutes is inconsistent with the constitutional structure of the legislative process.[166] In support of this argument, formalists contend that reliance on legislative history is equivalent to a legislative veto and therefore invalid because it creates legislation by avoiding the constitutional requirements of

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162. Peter N. Swisher, *Judicial Rationales in Insurance Law: Dusting Off the Formal for the Function*, 52 OHIO ST. L.J. 1037 (1991). This conclusion was based on the belief that "a legal system is a collection of laws emanating from a sovereign power and such laws, regardless of their social or moral consequence, are still valid if enacted in due form." *Id.* at 1039 n.6.

163. Joseph W. Singer, *Legal Realism Now*, 76 S. CAL. L. REV. 465 (1988) (review essay) (exploring how current theorists accept legal realism and how classical formalism creeps back into legal discourse).

164. Swisher, *supra* note 162, at 1040; *see also* David Lyons, *Legal Formalism and Instrumentalism — A Pathological Study*, 66 CORNELL L. REV. 949, 952 (1981) ("[S]ound legal decisions can be justified as the conclusions of valid deductive syllogisms.").

165. Several other statutory interpretation theories are also traceable to early formalist legal theory. Intentionalism and Imaginative Reconstruction are examples. As a principal theory of statutory interpretation, intentionalism was first employed in the context of constitutional interpretation. Intentionalism is premised on the assumption of legislative supremacy, a belief that goes back to the Constitution's Separation of Powers doctrine, which does not allow courts to displace the legislature. *See* Daniel B. Rodriguez, *The Substance of the New Legal Process*, 77 S. CAL. L. REV. 919, 929-30 (1989) (review essay) (finding that both textualism and intentionalism are built on core assumption of legislative supremacy). When interpreting statutes, intentionalists consult legislative history to discern the purpose of the statute rather than the intent of framers. *Id.*

Imaginative reconstruction, a strict form of intentionalism, proposes that "the judge should try to put himself in the shoes of the enacting legislators and figure out how they would have wanted the statute applied to the case before him." *See* POSNER, *supra* note 27, at 286-87. Unlike strict formalism, imaginative reconstruction allows a judge to make policy choices when it is unclear whether the statute applies. *Id.* Like formalism, however, this theory suggests that when interpreting a statute, the judiciary should not exceed its powers. *See id.* (stating that when making policy choices, the court must be guided, to the extent known, by what would seem reasonable to legislators rather than what may seem reasonable to the court).

166. For a further discussion of formalists arguments against the use of legislative history in statutory interpretation, see Eskridge, *supra* note 2, at 649.

bicameralism and presentment.[167]

Further, formalists argue that such reliance creates "strong incentives for manipulating legislative history to achieve through the courts results not achievable during the enactment process."[168] In addition, the purpose behind the Presentment Clause is frustrated if a statute is ultimately given meaning the President might not have agreed to, because "[t]he President passes upon legislation, and as a practical matter does so without the benefit of legislative history."[169] Moreover, because formalists believe that judges dictate the law which the sovereign commands, no room is left for judicial subjectivity in cases of statutory interpretation.[170] For formalists, "[t]he law provides sufficient basis for deciding any case that arises. There are no 'gaps' within the law, and there is but one sound legal decision for each case. The law is complete and univocal."[171]

Although the new textualists follow old formalist traditions of strict separation of powers and rely on "objective data" instead of legislative history,[172] it is argued that they part ways with old formalists when assessing the role of congressional intent in interpreting text.[173] Further, it is proposed that the new textualists bring more flexibility to the plain meaning rule, broaden traditional canons of construction and provide Congress with clearer interpretive guidance while restraining judges from abusive interpretations.[174]

The new textualism associated with Justice Scalia varies slightly from old formalist thought in that the former considers the role of congressional intent in interpreting certain texts. The two models,

167. *See* Eskridge, *supra* note 2, at 649.

168. *See* Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 376 ("The most compelling and widely discussed concern about the use of legislative history is its potential for manipulation.").

169. *Id.* For a further discussion of Starr's theory and reservations about legislative history, see *Of Forests and Trees: Structuralism in the Interpretation of Statutes*, 56 GEO. WASH. L. REV. 703 (1988) (discussing present-day judicial tendency to resort to structuralism as interpretive methodology).

170. For a further explanation of the tenets of formalism, see Swisher, *supra* note 162 and accompanying text.

171. *See* Lyons, *supra* note 164, at 950.

172. *See* Thomas W. Merrill, *Chief Justice Rehnquist, Pluralist Theory, and the Interpretation of Statutes*, 25 RUTGERS L.J. 621, 659-60 (1994) (observing that Justice Scalia avoids legislative history in order to determine objective meaning of statute versus subjective intentions of legislators).

173. *Id.*

174. *See* Eskridge, *supra* note 2, at 656-67 (noting that textualist approach to statutory interpretation limits opportunity for judicial lawmaking). Eskridge further explains three ways in which Justice Scalia's textualism has manifested itself in recent Supreme Court decisions: 1) revival and greater adherence to the plain meaning rule; 2) use of more structured, textual arguments in statutory interpretation; and 3) use of the traditional canons of statutory interpretation. *Id.*

however, share the same theoretical roots and desire to shun legislative history. The strong common thread running between the two theories is adherence to the separation of powers doctrine. A careful reading of Justice Scalia's dissent in *Morrison* illustrates this similarity. Justice Scalia's contention that judges are constitutionally out of bounds when they search through and rely on legislative history has been refuted.[175] Further, there is no proof that policymaking abuses are deterred by Justice Scalia's separation of powers model. In addition, Justice Scalia's methodology for determining what is purely executive, as articulated in the *Morrison* decision, is not entirely persuasive.[176]

A deeper concern is whether Justice Scalia is advocating a separation of powers theory as rationale for his analysis in particular cases. Because there is no consistency in application, doubts surface about separation of powers precepts as the driving force for his textualist construction. It could be that Justice Scalia is seeking a more fundamental change in the way we look at federalism, which, incidentally, coincides with textualist construction. That is, all powers to the executive (those who appoint Justices to the Court), more powers to the Court (those who are bright enough to divine and make policy), and less deference to Congress (those who are institutionally incapable of conveying intent).

One need only go to Justice Scalia's record to confirm that the separation of powers model has not deterred judicial abuse. In theory, Justice Scalia's approach may deter judicial abuse to a greater extent than an interpretive methodology that routinely considers legislative history or other extratextual materials. However, Justice Scalia evades framers' intent by using his own faculties and methods to impart meaning on text.[177] Unfortunately for Justice Scalia, deviations from true textual methodology are readily noticeable and the reader is soon apprised that something other than a principled philosophy is motivating the analysis.

Under an approach that routinely considers legislative history, support could generally be found for various alternative propositions because of the competing interests that participate in the leg-

175. *See* Eskridge, *supra* note 2, at 671-73 (stating that separation of powers principles do not command abandonment of legislative history).

176. *See* Ross, *supra* note 12, at 304-05 (stating that strong argument against Justice Scalia's classification of prosecutorial function as purely executive can be made based on express provisions of Constitution, as well as substantial historical evidence).

177. Patterson v. McLean Credit Union, 491 U.S. 164, 176-77 (1989) (adopting strict construction of 42 U.S.C. § 1981 (Supp. V 1993)).

islative process. Reliance on unreliable enactment data made the interpretive process somewhat unprincipled.[178] Justice Scalia's application of textualism is equally unprincipled, however, because his interpretation is limited only by the range of his intellect and common sense. Although intellect and common sense may be valuable attributes in the field of statutory interpretation, they are no substitute for the words of the statute as contextualized by the legislative history. Fidelity to a broad plain-meaning approach that expands and circumvents approved text and allows substitution of personal context is also unreliable.

B. *The Resilience of Legislative History*

The theoretical attack on legislative history has had only a negligible influence on judges and an even smaller impact on Congress.[179] Judges continue to use legislative history routinely and Congress clearly contemplates its continued use. In fact, Congress is even setting aside *exclusive* legislative history for some statutory provisions.[180] The Executive also considers and uses legislative history[181] and has increasingly moved into the business of making its

178. *See* William N. Eskridge, Jr., *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 551 (1992) (observing that extensive use of legislative history in 1980s resulted in intense judicial attacks).

