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ARTICLES

## Scaled Legislation and New Challenges in Statutory Interpretation

*Jill M. Fraley*<sup>1</sup>

### INTRODUCTION

This article seeks to address an unexamined conflict between a traditional principle of statutory interpretation, the presumption in favor of the greatest common good, and the developing norms of clear statement rules, which integrate foundational constitutional values such as federalism into the interpretive canon. Historically, interpretive practices of the Supreme Court have fluctuated in response to major shifts in the structure of the federal government, such as the New Deal era expansion and rights revolution development of the regulatory state.<sup>2</sup> Such shifts in structure happened concurrently with adaptations of the federal legislative process to emerging social problems and governmental relationships.<sup>3</sup> This article highlights another important and often overlooked shift in federal governance structures and the legislative process—the movement toward routinely legislating at the federal level for regions, defined as scales smaller than the national but larger than a single state.

This trend in lawmaking introduces new conundrums for statutory interpretation by complicating our initial instincts to understand the common good in the context of our federal structure where federal legislation is

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<sup>2</sup> Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 408–09 (1989) (tracing fluctuations in statutory interpretation methodologies to major shifts in legislative practices).

<sup>3</sup> Abbe Gluck has argued that “federal courts do not seem to think of statutory interpretation methodology as ‘law . . .’” Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as ‘Law’ and the Erie Doctrine*, 120 YALE L.J. 1898, 1901 (2010). This approach has allowed courts greater political fluctuation in statutory interpretation and, although the price for this is potentially political entanglements, the advantage is the ability of courts to rapidly adapt as Congress changes the nature of legislation.

traditionally directed to the national level and state legislation to the local level. Scaled legislation—my term for federal legislation conceptualized at a scale other than national—allows the federal government to efficiently target specific or contextualized social problems, such as those that affect only the southwest border, mountainous areas, river basins, and so forth. On the other hand, scaled legislation, I argue, is uniquely positioned to generate ambiguities in terms of the scale at which goods are intended to be prioritized. Such legislation often has not only direct local benefits but also indirect (or second-order) national benefits. As a consequence of the necessary coalition building in our federalist legislative process, the concerns for regional and local goods that prompt scaled legislation are proportionately less likely to be explicitly prioritized on the face of the bill than the indirect, second-order national benefits. Even when national goods are intended to fall to the second order in federal legislation, such intent may be latent in the text and could be either clear or ambiguous in the legislative history.

This article is intended to provide the legal history necessary to illuminate this trend in legislation and to outline parameters for a discussion of its consequences for statutory interpretation. The discussion here focuses on how ambiguities of scale in the common good interact with recent trends toward instilling federalist structures within the interpretive canon. I suggest that these trends may converge uncomfortably to create a presumption that, even without apparent textual ambiguity, location-specific legislation should be interpreted to serve the national scale. The problem is counterintuitive: courts have increasingly protected state interests and the federalism balance through incorporating a federalism canon into the process of statutory interpretation.<sup>4</sup> Yet when applied in conjunction with the common good, the federalism canon may subvert the intent behind legislation aimed at geographically specific goods and instead focus priorities at the national level.

This article begins in Part I with a brief legal history of legislating for the common good. In this history, I explain that until the early 1960s, members of Congress balked at the idea of legislating for one particular area of the country despite the creation of the Tennessee Valley Authority in the 1930s. Such legislation was seen as the quintessential pork barrel, something that might be occasionally suffered as an appendage to a bill but could never be the focus of legislation. Congress occasionally acted to provide location-specific projects (such as lighthouses) that were closely tied to a greater good (such as safe travel by sea) but hesitated to legislate on more general terms for location-specific social problems such

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<sup>4</sup> This federalism canon is meant to guard at the outer limits of Congress's power by requiring a clear statement of congressional intent. *See* WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATIVE AND STATUTORY INTERPRETATION* 367 (2d ed. 2006) (discussing "[t]he substantive canons designed to protect state authority from federal encroachment").

as unemployment and poverty. Indeed, until the 1960s, there does not seem to have been a great deal of recognition of the substantial spatialities of socioeconomic issues across the country. By the early 1960s, however, federal agencies and advisors developed an appreciation for the fluctuating unevenness of socioeconomics and the geographically disparate impacts of federal spending. These developments generated a steady flow of location-specific legislation, which, although a significant change to congressional practice, received far less attention than other developments that fit more fluidly with the emerging rights emphasis. The focus on rights obscured attention to location-specific legislation, which tended to be viewed as though each piece of legislation was a one-off.