179. *Id.* at 552-53.

180. *See* Civil Rights Act of 1991, 42 U.S.C. § 1981 (Supp. III 1991) (Note on Legislative History for 1991 Amendment). Section 105(b) of Pub. L. 102-166 provides:

> No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove-Business necessity/cumulation/alternative business practice.

Id. The memorandum referred to states, in relevant part:

> The final compromise on S. 1745 agreed to by several Senate sponsors, including Senators Danforth, Kennedy, and Dole, and the Administration states that with respect to Wards Cove-Business necessity/cumulation/alternative business practice — the exclusive legislative history is as follows: The terms "business necessity" and "job related" are intended to reflect the concepts enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

137 CONG. REC. S15,276 (daily ed. Oct. 25, 1991).

181. *See, e.g.*, President's Signing Statement for the Civil Rights Act of 1991 (on file with author) (recognizing that President Bush took position that memorandum inserted into record of Civil Rights Act of 1991 by Senator Dole provided correct interpretation of that statute's position on affirmative action). Senator Dole's memo essentially said that the 1991 Act did not resolve the issue of whether affirmative action programs are legal. *See* 137 CONG. REC. S15,477-78 (daily ed. Oct. 30, 1991).

own.[182] Over time, legislative history has maintained its role and importance despite longstanding claims of constitutional infirmity[183] and quips by foreign critics.[184]

Judge Wald observed that the texts of statutes are increasingly complex, thereby making the job of interpretation an ever-challenging one.[185] She added that this responsibility requires context,[186] in addition to principled creativity, common sense and an open mind.[187] Her observation that the plain text cases typically do not make it to court is a telling indictment for the textualist who regularly concludes that text is plain.[188] Justice Breyer's conclusion that there is little conflict in the legislative history of most statutes that courts interpret further dilutes the textualists' desire to banish legislative history.[189]

Because of multiple competing forces, sometimes unspoken, that affect legislators' choices, there is good reason for caution when a judge sets out to discover collective legislative intent.[190] This reality was factored into earlier theories of statutory construction.[191] However, theories of statutory construction cannot factor

182. William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699, 704-05 (1991) (noting that under President Reagan, Attorney General Meese elevated stature of presidential signing statements to legislative history by securing their inclusion in United States Code Congressional and Administrative News (U.S.C.C.A.N.). These statements were then used by President Reagan to advance his personal agenda for particular statutes).

183. For a further discussion of the role and importance of legislative history, see Starr, *supra* note 168, at 378.

184. J. A. Corry, *The Use of Legislative History in the Interpretation of Statutes*, 32 CANADIAN B. REV. 624, 636 (1954) ("The frequent reliance of the federal courts in the United States on legislative history has prompted the jibe that the court will not look at the act unless the legislative history is obscure!").

185. *See* Wald, *supra* note 3, at 304-05.

186. *Id.* at 302.

187. *Id.* at 303.

188. *See* T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 23 (1988) ("Contextual analysis is necessary as a matter of semantics (words have no 'plain meaning'; meaning depends on context and usage.).").

189. Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 862 (1992). Justice Breyer then stated the obvious, i.e., if the legislative history presents serious conflicts or is vague, do not use it. *Id.*

190. *See id.* at 864-67 (noting that although legislative intent is sometimes difficult to ascertain, it is judicial tool that can be justified, at least in part, by its ability to help judges interpret statutes). I agree with Justice Breyer that there is such a thing as legislative intent although, at times, it may be difficult to identify.

191. In the late nineteenth century, legal realism emerged in direct opposition to formalism. The realist did not view the law as being deduced from a higher source or a timeless absolute, but rather as a consequence of social desires and purposes. *See* GARY J. AICHELE, LEGAL REALISM AND TWENTIETH-CENTURY AMERICAN JURISPRUDENCE 16-21 (1990) (noting Holmes' emphasis upon historical knowledge and his distaste for proposition that only force at work in development of law is

out the judge's personal value system which is the birthplace of theory manipulation.[192] The preceding analysis of Justice Scalia's textualism shows that despite its theoretic prophylactic attributes, susceptibility to manipulation remains an overriding concern when discerning the meaning of legislation. As a result, the judge's decision seems tailored to achieving social and political consequences commanded by his or her predispositions or *current* value system.[193]

Concededly, legislative history has been abused in the past and remains subject to manipulation in the future. However, a convincing case for its total exclusion or abandonment is yet to be made.[194] Significant evidence of abuse under the rubric of textualism and irreconcilable conflicts support a conclusion that Justice Scalia is not offering a better tool of construction. A more logical explanation for his departure from the traditional model seems to be the flexibility that advocating textualism gives in making law and shaping policy. To the extent that a new textualism exists, contextual rules are as important as focusing on text because of the interpretive responsibility a judge assumes when construing the language of a statute. To paraphrase one commentator on this subject, judges should not be free to read the notes of a song written by Congress without listening to the music.[195]

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logic). Applied to statutory interpretation, the realist believes that a collective legislative intent is undiscoverable and legislative history is useless because one cannot tell why one draft was chosen over another. *See* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870, 873 (1930). Historicists have similar beliefs. *See* Eskridge, *supra* note 2, at 644 ("To reconstruct a past event (especially something as difficult as a collective state of mind) involves selection of evidence, arrangement of the evidence, and interpretation of the evidence.").

192. Realists reject the use of canons in statutory construction because of their susceptibility to manipulation and instead suggest that statutes be interpreted in light of their purpose. *See* Llewellyn, *supra* note 160, at 400-03. Further, in order to determine the statute's purpose, the judge should be given leeway so as to achieve a result that is beneficial to society. *See* Radin, *supra* note 191, at 884 ("What is desirable will be what is just, what is proper, what satisfies the social emotions of the judge, what fits into the ideal scheme of society which he entertains.").

193. Historicists believe that our own interpretations, views and predispositions are influenced by the present. *See* Eskridge, *supra* note 2, at 644. Historicism, grounded in principles of hermeneutics and modern historiography, recognize that the interpreter chooses the interpretation most consistent with her own value system, or the interpretation that portrays the past more complexly. *Id.* Under principles of hermeneutics, interpretation involves an interaction between the text and the interpreter; therefore, past intent cannot be reconstructed and the views of the interpreter must come into play. William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 619-21 (1990).

194. *See* Breyer, *supra* note 189, at 869 (arguing that judges' misuse of legislative history is not frequent enough to warrant completely ignoring it).

195. *See* Llewellyn, *supra* note 160, at 399 ("But a court must strive to make sense *as a whole* out of our law *as a whole.* It must . . . take the music of any statute

C. *The Human Factor*

Theories of statutory interpretation are seemingly advanced on the premise that judges are static human beings who desire a *principled format* for construing text. It could be, however, that judges are more interested in a *convincing result* that revolves around their sense of rightness, rather than the tools they employ for reaching the desired answer. This may partly explain why, despite the extensive arguments made against the consideration and reliance on legislative history, its use remains routine. The integrity that non-use brings to the interpretive process is apparently outweighed by the conviction that its use is correct and beneficial. And, from a constitutional standpoint, Congress clearly contemplates consideration and use of pre-Act materials.

A shift in focus from theoretical rules that may seem unfamiliar or incorrect to judges to an evolutionary reality of what the judge is or has become through education, training and experience may adjust our expectations of judges and the characterization of their interpretive product. Failure of theory to control interpretation is partly traceable to the constricted theme of viewing the Court as a single independent entity. It could be that such cabining is necessary to create the lab conditions for a theory to operate. However, such confinement severely constricts the definition of what is *principled* to an almost utopian magnitude, thereby guaranteeing failure in theory implementation in almost every instance.

Although constitutionally separated from the Executive Branch and Congress, a functional analysis of the Court's construction of a statute should include these two branches. In addition to reading the text of a statute, it may also be necessary to consult the legislative history and inquire about the President's views in order to understand a law which has its birthplace in and is infected by the political process. To exclude such influences can only create false expectations and force conclusions that decisions are irrational, irreconcilable or unprincipled.