In Part II, I trace the central approaches to statutory interpretation, focusing on the specific role of the substantive canons. I examine in detail the canon of the common good along with the more recent innovation of applying constitutional structures, particularly federalism, within the process of interpretation. The article focuses on establishing historical foundations and contemporary arguments to elucidate how these canons may interact with scale.

In Part III, I consider the problem of ambiguities of scale and the common good. I argue that while such ambiguities have been an issue, the problem is amplified by a recent trend toward instilling constitutional structures within the interpretive canon. The substantive canon of federalism may converge uncomfortably with the substantive canon of legislating for the common good to create a presumption that, without apparent textual ambiguity, even location specific legislation should be interpreted to serve the common good at the national scale.

Simply put, Congress often legislates for geographically discrete areas and does not necessarily do so in furtherance of the national common good, or at least not directly. Congress recognizes and acts to correct social problems of smaller scales—either acting for the local good specifically or, in many cases, pursuing a dual purpose of both generating local goods and indirectly improving the national common good through increased equality. Unfortunately, in the latter case, the direct and indirect goals occasionally collide. In the case of dual-purpose legislation, overlaying the federalist framework onto the substantive common good canon would result in consistently privileging the national result.

If no recourse is made to the question of the intended scale of the common good, the presumption may consistently favor subverting local goods in favor of national ones, even while Congress directly legislated for the local good and only indirectly addressed the common good; a lack of textual ambiguity would confine the inquiry to the substantive canons and the legislative text.

Part IV examines the legislative history of the Tennessee Valley Authority to demonstrate how—as a historical and procedural matter—

geographically specific legislation is particularly inclined to suggest ambiguities of scale. This history demonstrates how such latent ambiguities may further geographic inequalities.

Finally, the Conclusion offers some guidance for both interpreting and crafting geographically specific legislation to avoid the problems of ambiguities of scale. I suggest that the substantive interpretive canon should carry the weight of the constitutional structure only where there is a question of constitutionality of a provision and not in the more general case of an inquiry regarding competing interpretations. Where there is a location-specific legislative text, I suggest that courts must look to the missing element of scale, particularly in the context of determining the common good. I propose that if courts incorporate federalism into statutory interpretation on questions beyond constitutionality, they are likely to distort location-specific legislation by assuming that the common good is evaluated at the national level; in doing so, this might open the way to additional geographic inequalities through uneven distributions of burdens.

In addition, I recognize the possibility of using such latent ambiguities of scale in the common good—when explicitly recognized—as a method of generating dialogue between the courts and Congress on how statutory interpretation might intersect with our continuing explorations of the nature of federalism. To that end, I suggest not only interpretive adaptations but also responsive, legislative ones. Location-specific legislation should be textually explicit about the scale of public goods being contemplated and the order of priorities if common goods are being distributed across multiple scales, directly or indirectly.

## I. A LEGAL HISTORY OF LEGISLATING FOR THE COMMON GOOD

I begin with some legislative history to contextualize the increasing trend of scaled legislation. The introduction of the Appalachian Regional Commission legislation provides a solid starting point for examining the arguments against scaled legislation and the trends in legislation to that point in time.

### A. *The ARC: Is Scaled Legislation Geographically Discriminatory?*

When the Appalachian Regional Commission (ARC) Act was proposed in 1964, Representative William C. Cramer of Florida expressed his outrage, saying, “I can’t imagine why anybody would want to vote for discriminatory legislation like this.”<sup>5</sup> As reporter Marshall McNeil explained in the *Washington Daily News*, “[The detractors’] principal protest is that ‘it would provide preferential treatment for one region of the U.S. and thereby

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<sup>5</sup> *Appalachia Aid Bill Gets Approval of House Panel*, CHARLESTON DAILY MAIL, Jul. 31, 1964, at 15.

discriminate against other areas which have equally great unemployment and lack of economic development.”<sup>6</sup> This view was also included in the Public Works Committee’s review of the bill.<sup>7</sup> These responses to the ARC bill demonstrate just how much Congress viewed the undertaking as a new type of legislative initiative.