If one accepted judicial conviction of rightness over theory as an overarching force and broadened the definition of *principled* to include the gross product of forces that affect interpretation, then the process of construction becomes a more acceptable one. Thus, a liberal or conservative dominated construction does not have to be labeled judicial activism because its origins cannot be traced to

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as written by the legislature; it must take the text of the play as written by the legislature.").

some respected theory. Rather, such interpretation may be treated as the most principled one the court is capable of at that time. But the matter does not have to end there. Congress is free to put its imprimatur on or disagree with the interpretation, through acquiescence or amendments, thereby buttressing its rationality or destroying its legal value.[196]

Debate between the Justices motivated by rightness (albeit couched in interpretive rules), as opposed to an overriding theory, brings out the reasoned choices available. Although this process inevitably produces winners and losers, it does not compel a conclusion that the process or product is unprincipled. Even if dissenters are armed with persuasive theories of construction in support of their positions, their loss is not irremediable or unnoticed. While immediate support may not be found in Congress or the President, the constant cycle of that statute's meaning remains in motion. Further, the dissenters or majority may adjust their positions as they evolve as humans.

Over the years, Supreme Court Justices have been labeled as, among other things, liberals, moderates and conservatives. The labels reflect judicial philosophy as evidenced by the Justices' opinions. However, judicial philosophy, fashioned from general social, political and economic philosophies, traces its roots to places very distant from the Supreme Court. And, to the extent a Justice is controlled by precast views, the likelihood of truly objective decision-making is reduced to an illusion.

Justice Scalia is labeled a conservative. This label associates him on a general level with the social, political and economic agenda of conservatives. As such, he is expected to protect conservative ideals. On a judicial level, the label is used to predict his position on such issues as the powers of the national government versus the states, equal protection clause, affirmative action and the rights of criminal defendants.[197]

196. Justice Scalia recognizes that congressional inaction is not proof that the Court's interpretation is right because of the numerous reasons why Congress may fail to act. *See* Johnson v. Transportation Agency, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting) ("The majority's response to this criticism of *Weber* . . . asserts that, since 'Congress has not amended the statute to reject our construction, . . . we . . . may assume that our interpretation was correct.' This assumption, which frequently haunts our opinions, should be put to rest."). However, this reality cuts both ways and Justice Scalia's incorrect interpretations would also benefit from congressional inaction.

197. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 357-59 (1986) (noting that Justices are labeled liberal or conservative depending on their personal theories of constitutional interpretation and their standards in judging official acts). Conservative interpretation is typically tied to convictions about the Framers' intent

For Justice Scalia, as for most Justices, the labels typically withstand the most searching scrutiny.[198] Although he is not electorally accountable, partisan political and other societal forces will likely play a role in his interpretation of statutes.[199] Justice Scalia's personal convictions are tempered, however, by built-in accountability

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and the views associated with political conservatives, while liberal interpretation is not. *Id.*; Frank I. Michelman, *Super Liberal: Romance, Community, and Tradition in William J. Brennan, Jr.'s Constitutional Thought*, 77 VA. L. REV. 1261, 1263 n.10 (1991) (noting that "what is primarily distinctive in liberal constitutional thought is the prominence and general priority it accords to individual civil and political rights against the state," and concluding that Justice Brennan is liberal by any definition).

198. The scholarly debates have endured about how Justices made their decisions in particular cases. One often-used beginning point for analysis has always been the Supreme Court appointments process. There is ample evidence that Presidents screen and nominate candidates that share their conservative or liberal philosophy. *See generally* LAWRENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT 74 (1985) (noting that Presidents attempt to shape Supreme Court by predicting how particular candidates will vote in future based on candidate's past behavior); Donald E. Lively, *The Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities*, 59 S. CAL. L. REV. 551 (1986) (outlining significance of President's ideology in nomination process and Senate's necessary response).

Although there appears to be agreement that personal and professional qualifications (training, experience, temperament, intellectual capacity, morality) ought to be key factors in selection, inquires about a nominee's policy values abound because selection is often tied to partisan politics. *See* Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1169 n.9 (1988) (noting that President Eisenhower appointed Justice Brennan for political symbolism); Stephen Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185, 1189 (1988) (noting that after *Dred Scott* decision, nominees had to prove their antislavery sentiments); Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1148-56 (1988) (noting that parochialism and partisanship shaped early appointments with Justice Brandeis being opposed for his social and economic views, and confirmed strictly along party lines, and Judge Carswell's nomination being defeated partly because of his racial bias).

Although some Justices have surprised or even disappointed the President that selected them, Justices have typically met the substantive expectations of the selecting President. *See* Lively, *supra*, at 556-62 (identifying numerous Presidents who left indelible marks on the American legal landscape through ideological screening that included consideration of friendship, age, race, geography, religion, party affiliation, views on affirmative action, family values, human life and judicial restraint). *But see* HARRY H. WELLINGTON, INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION 150 (1990) (observing that it is difficult to forecast Supreme Court nominee's perspectives); Orrin G. Hatch, *Save The Court From What?*, 99 HARV. L. REV. 1347, 1356-58 (1986) (noting that judicial responsibility requires that judges lay aside their personal views and be objective, and that there is evidence which demonstrates that Justices contravene or fail to meet expectations of appointing Presidents).

199. WELLINGTON, *supra* note 198, at 59-60 (stating that Justices are capable of detached perspective because they are not electorally accountable or subject to interest group pressures, but originalism does not eliminate judges' personal preferences); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 784 (1983) (judges, like legislators, are political actors motivated by personal values and self-interest).

considerations that help shape long-term judicial legitimacy.[200]

D. *Textualist Construction with Liberal Results*

To help overcome the conservative majoritarian critique, supporters of textualism point to instances when its application has produced liberal results.[201] At its most basic level, the suggestion is that if Justice Scalia can come out on the same side as liberal Justices and even reject the construction of other conservative Justices, this further evidences the objectivity of his methodology. Such an analysis is of course much too superficial.

First, Justice Scalia's badge as a conservative does not mean or require that he hold conservative views or reach conservative results in every case.[202] To be labeled a conservative does not mean to hold *exclusively* conservative views. Second, Justice Scalia's agreement with opinions written by liberals does not automatically mean that the results are liberal. Understandably, conservative Justices sometimes reach liberal results and vice versa. Third, not all conservative Justices share Justice Scalia's brand of construction, thereby making disagreement with fellow conservatives less telling. Further, a close examination of the cases cited for "deployment of textualism with liberal results" leaves interpretive doubt as to whether textualism was even deployed, much less whether the results were liberal or conservative.

1. *Family Law*

Rose v. Rose[203] is a family law case cited for the liberal results proposition. The case deals with a veteran's obligation to pay child support from benefits received from the Veterans' Administration. The backdrop of this case is a state court proceeding where the veteran (husband) was ordered to pay child support out of veterans' benefits, his exclusive source of income.[204] The court order was pitted against a variety of federal statutes lodging in the Administrator of Veterans' Affairs' exclusive authority to apportion disabil-

200. Realists and critical legal scholars have recognized that although sociopolitical forces instead of legal reasoning may drive a particular decision, factors such as common sense, legal culture and custom protect against arbitrariness. *See* Joseph W. Singer, *The Player and the Cards; Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984) (outlining why "traditional legal theory" has failed as result of its determinative, objective and neutral decision procedures).

201. *See* Eskridge, *supra* note 2, at 669 n.193; Mashaw, *supra* note 2, at 835.

202. *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 187-88 (1985) (noting that label does not require that one hold *all* positions of group).

203. 481 U.S. 619 (1987).

204. *Id.* at 622-23.

ity benefits on behalf of children,[205] and provisions protecting the veteran's benefits from attachment, levy or seizure.[206]

Writing for the Court, Justice Marshall concluded that use of service-connected disability income under the state statute to compute child support did not conflict with and was not pre-empted by the federal regulatory scheme.[207] Justice Scalia concurred in the judgment, finding that none of the federal statutes relied on by the veteran prohibited a state court from using the veteran's benefits in computing child support payments and enforcing an award through civil contempt proceedings.[208] Justice Scalia's concurrence in the judgement does nothing to legitimize his textualism

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205. *See* 38 U.S.C. § 511(a) (Supp. V. 1993). Section 511(a) provides:
[t]he Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

Id.; *see also* 38 U.S.C. § 5307(a)(2) (Supp. V 1993). Section 5307 provides:
(a) All or any part of the compensation, pension, or emergency officers' retirement pay payable on account of any veteran may—

. . . .

(2) if the veteran is not living with the veteran's spouse, or if the veteran's children are not in the custody of the veteran, be apportioned as may be prescribed by the Secretary.

Id.

206. *See* 38 U.S.C. § 5301(a) (Supp. V 1993). Section 5301 provides:
(a) Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.

Id.; *see also* 42 U.S.C. § 659 (1988). Section 659 provides:
Notwithstanding any other provision of law (including section 407 of this title), effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

Id.

207. Rose v. Rose, 481 U.S. 619, 636 (1986) (noting that "neither the Veterans' Benefits provisions of Title 38 nor the garnishment provisions of the Child Support Enforcement Act of Title 42 indicate unequivocally that a veteran's disability benefits are provided solely for that veteran's support").

208. *Id.* at 640-44 (Scalia, J., concurring in part and judgment).

generally. This alliance in result is not evidence that Justice Scalia was swept up in a textualist tide that landed him on the same beach with liberals. In the first instance, there is no evidence in the conviction that parents, particularly fathers, should pay child support is a uniquely liberal or conservative view. Americans of all stripes and philosophies likely see this as a father's moral and legal obligation. Therefore, a conservative Justice's agreement that a veteran must use his benefits to support his children is rather unsurprising when the law can fairly be construed to require this under *some* circumstances.[209] The fact that Justice Scalia has nine children may have also been a key factor in shaping his position on this issue.

Justice Scalia's concurrence in *Rose* could have partly legitimized his textualist philosophy if its application resulted in social engineering of the type Justice Marshall's construction facilitated.[210] However, Justice Scalia took pains to point out that his conclusion stemmed from being presented with and answering the limited question of whether a state court may base an award of child support on veteran's benefits.[211] Although Justice Scalia agreed with Justice Marshall's conclusion, application of textualism may arguably command a different result.

Although Justice Scalia agreed that a state court may act as the Tennessee court did in *Rose*, he suggested that had the Administrator of Veterans' Affairs exercised his authority to apportion the veteran's benefits, a state court would have been disempowered to make a conflicting award.[212] Further, another section of the statute specifically prohibits the attachment, levy or seizure of veterans' benefits, thereby explicitly limiting State courts' powers to issue orders of support.[213] Despite this express limitation (plain text), Justice Scalia concluded that a state court may award support and

209. *Id.* at 626-29. The plain language of § 5307(a)(2) and implementing regulations clearly contemplates the use of benefits for child support in appropriate cases. For a further discussion of 38 U.S.C. § 5307(a)(2), see *supra* note 205.

210. *Rose*, 481 U.S. at 626-28. Justice Marshall's decision was apparently partly driven by convictions that state courts should have wide latitude in the family law area even if arguably preempted, provided they did not frustrate federal law. *Id.*

211. *Id.* at 640 (Scalia, J., concurring in part and judgment) (noting that he could not join much of court's analysis because in his view, it erroneously suggested that certain state actions not before court in this case were permissible because they did not frustrate purposes of federal provisions).

212. *Id.* at 641 (Scalia, J., concurring in part and judgment) (noting that it would be "extraordinary to hold that a federal officer's authorized allocation of federally granted funds between two claimants could be overridden by a state official").

213. *Id.* at 642-43 (Scalia, J., concurring in part and judgment) (citing 38 U.S.C. § 3101(a) (1988)).

enforce it through civil contempt. As an interpretive matter, it seems odd to conclude that a state court cannot touch a veteran's benefits as an original matter by legal or equitable process, yet conclude that the same court may indirectly do the prohibited act by enforcing an award of the same benefits by civil contempt proceedings. Justice Scalia's opinion is therefore not an example of consistent application of textualist rules leading to liberal results.

2. *Civil Rights (Pregnancy Discrimination)*

It has been suggested that textualism was deployed in *California Federal Savings & Loan Ass'n v. Guerra*,[214] resulting in the liberal conclusion that a state law protecting the jobs of employees out on pregnancy leave was not preempted by provisions of Title VII which prohibit discrimination on the basis of sex. However, a close analysis shows that textualism was only partially and awkwardly deployed and Justice Scalia did not fully join the liberals. Writing for the Court, Justice Marshall concluded that a state law providing special job protections during pregnancy leave was consistent with the purposes of Title VII generally (to achieve equality and remove barriers) and the specific requirements of the Pregnancy Discrimination Act (PDA).[215] Justice Marshall found that it was not impossible for employers to comply with the state law guaranteeing leave and reinstatement to only female employees and the federal laws prohibiting preferential treatment on the basis of sex.[216]

Justice Scalia took the position that the Court's broad interpretation that Title VII and the PDA permit such protection was unwarranted.[217] He argued that the Court's analysis should have been limited to interpreting the preemptive effect of section 708 of the PDA which preempts laws that "require or permit the doing of any Act which would be an unlawful employment practice."[218] Interpreting the California statute, Justice Scalia determined that the state law did not "remotely purport to require or permit any refusal to accord federally mandated equal treatment to others similarly situated."[219] This conclusion happens to be more a manipulation

214. 479 U.S. 272 (1986).

215. *Id.* at 274 (referring to Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1988)).

216. *See id.* at 280 (noting that Title VII does not preempt state law that guarantees pregnant women certain number of pregnancy disability leave days because this is neither unlawful under Title VII nor inconsistent with its purpose).

217. *Id.* (Scalia, J., concurring).

218. *Id.* at 295-96 (Scalia, J., concurring) (citing 42 U.S.C. § 2000e-7 (1988)).

219. *Id.* at 296 (Scalia, J., concurring).

of textualist focus than proper application of textualist theory. Instead of interpreting the anti-discrimination mandates of Title VII, which incidentally is the heart of the case, Justice Scalia limited his focus to preemption provisions. Such strategic focus allowed him to avoid an inevitably contrary conclusion mandated by textualism.

Specifically, Title VII prohibits discrimination on the basis of "race, color, religion, sex or national origin."[220] The PDA amending Title VII defines sex discrimination as including discrimination:

> because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions *shall be treated the same* for all employment related purposes, including receipt of fringe benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.[221]

California Federal, the employer in this case, had a disability policy that did not guarantee any employee a job upon return from disability related leave.[222]

The plain language of Title VII prohibits sex discrimination. This means either sex, male or female. Justice Scalia should have had no problem with this construction because he has been very

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220. *See* 42 U.S.C. § 2000e-2(a) (1988). Section 2000e-2(a) provides:

> It shall be an unlawful employment practice for an employer —
> (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

221. *See* 42 U.S.C. § 2000e(k) (1988) (emphasis added).

222. *Guerra*, 479 U.S. at 278. The employer's policy allowed all employees with three months of service to take unpaid leave for a variety of reasons, including disability and pregnancy. *Id.* However, the employer reserved the right to terminate any employee whose job was filled and no similar position was open at the time of return. *Id.* The California code made it unlawful for an employer to deny a woman pregnancy-related leave and guaranteed such leave for up to four months. *Id.* at 275-76. Men did not have similar guarantees for disability leave by the statute or under the employer's policy, and employers did not violate the statute by failing to grant men the same protection as provided for women. *Id.* at 275-76.

forceful in pointing out that the "race" provision in Title VII means black or white.[223] Further, the plain language of the PDA proscribes adverse treatment of women because of pregnancy and simultaneously requires equal treatment for pregnancy disability. In this case, the employer did not guarantee any employee a job upon return from disability leave. Hence, "same treatment" under the PDA would be nullified by a state law which required that the employer guarantee a job to employees of a particular gender returning from pregnancy (disability) leave. Effectuating the statute's plain meaning would therefore require preemption because it contravenes federal requirements.