Notably, Congress spoke in terms of discrimination and inequalities rather than of the pork barrel. Pork barrel politics, the practice of targeting federal benefits to specific voters to gain political goodwill,<sup>8</sup> differed from Congress’s new legislative initiative in three critical respects. First, rather than reaching across many states, pork barrel tended to focus on “district-level benefits,” particularly “new, highly visible” benefits such as highway construction, in order to be effective at gaining votes in Congress.<sup>9</sup> Indeed, the literature of political science has tended to identify and track pork barrel as specifically “district-level” benefits.<sup>10</sup> Therefore, pork barrel generally represented local level federal spending within a specific district—often on projects that were a part of a national network of goods, such as interstates, post offices, railroads, and the national defense. Pork barrel was a particularly effective means of building political capital because “[i]t [was] rarely necessary for a member of Congress to create a new program in order to provide their constituents program benefits.”<sup>11</sup> Pork barrel, therefore, required less energy to accomplish and attracted less unwanted attention. Pork barrel represents precisely this type of localized redirecting of federal benefits within an overall federal scheme, often using grant award programs.

Second, pork barrel spending can be substantially tied to political power in Congress, particularly things such as seniority, leadership, and district population.<sup>12</sup> These benefits are obtained not because of a demonstration of a particular need of one local area, but because of a particular member’s

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6 Marshall McNeil, *LBJ Pushes Appalachia Bill*, WASH. DAILY NEWS, Aug. 10, 1964.

7 Rep. of Comm. on Pub. Works to Accompany H.R. 11946, *Appalachian Regional Development Act of 1964*, H.R. REP. NO. 88-1641, at 25–26 (July 31, 1964), in *Aides Files*, Office Files of Richard N. Goodwin, Box 27, Lyndon B. Johnson Library [hereinafter Rep. Comm. on Pub. Works].

8 See Alessandro Lizzeri & Nicola Persico, *The Provision of Public Goods Under Alternative Electoral Incentives*, 91 AM. ECON. REV. 225, 225–26 (2001) (stating that politicians tend to favor pork barrel legislation because politicians can specifically target the benefits that flow from this legislation to voters).

9 Robert M. Stein & Kenneth N. Bickers, *Congressional Elections and the Pork Barrel*, 56 J. POL. 377, 379–80 (1994).

10 See *id.* at 379–80 (reviewing literature on the relationship between election results and pork barrels, noting measures of district-level benefits).

11 *Id.* at 381.

12 See *id.* at 379 (reviewing studies showing relationship between influence and access to pork barrel).

"influence."<sup>13</sup> As a result, an area such as Appalachia with less prominent members of Congress likely would not receive pork barrel. (Indeed, even after the creation of the ARC, federal spending in Appalachia per capita has remained a small fraction of the national norm.<sup>14</sup>).

Finally, pork barrel projects fall within national scale programs, which function as simple re-directions of spending within larger frameworks such as those directed to transportation or the national defense. At the local level, these benefits manifest as specific spending for a single project (building a highway, a new postal facility, a new railway bridge, etc.) rather than as part of any socio-economic program.

In contrast to pork barrel projects, the ARC was not local in scale but rather crossed eight to thirteen states, had no ties to particularly powerful members of Congress, and embarked on an integrated regional plan for socio-economic improvements. These features typify scaled legislation, not pork barrel, and presented a substantial deviation from previous legislation, which members of Congress had to justify as they approved the program.

Historically, more programmatic social goods tended to be directed to the nation as a whole.<sup>15</sup> With few and notable exceptions, the norm has continued to be social legislation addressed to the national common good such as the Pure Food and Drug Act (1906),<sup>16</sup> the Federal Reserve Act (1913),<sup>17</sup> the Federal Farm Loan Act (1916),<sup>18</sup> the Oil Pollution Act (1924),<sup>19</sup> the Settlement of War Claims Act (1928),<sup>20</sup> the Migratory Bird Conservation

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<sup>13</sup> *Id.*

<sup>14</sup> In a letter to the editor published in the *New York Times*, Al Smith, then Federal Co-Chairman of the ARC, wrote, "Federal records show that in 1965 Federal per capita expenditures in Appalachia were only sixty percent of those for the rest of the U.S. Today, Appalachia's share is still below eighty percent." Al Smith, Letter to the Editor, *Progress in Shortchanged Appalachia*, N.Y. TIMES, Oct. 15, 1981, at A26.