It is precisely this plain-text problem that caused the majority to resort to legislative history in support of their conclusions. Turning to the PDA's legislative history and goals, Justice Marshall wrote: "[i]t is a 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.' "[224] The conclusion that textualism was deployed is further belied by Justice Marshall's citation to *Steelworkers v. Weber*,[225] as support for his "look to the spirit" construction. The bitter irony and reality is that *Weber* was also cited by Justice Brennan as authoritative support for his decision in *Johnson v. Transportation Agency*, where Justice Scalia wrote a passionate dissent.[226] In *Johnson*, Justice Brennan wrote that a promotion scheme that gave preference to female employees was not forbidden by Title VII.[227] In dissent, Justice Scalia argued that the plain language of Title VII (the same provision at issue in *California Federal*) commanded a different result. Specifically, Justice Scalia contended that the Court was interpreting the statute to compel rather than prohibit discrimination.[228] In view of the language of Title VII and the PDA, and considering the interpretive commands of textualism, including prior interpretations by Justice Scalia, the *California Federal* case clearly does not evidence deployment of textualism. The extent to which Justice Scalia's concurrence in the judgment is liberal is also limited by the narrow focus of his analysis.

223. Johnson v. Transportation Agency, 480 U.S. 616, 677 (1987) (Scalia, J., dissenting) (writing that "[a] statute designed to establish a color-blind and gender-blind workplace has thus been converted into a powerful engine of fascism and sexism, not merely *permitting* intentional race and sex-based discrimination, but often making it through operation of the legal system, practically compelled").

224. *See Guerra*, 479 U.S. at 284 (citations omitted).

225. 443 U.S. 193 (1979).

226. *See Johnson*, 480 U.S. at 677 (Scalia, J., dissenting).

227. *Id.* at 641-42.

228. *Id.* at 677 (Scalia, J., dissenting).

3. *Immigration Law*

Two immigration decisions are cited as further examples of Justice Scalia's deployment of textualism, resulting in endorsement of liberal interpretations.[229] In *Kungys v. United States*,[230] Justice Scalia wrote a plurality opinion which interpreted the Immigration and Nationality Act (INA)[231] as requiring a stringent Agency showing in denaturalization proceedings to establish concealment or misrepresentation of a *material* fact.[232] But Justice Scalia also refused to impose a materiality requirement under the Act for false testimony designed to obtain immigration or naturalization benefits.[233] The first conclusion is a liberal one; the second is not. In any event, his interpretation did not essentially involve the deployment of textualism to interpret the word "material." Rather, his liberal conclusion stemmed from offering an interpretation that comports with customary meaning and understanding for both liberal and conservative readers. Obviously, the touchstone of textualism is not determination of evidentiary or proof requirements. *Kungys* was not a case about what materiality *means*, but rather what materiality *requires*.

The second immigration case is *INS v. Cardoza-Fonseca*.[234] Here the Court ruled that applicants for asylum need only show a "well-founded" reason to fear persecution rather than a "clear probability" that they would be persecuted.[235] Justice Scalia's conclusion that "well-founded fear" is something less than "clear probability" is liberal. And textualism was deployed to preclude consideration of legislative history because Justice Scalia concluded that the statute's language is "plain." However, even with the concession that this case represents deployment of textualism to en-

229. Two additional decisions usually cited for this proposition are omitted from the analysis because there is little, if anything, uniquely liberal or conservative about their character. *See* Pittston Coal Group v. Sebben, 488 U.S. 105 (1988) (interpreting Black Lung Benefits Reform Act of 1977 and implementing regulations); United States v. Johnson, 481 U.S. 681 (1987) (interpreting Federal Tort Claims Act).

230. 485 U.S. 759 (1988).

231. Pub. L. No. 82-414, 66 Stat. 163 (1952), codified as amended in 8 U.S.C. § 1001 (1994).

232. *Kungys*, 485 U.S. at 772 (requiring that INS show by clear, unequivocal and convincing evidence that misrepresentation or concealment "had natural tendency to influence the decisions" of INS).

233. *Id.* at 782. This conclusion makes any false testimony, no matter how trivial, a basis for the INS to conclude that an applicant for benefits does not have good moral character.

234. 480 U.S. 421 (1987).

235. *Id.* at 449.

dorse a liberal result, it is not necessarily inconsistent with conservative judicial philosophy.

As noted earlier, conservative philosophy only denotes general thinking on core issues and may accommodate liberal or even contradictory views in particular cases. To say that Justice Scalia agreed with liberal thought in *Cardoza-Fonseca* is not to say that he is a liberal on all immigration matters. And to say that Justice Scalia deployed textualism in one immigration case is not to say he would deploy it in another. Therefore, *Cardoza-Fonseca* is not a litmus test for textualism or pure conservative thought. Fortunately, there are opportunities to observe Justice Scalia at work in the immigration area.

The Haitian refugee situation had drawn clear lines between liberal and conservative camps. Although the call for stringent or exclusionary application of immigration laws has at times been bipartisan,[236] support for Haitian refugees typically come from liberal quarters. The Bush Administration's policy of interdicting Haitians at sea and returning them to Haiti typifies conservative attitudes on this question. On the other side, liberals wanted Haitians picked up in international waters properly screened for asylum. This dichotomy played itself out in the 1992 presidential campaign with President Bush steering clear of the issue and then-Governor Clinton pledging to give Haitian refugees due process.[237] The issue had even been framed in terms of discriminatory opposition to dark-skinned immigrants by conservative policy-makers.[238] Pitched in such terms, immigration from Haiti pitted liberals against conservatives.

The Immigration and Nationality Act (INA)[239] provides in section 243(h)(1): "The Attorney General shall not deport or return

236. New immigrants may be seen by a cross section of the community in which they land and stay as a threat. They represent for some, competition for jobs and public resources, among other things. *See* Kevin R. Johnson, *Judicial Acquiescence to the Executive Branch's Pursuit of Foreign Policy and Domestic Agendas in Immigration Matters: The Case of the Haitian Asylum Seekers*, 7 GEO. IMMIGR. L.J. 1, 17-18, 24 (1993).

237. *See* Christopher Marquis, *Clinton Summary Repatriations to Haiti to End*, MIAMI HERALD, Nov. 13, 1992, at 24A. After being elected, President-elect Bill Clinton reaffirmed his pledge by stating that: "I think we should have a process in which these Haitians get a chance to make their case .... I think that ... sending them back to Haiti under the circumstances which have prevailed for the last year was an error." *Id.*

238. *See* Cheryl Little, *United States Haitian Policy: A History of Discrimination*, 10 N.Y.L. SCH. J. HUM. RTS. 269 (1993); *see also* Johnson, *supra* note 236, at 26 (stating that people of color from Haiti have been singled out or given special negative treatment by United States armed forces).

239. 8 U.S.C. § 1253(h)(1) (1994).

any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."[240] On May 23, 1992, President Bush signed Executive Order 12807[241] under which Haitians were intercepted in international waters and forcibly returned to Haiti without being screened to determine their refugee status.[242] This repatriation was contrary to immigration policy and representations made to the Supreme Court by the Solicitor General of the United States.[243]

In support of its no-screen repatriation policy, the government argued, among other things, that the above-quoted provision of the INA does not apply to refugees picked up in international waters and returned to their country.[244] To reach this conclusion, the government pointed to the structure of the INA, other INA provisions that purportedly contravene section 243(h)(1), INA provisions that limit coverage to aliens in the United States, and other immigration protocols (schemes) and their legislative histories.[245] The govern-

240. *Id.*

241. 57 Fed. Reg. 23,133-34 (1992).

242. Haitian Centers Council v. McNary, 969 F.2d 1350, 1353 (2d Cir.), *rev'd*, 113 S. Ct. 2549 (1992).

243. *See id.* at 1356-57. The repatriation of Haitian refugees has a long history in federal courts. Haitian and human rights advocates began a stream of litigation in 1991 in response to the United States interdiction and repatriation program for Haitians fleeing their country by sea. The flight of Haitians was traced directly to the overthrow of their democratically elected president. The Haitian Refugee Center located in Miami sued to enjoin the government's repatriation program and won a preliminary injunction. Haitian Refugee Ctr. v. Baker, 789 F. Supp. 1552 (S.D. Fla.), *rev'd*, 949 F.2d 1109 (11th Cir. 1991). Judge Atkins, who issued the injunction, is generally regarded as liberal. On appeal to the United States Court of Appeals for the Eleventh Circuit, the injunction was dissolved. Haitian Refugee Ctr. v. Baker, 949 F.2d 1109 (11th Cir. 1991). Judge Hatchett, the dissenting judge on appeal, is black. The Eleventh Circuit remanded the case but Judge Atkins again granted injunctive relief in favor of the Refugee Center and this was again appealed to the Eleventh Circuit. Haitian Refugee Ctr. v. Baker, 789 F. Supp. 1579 (S.D. Fla. 1991), *rev'd*, 953 F.2d 1498 (11th Cir.), *cert. denied*, 502 U.S. 1122 (1992). The appeals court vacated and remanded, finding that the government's actions were proper. Haitian Refugee Ctr. v. Baker, 953 F.2d 1498, 1515 (11th Cir.), *cert. denied*, 502 U.S. 1122 (1992). This decision was appealed to the Supreme Court but writ of certiorari was denied. Haitian Refugee Ctr. v. Baker, 953 F.2d 1498 (11th Cir.), *cert. denied*, 502 U.S. 1122 (1992).