<sup>15</sup> President Roosevelt's New Deal programs are commonly cited as social goods directed to the nation as a whole. One category of exceptions, however, is for the addition of specific areas of land to the tax base through purchase, agreements with (or legal superseding of) tribal authorities, or the creation of arable/habitable land through land/water interventions. *See, e.g.*, Desert Land Act, ch. 107, 19 Stat. 377 (1877) (codified as amended at 43 U.S.C. § 641 (2006)) (granting public lands to individuals in return for irrigation of the land); Newlands Reclamation Act, Pub. L. No. 57-161, 32 Stat. 388 (1902) (codified as amended in scattered sections of 43 U.S.C.) (funding irrigation projects to make portions of western states arable); Pueblo Lands Act, Pub. L. No. 68-253, 43 Stat. 636 (1924) (appropriating Pueblo lands).

<sup>16</sup> Pure Food and Drug Act of 1906, Pub. L. No. 59-384, 34 Stat. 768.

<sup>17</sup> Federal Reserve Act of 1913, Pub. L. No. 63-43, 38 Stat. 251 (substantially amended and codified at 12 U.S.C. §§ 342, 360 (2006)).

<sup>18</sup> Federal Farm Loan Act of 1916, Pub. L. No. 64-158, ch. 245, 39 Stat. 360.

<sup>19</sup> Oil Pollution Act of 1924, Pub. L. No. 68-238, 43 Stat. 604.

<sup>20</sup> Settlement of War Claims Act of 1928, Pub. L. No. 70-122, 45 Stat. 254.

Act (1929),<sup>21</sup> the Fair Labor Standards Act (1938),<sup>22</sup> the Federal Food, Drug, and Cosmetic Act (1938),<sup>23</sup> the Public Health Service Act (1944),<sup>24</sup> the Federal Tort Claims Act (1946),<sup>25</sup> and the Federal Water Pollution Control Act (1948).<sup>26</sup> Social goods were often distributed to localities—but in ways that applied to all of the states equally, such as the Capper-Ketchum Act (providing for the development of agricultural extension programs)<sup>27</sup> and the Davis-Bacon Act (requiring the payment of locally prevailing wages to workers on federally funded public works).<sup>28</sup>

While the TVA notably slipped through during the Depression Era, its success was directly related to both Roosevelt's personal appeal for the cause and his argument that the TVA was an experiment that, if successful, would be replicated across the country.<sup>29</sup> Similarly, the Hoover Dam appeared to slip through the cracks after having been nixed repeatedly for favoring certain states above others. The Hoover Dam's success likely stemmed from a creative new use of the interstate compact, which had previously been used essentially as a contract between two states rather than an agreement among many about a contested issue.<sup>30</sup>

A few other seeds were sown for the ARC by federal programs formed by geographical features. In 1824, the Rivers and Harbors Act provided for the Army Corps of Engineers to increase the navigability of the Ohio and Mississippi Rivers—a move strongly directed toward encouraging frontier settlement.<sup>31</sup> The Mississippi River Flood Control Act of 1928 authorized the Army Corps of Engineers to work to control rising waters.<sup>32</sup>

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21 Migratory Bird Conservation Act of 1929, ch. 257, 45 Stat. 1222 (codified as amended at 16 U.S.C. § 715 (2006)).

22 Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. § 201-19 (2006)).

23 Federal Food, Drug, and Cosmetic Act of 1938, ch. 675, 52 Stat. 1040 (codified as amended at 21 U.S.C. § 301-399d (2006)).

24 Public Health Service Act of 1944, ch. 373, 58 Stat. 682 (codified as amended at 42 U.S.C. § 262 (2006)).

25 Federal Tort Claims Act of 1946, ch. 753, 60 Stat. 842 (codified as amended at 28 U.S.C. § 1346 (2006)).

26 Federal Water Pollution Control Act of 1948, Pub. L. No. 80-845, 62 Stat. 1155 (codified as scattered sections of 43 U.S.C.).