During the certiorari proceedings, the Solicitor General represented to the Supreme Court that screened individuals would be brought to the United States to pursue asylum claims. *See McNary*, 969 F.2d at 1356-57. Once certiorari was denied in the *Baker* case, however, the government changed its position and began intercepting and returning Haitians without screening for asylum eligibility. *Id.* at 1357.

244. *See McNary*, 969 F.2d at 1358.

245. *Id.* at 1358-60.

ment did not rely on the statute's text.

Judge Pratt of the Second Circuit steered the government to the provision's language, however, although sometimes he eagerly confirmed textual mandates with legislative history.[246] To interpret the text, Judge Pratt turned to the statute's previous textual formulation which provided that: "[t]he Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion."[247] He interpreted the textual amendments as mandatory-prohibitive on the Attorney General by providing "shall not" thereby limiting the Attorney General's powers of repatriation by prohibiting deportations and "returns" and broadening alien coverage by excising "within the United States," thereby protecting "any alien."[248] In sum, the plain text of the statute says that the government *shall not deport or return any alien.* The statute also defines aliens as persons not citizens or nationals of the United States thereby placing Haitians squarely under the text's umbrella.[249]

Based on the textual changes, Congress specifically removed the geographic limitation on aliens thereby broadening coverage to aliens in any location. Extraterritorial waters would therefore fall within the literal ambit of the statute. Congress also *added* "return" after the word "deport," a legal term of art applied to individuals (aliens) in the United States.[250] The INA does not define "return" but the ordinary meaning of the word is generally well understood. In any event, Judge Pratt turned to the dictionary to ascertain or confirm the word's ordinary meaning, i.e., to put back in a former position.[251] Judge Pratt also attributed ordinary meaning to the President's use of the word "return" in his Executive Order which required the *return* of vessels and passengers to their country of origin.[252] Under Justice Scalia's textualist methodology, the analysis

246. *Id.* at 1359 (stating that Court's reading "gives full vitality to all portions of § 243(h), as actually written by Congress").

247. *Id.* at 1357.

248. *Id.* at 1357-58.

249. *Id.* at 1358. The definition found at 8 U.S.C. § 1101(a)(3) states: "The term 'alien' means any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (1994).

250. *See McNary,* 969 F.2d at 1360-61 (stating that inclusion of word "return," in its ordinary meaning, indicates that returning aliens from international waters is prohibited by the INA).

251. *See id.* at 1360.

252. *Id.* at 1361 (presuming that ordinary meaning is intended by President as well as Congress).

would stop here. The plain language would be given its ordinary meaning. Unless insistence on the plain meaning would lead to absurd results, Justice Scalia's textualism would not countenance consideration of statutory structure or parallel regulatory schemes.[253]

However, Judge Pratt went on to consider and reject the government's non-textual arguments on a variety of grounds. For example, the government argued that section 243(h)(1) was placed in the "deportation section" of the statute that applies to aliens in the United States.[254] He rejected this construction as elevating location or structure over plain text, and in any event noted that prior to the 1980 amendment, this section dealt only with deportation which logically explains the provision's location.[255] In addition, the government argued that another section of the INA prohibited the application of section 243(h)(1) in situations where the alien committed certain nonpolitical crimes prior to arrival "in the United States."[256] This interpretation was rejected because it required using one section of the statute providing for a criminal exception to trump the specific language of section 243(h)(1) by reading the "in the United States" requirement back into section 243(h)(1) after Congress purposefully took it out.[257]

Another interpretive guide the government used is the parallel refugee provision found in the 1951 Geneva Refugee Convention which provides that: "[n]o contracting state shall expel or return (refouler) a refugee"[258] under conditions similar to those set out in

253. Judge Pratt does not appear to be a textualist but begins his analysis with primary reliance on the text. Although he concluded that the language of § 243(h)(1) was plain, this was not conclusive. He expressed a willingness to "turn to other canons of construction [but] only to determine whether there is a 'clearly expressed legislative intention' contrary to that language, which would require us to question the virtually conclusive presumption that congress meant what it said." *Id.* at 1358. Judge Pratt noted, however, that Justice Scalia sees statutory construction differently. *Id.* (citing Union Bank v. Wolas, 502 U.S. 151, 163 (1991) (Scalia, J., concurring); INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)).

254. *Id.* at 1359.

255. *Id.* at 1359-60.

256. *See id.* at 1359.

257. *Id.* (indicating that not only does government's interpretation contravene congressional intent, but also is inconsistent with common sense).

258. *See id.* at 1361. The 1967 United Nations Protocol Relating to the Status of Refugees provides that: "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. (incorporated by United Nations Protocol Relating to Status of Refugees, Jan. 31, 1978 [1968], art. 31, 19 U.S.T. 1223, T.I.A.S. 6577). Section 2 of

section 243(h)(1). It was argued that the 1980 amendment to section 243(h)(1) simply brought it in conformity with Article 33 of the Convention which uses "return" only with respect to refugees within a country's territorial borders.[259] In support, the government relied on a dictionary definition of "refouler" as opposed to "return," legislative history in the form of a statement by one country's representative at the final reading of the draft Convention and the President's interpretation.[260]

This interpretation was rejected with plain text and coherence of structure analysis. Judge Pratt noted that construction principles used for statutes are also applicable to treaties, and the word "return" has the same ordinary meaning in either text.[261] Further, he argued that the definition of refugee under the protocol was the same as the INA's because it covered "any person outside [his or her] country of nationality."[262] In instances when the treaty parties wanted refugees to be defined in territorial terms, they so provided in the articles.[263] With respect to the government's dictionary definition of "refouler," to wit, "expel aliens," the judge proffered other definitions in dictionaries, including the government's, which defined the term as — "to repel or drive back."[264] In any event, the judge recognized the incoherence caused by the government's definition that transformed the text from "expel or return" to "expel or expel."[265] Finally, the negotiations' history of the Refugee Convention and the President's interpretation were rejected as weak guides of construction, partisan and self serving.[266]

President Bush's cousin, John M. Walker, Jr., dissented.[267] He concluded that the Haitian refugee representatives were barred

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Article 33 also has a "serious crime" provision similar to the one found in 243(h) of the INA. *Id.* at art. 33, § 2.

259. *See McNary*, 969 F.2d at 1361.

260. *See id.* at 1361-65.

261. *Id.* at 1361-62 (citing with approval Justice Scalia's concurrence in United States v. Stuart, 489 U.S. 353, 371 (1989) (Scalia, J., concurring)).

262. *Id.* at 1362.

263. *See id.*

264. *Id.* at 1363.

265. *Id.* (noting that word "expel" was necessary to clarify that Article applied to specific manner of "return" as well as other manners).

266. *Id.* at 1365-67. With respect to the government's reliance on legislative history to undermine the clear language of the convention, Judge Pratt responded with a quote from Justice Scalia's concurrence in United States v. Thompson, 504 U.S. 505 (1992) which characterized such reliance as "that last hope of lost interpretive causes, that St. Jude of the hagiology of statutory construction." *Id.* at 1365 (citing *Thompson*, 504 U.S. at 519 (Scalia, J., concurring)).

267. *See id.* at 1369 (Walker, J., dissenting).

from litigating these issues for a variety of procedural reasons, and on the merits, concluded that section 243(h)(1) does not apply to aliens in extraterritorial waters.[268] The Supreme Court granted certiorari,[269] and several justices had previously tipped their hands on this issue when another writ for certiorari was denied in early 1992.[270] As Justice Blackmun observed:

> [t]he world has followed with great concern the fate of thousands of individuals who fled Haiti in the wake of that country's September 1991 military coup. As the complex procedural history of this case reveals, the legal issues surrounding the rights of Haitians interdicted on the high seas by the United States Coast Guard have deeply divided the four federal Judges who have considered their claims.[271]

In June of 1993, the Supreme Court decided the Haitian asylum seekers' fate.[272] Justice Scalia silently joined the majority opinion which held that neither section 243(h) nor Article 33 applied extraterritorially.[273] The Court found that the President's powers were not limited by the statute or protocol and the *legal* meaning of the word "return" was narrower than the *common* meaning.[274] Extensive reliance was placed on legislative and negotiations' history to support the Court's conclusions.[275]

In what read like a Scalia lecture on statutory construction, Justice Blackmun in a passionate dissent, outlined the flaws of the majority's interpretation.[276] Noting that the texts of section 243(h) and Article 33 were unambiguous, he argued that the Court should have ended its inquiry with the statute and treaty terms and given the words their ordinary meaning.[277] He found that no territorial restriction was placed in either provision and no contextual basis existed for reading one into the same.[278] Justice Blackmun observed that the Court had to ascribe a legal meaning to the text

268. *Id.* at 1370, 1373 (Walker, J., dissenting).
269. Sale v. Haitian Centers Council, 113 S. Ct. 3028 (1993).
270. *See* Haitian Refugee Ctr. v. Baker, 502 U.S. 1122 (1992). For a discussion of this case, see *supra* note 243 and accompanying text.
271. *Id.* (Blackmun, J., dissenting).
272. *See* Sale v. Haitian Centers Council, 113 S. Ct. 2549 (1993).
273. *Id.* at 2550, 2552.
274. *Id.* at 2559-67.
275. *See id.*
276. *Id.* at 2567-77 (Blackmun, J., dissenting).
277. *Id.* at 2568-70, 2573-74 (Blackmun, J., dissenting).
278. *Id.* (Blackmun, J., dissenting).

different from the ordinary meaning to reach its conclusion that "the word 'return' does not mean return;" that "the opposite of 'within the United States' is not outside the United States;" and that "the official charged with controlling immigration has no role in enforcing an order to control immigration."[279]

Because of the Court's heavy reliance on legislative and negotiations' history, Justice Blackmun responded that such data cannot surmount plain text, except in special cases "where the terms of the document are obscure or lead to 'manifestly absurd or unreasonable' results."[280] In any event, the historical textual evolution of section 243(h) (part of its legislative history) negates the Court's interpretation because in amending the Act in 1980, Congress "(1) deleted the words 'within the United States;' (2) barred the Government from 'return[ing],' as well as 'deport[ing],' alien refugees; and (3) made the prohibition against return mandatory, thereby eliminating the discretion of the Attorney General over such decisions."[281]

Quoting from *Cardoza-Fonseca*, Justice Blackmun added that "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language."[282] Justice Blackmun further added that "[t]o read into § 243(h)'s mandate a territorial restriction is to restore the very language that Congress removed."[283] With respect to the majority's reliance on the treaty's negotiations history, Justice Blackmun noted that a statement by the Netherlands delegate cannot override text, particularly when such statement was not adopted or agreed to, and in view of previous recognition by the United States government that the convention applied extraterritorially.[284] Finally, he noted that "[i]f any canon of construction should be applied in this case, it is the well-settled rule that 'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.' "[285] Hence, while *Kungys* and

279. *Id.* at 2568 (Blackmun, J., dissenting).

280. *See id.* at 2571 (Blackmun, J., dissenting) (citing Article 32 of the Vienna Convention on the Law of Treaties, art. 32, 1155 U.N.T.S. 331, 340, 8 I.L.M. 679, 692 (1969)).

281. *Id.* at 2574 (Blackmun, J., dissenting).

282. *Id.* (Blackmun, J., dissenting) (quoting INS v. Cardozo-Fonseca, 480 U.S. 421, 442-43 (1987).

283. *Id.* (Blackmun, J., dissenting).

284. *Id.* at 2570-73 (Blackmun, J., dissenting).

285. *See id.* at 2577 (Blackmun, J., dissenting) (quoting Murray v. The Charming Betsy, 2 Cranch 64, 117-18, 2 L. Ed. 208 (1804)).

Cardoza-Fonseca may in many respects be regarded as liberal decisions, they are scant evidence that theoretical rules control Justice Scalia's interpretations.

E. *Competing Impulses*

The conclusion that a particular Justice reaches when construing a particular statute is more likely the product of many complex forces that transcend liberal or conservative labels. Clear instances of Justices rendering decisions outside their labels suggest that institutional integrity and intellectual capacity play key roles alongside all those factors (race, religion, financial status, socialization) that go into making people conservative or liberal. The fact that people may change over time is also an important consideration. A more reasoned explanation of "aberrational" decisions seems to be that when faced with a statute, a Justice is impacted by a variety of impulses, some more dominant than others. Although dominant impulses may be the driver, such impulses are tempered and steered by judicial integrity and intellect that force a consideration of minor or lesser impulses. For any number of reasons, most of which are speculative, lesser impulses sometimes prevail.

A prime example of competing impulses at work on a liberal Justice can be seen in *Emporium Capwell v. Western Community Organization*.[286] Here, the Court was called upon to interpret section 9(a) of the National Labor Relations Act (NLRA).[287] Section 9(a) of the NLRA provides:

> [r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:
> *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect:

286. 420 U.S. 50 (1975).
287. 29 U.S.C. § 159(a) (1988).

> *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.[288]

Interpretation of section 9(a) was triggered by a group of black employees who contended that their employer was discriminating against them and that the union and contractual procedures for grievance adjustment were ineffective.[289] Previously, the president of the employees' company had refused to meet with them to discuss their grievances.[290] The employees then picketed the employer and were ultimately discharged.[291] As stated by the Court, the issue was "whether, in light of the national policy against racial discrimination in employment, the National Labor Relations Act protects concerted activity by a group of minority employees to bargain with their employer over issues of employment discrimination."[292]

The fact that Thurgood Marshall wrote the opinion for the Court suggests an affirmative answer, particularly because the union had determined that the company was engaging in racial discrimination, and so charged the company. Further, it is possible for both the employer and union to engage in racial discrimination thereby necessitating statutory protection for "self help" in the form of economic protest by discrimination victims. All preconceived notions stemming from associating these particular conclusions with Justice Marshall become skewed when you find that Justice Rehnquist joined in the opinion. It is unlikely that this discovery would result in a conclusion that Justice Marshall is a conservative or Justice Rehnquist is a liberal. A less troubling possibility is that Justice Marshall engaged in liberal construction that Justice Rehnquist agreed with, or wrote a conservative (aberrational) decision, thereby obtaining Justice Rehnquist's support. However, deeper analysis suggests other possibilities more in tune with an "impulses" formulation.

Specifically, the plain language of section 9(a) provides that the union is the *exclusive* representative of the affected black employees.[293] This language precludes direct employee to employer grievance adjustment. The language, however, grants employees

288. *Id.*
289. *See Emporium Capwell,* 420 U.S. at 50.
290. *Id.* at 55.
291. *Id.* at 56.
292. *Id.* at 52.
293. 29 U.S.C. § 159(a) (1988).

the right of direct contact provided such contact is consistent with the terms of the collective bargaining contract. In this case, it was established that the employees' attempts to deal directly with the company president contravened the contract which required resolution through an Adjustment Board, and if necessary, arbitration.[294] As a black liberal Justice committed to civil rights and routine user of legislative history to protect individual rights, Justice Marshall could have easily found legislative support evidencing an intent to protect black employees under the circumstances. And he could have vigorously advocated this construction, even if he had to do so in dissent. However, he did not. Instead, Justice Marshall wrote that the employees' actions were unprotected under the NLRA.[295]

At least two primary impulses were at work on Justice Marshall in *Emporium Capwell.* Upon reviewing Justice Marshall's background or judicial philosophy, it is reasonable to conclude that the civil rights/abhorrence of racial discrimination impulses are strong. But lesser and very important impulses that favor preserving the integrity and strength of unions were also hard at work. Competing or contradictory impulses do not always present "all or nothing" options. And, the level of accommodation or compromise may depend on the Justice's integrity, institutional respect for the decisonmaking process and personal intellect. In this case, the union impulses overrode the antidiscrimination impulses. Justice Marshall concluded that the principle of majority rule evidenced by section 9(a) controls, notwithstanding its potential to sacrifice the rights of minorities.[296] This principle secured a united front for the union and protects fragmentation and competing claims by employees. The civil rights impulses were appeased with the conclusion that the exclusive representative status came with built-in minority protection in the form of democracy and good faith obligation on the part of the union.[297]

In retrospect then, one may say that the decision is not truly aberrational because, on a general level, it is truly a liberal decision. That is, it is a pro-union decision by a Justice faced with two liberal choices. But to dissect this decision on pro minority versus pro union grounds is a distinction without a difference. Such an analy-

294. *See Emporium Capwell,* 420 U.S. at 53-55. The union had elected to use the grievance arbitration machinery of the contract while the dissatisfied employees wanted to picket. *Id.*

295. *Id.* at 70.

296. *Id.* at 62.

297. *Id.* at 64.

sis has elements of avoidance because it fails to account for Justice Rehnquist's support or the dissatisfaction of minorities left at the mercy of unions, which sometimes hold unattractive views on racial discrimination.

Looking at the interpretive process as cyclical, however, brings more coherence to it. It is doubtful that reformation of the Court appointments process or theories of construction will bring integrity and objectivity to statutory construction. While this broader model does not directly exert pressure on the Justice to avoid manipulation, it contains elements of built-in deterrence. The 1964 Civil Rights Act[298] offers a good example of how endemic cyclical forces may deter manipulation, albeit in a delayed fashion.

Passage of the Civil Rights Act of 1964 may not have been a welcome development for employers. Political forces had been set in motion and Congress responded with equal employment legislation which the President signed. Those who regarded themselves as losers in the legislative process were now free to mitigate the loss by persuading courts that the statute should be interpreted in a way that favors them. Even if the losers are subjected to decisions they regard as wrong, consolation lies in the prospect for "civilized revenge" through developments such as congressional override, shift in the balance of power on the Court or the election of a new president. Even a favorable decision on another subject may operate as a therapeutic consolation prize. These multiple possibilities for change provide the basis for hope and confidence in the long-term potential of the Court to render "correct" interpretations. When Justices breach this cycle by permitting ideology instead of legitimate sources to guide the interpretive task, the results are likely to be harmful even for their ideological brethrens.

For example, after the 1964 Civil Rights Act was passed, the Court was offered competing interpretations by employers and employees. Initially, the Court sided with plaintiffs and rendered what is generally regarded as broad (liberal) interpretations with liberal results.[299] Such liberal results are typically regarded as the product of a liberal Court. Employers therefore remained losers to the extent that they regarded the Court's construction as inimical to busi-

298. 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. § 2000e (1988)).

299. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (interpreting Civil Rights Act as extending to charges upon which the Equal Employment Opportunity Commission has not made finding); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (stating that Congress directed thrust of Title VII to consequences of employer conduct thereby prohibiting practices fair in form but discriminatory in application).

ness interests. Justices favoring such pro-plaintiff rulings had no doubt that their interpretations were *correct* whether supported by the statute's text, legislative history or general legislative goals.

But employers would have their day. When sufficient support was marshalled, conservative Justices rendered narrow interpretations that placed employers in the winners' category.[300] Such narrow construction was viewed as right, regardless of the lack of evidence that Congress desired such a result. Because such narrow interpretations contravened Congress' design and intent, Congress overruled the Court thereby returning plaintiffs to the winners' circle.[301] But the cycle does not end. In the 1980s, the composition of the Court changed and conservatives became the majority. Employers began moving back into the winners' circle as conservative Justices interpreted the statute more narrowly than they had in the past.[302] This flexing of conservative muscle showed clear indifference to statutory text and rejection of obvious congressional preference for broader interpretations.[303] No doubt the conservative Justices thought their interpretations were correct.[304]

Again, Congress responded to preserve employee protections afforded by the statute.[305] However, in this round, Congress did more. It not only restored the protections the Court eroded, but expanded the statute's remedial potential.[306] Therein lies a poten-

300. *See, e.g.*, General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (finding that employer's disability plan that excluded pregnancy from coverage did not violate Title VII); United Air Lines v. McMann, 434 U.S. 192 (1977) (finding that employer's mandatory retirement plan that forced employee McMann, to retire at age 60 did not violate Age Discrimination in Employment Act (ADEA), 42 U.S.C. § 621 (1988)).

301. *Gilbert* was overruled by the Pregnancy Discrimination Act, 42 U.S.C. § 2000e-(k) (1988). United Airlines v. McMann was overruled by amendments to the ADEA. *See* 29 U.S.C. § 621 (1988).

302. *See, e.g.*, Independent Fed'n of Flight Attendants v. Zipes, 491 U.S. 754 (1989) (denying plaintiff's recovery of attorney's fees from losing intervenors except in limited circumstances); Wards Cove Packing Co. v. Atonio, 490 U.S. 228 (1989) (increasing plaintiffs' burden in disparate impact cases); Martin v. Wilks, 490 U.S. 755 (1989) (making consent decrees concerning employment decisions open to challenges); Lorance v. AT&T Technologies, 490 U.S. 900 (1989) (narrowing statute of limitations period for challenging discriminatory seniority policies).

303. *See, e.g., Lorance*, 490 U.S. at 900. In *Lorance*, the Court could not point to any legislative material to support its construction and instead relied on another statute as its interpretive guide. *Id.* at 909-12.

304. The Court stated that its interpretation was necessary to protect employers from stale claims and disruptive influences. *Id.* at 911-12.

305. The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), reversed many of the Court's interpretations.

306. *Id.* § 102 (providing for compensatory and punitive damages, and jury trials); § 117 (expanding coverage to Congress); § 321 (expanding coverage to previously exempt state employees); § 101 (expanding coverage to American em-

tial inherent constraint on judicial manipulation and activism. That is, the Court's refusal to be guided by a coherent legislative mandate may lead to a congressional response which surpasses the existing wrong that was sought to be corrected. This experience should affect value judgments in future interpretive endeavors because Justices face the prospect of causing harm to the parties (constituents) that they seek to protect. Because of the Court's activism, employers now have more regulatory concerns than during the period preceding the Court's favorable decisions. This seems to be a heavy price for a fleeting victory achieved through promotion of personal agendas.

VI. CONCLUSION

Justice Scalia does not subscribe to textualism as a theory of construction. Instead, his decisions suggest that fidelity to textualism stems from its theoretic focus on neutral principles which is more appealing than the competing partisan statements found in legislative histories. Justice Scalia's subscription to textualism ends with his adoption of its facially neutral premise. For this reason, it is ineffective to analyze his statutory construction decisions using a textualist model. Moreover, the minority rights cases demonstrate that, at least in this area, Justice Scalia is not a textualist at all.

In the field of statutory interpretation, congressional players are the experts and creators of the text. The evolutionary process and experience of the text may in some cases be as important as the text itself. For controversial or social policy legislation, consideration of the statutes purposes and goals may be indispensable. That one should consult, at the appropriate times, these probative guides seems fundamental. In this regard, there are two issues, one of *considering* extratextual information, the other of *relying* on it.

It seems pragmatic, regardless of one's intellectual capacity or confidence that, where appropriate, consideration of such materials should be given, particularly because separation of powers principles can be held inviolate while legislative history and other contextualizing data is being considered. Use is another matter. Justice Scalia's interpretations can be more informed, if that is his goal, if he knows what the members of Congress said, in addition to common usage, dictionary definitions or use of similar provisions in other schemes. Consideration of all sources still leaves room for independent judgment and avoids treading on legislative territory

ployees abroad); § 113 (allowing plaintiffs to recover fees paid to experts for case preparation); § 114 (allowing for recovery of interest from federal government).

if that is truly a concern. Principled guides go for naught, however, if the judge is predisposed to advancing his personal views instead of vigilantly seeking out that of legislators.