27 Capper-Ketchum Act, Pub. L. No. 70-475, 45 Stat. 711 (1928).

28 Davis-Bacon Act, ch. 411, 46 Stat. 1494 (1931) (codified as amended at 40 U.S.C. § 3141-3148 (2006)).

29 See *infra* Part IV for a discussion of Roosevelt's theory of the TVA as a replicable experiment.

30 FREDERICK L. ZIMMERMANN & MITCHELL WENDELL, *THE INTERSTATE COMPACT SINCE 1925*, 32 (1951) (generally classifying an interstate compact as a contract).

31 River and Harbor Act of 1824, ch. 139, 4 Stat. 32 (1824).

32 Flood Control Act of 1928, ch. 569, 45 Stat. 534 (1928) (codified as scattered sections of 33 U.S.C.) (describing programs related to river navigation that also specifically tied in with national defense initiatives, which favored the creation of multiple methods of rapid inland



Other legislation brought to rural areas benefits that were previously enjoyed primarily by city dwellers, such as electrification and efficient postal service.<sup>33</sup> While multi-state in application, these initiatives were tied narrowly to a specific goal rather than greater programmatic social objectives, which remained strongly national in their outlook.

Against this norm, Congress and the Johnson Administration struggled to enact the Appalachian Regional Commission.<sup>34</sup> Some members of Congress were simply unable to accept this type of programming as a part of the congressional legislative mandate. A Public Works Committee Report of 1964 expresses many of these ideas: "No one is in favor of poverty . . . [But] the program is clearly inadequate and not in the public interest."<sup>35</sup> Members of Congress objected to the Bill on the grounds that it would "provide preferential treatment for one region of the United States and thereby discriminate against other areas of the Nation which have equal or greater unemployment and lack of economic development."<sup>36</sup> Spending on social programs to benefit solely one region was severely criticized: "A Federal program to benefit all of the citizens of the United States is one thing. A Federal program to benefit some or all of the citizens of one selected area or a few selected States simply because of their place of residence is an entirely different thing."<sup>37</sup> The highway portion of the bill was described as "particularly discriminatory against portions of the Nation outside Appalachia."<sup>38</sup> Another section was described as having "an enormously damaging potential for other regions of the United States."<sup>39</sup>

Proponents of the bill responded not with denials of the charges (which were roughly accurate) but with justifications based on Appalachia's unique needs and position. Indeed, the President's Appalachian Commission, which had recommended the creation of the Appalachian Regional

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transportation of military personnel and supplies).

33 See, e.g., Rural Electrification Act of 1936, ch. 432, 49 Stat. 1363 (1936) (providing for the furnishing of electric energy to rural areas); Rural Post Roads Act of 1916, ch. 241, 39 Stat. 355 (1916) (providing that the United States will aid individual states in the construction of rural post roads). Congress confirmed its commitment to providing rural mail delivery, mandating that "[r]ural mail delivery shall be extended so as to serve, as nearly as practicable, the entire rural population of the United States." Act of July 28, ch. 261, 39 Stat. 412, 423 (1916).

34 Notably, the Area Redevelopment Act had been passed in 1961, likely laying some precedent for the Appalachian Regional Commission Act. See Area Redevelopment Act, Pub. L. No. 87-27, 75 Stat. 47 (1961). The ARA was easily distinguishable in that it dispersed funds across the country, only directing them specifically to cities and rural areas that faced economic challenges and unemployment. See *id.* at 47-50 (designating as "redevelopment areas" those places that satisfied the Act's criteria, including that "substantial and persistent unemployment" has existed in the area for an extended time).

35 Rep. Comm. on Pub. Works, *supra* note 7, at 25.

36 *Id.*

37 *Id.* at 26.

38 *Id.* at 38.

39 *Id.* at 41.

Commission, opened its Report with the claim that “Appalachia is a region apart—geographically and statistically.”<sup>40</sup> This approach continued through the legislative process. The Committee on Public Works Report on the bill explained, “In these times of general prosperity, many of the people of Appalachia exist at a level significantly below the national average.”<sup>41</sup>

Proponents of the Appalachian bill also addressed the claim of geographic discrimination by noting how the program would indirectly benefit the national common good. This argument was framed in terms of either the “drain” of Appalachia on national resources or the idea of growing the tax base and national economy. A press release by the Committee on Public Works quoted Congressman Robert E. Jones: “The aim of the Appalachia project is to . . . take people off doles and make them taxpayers.”<sup>42</sup> The Appalachian Regional Commission would itself continue this argument, citing as a central planning goal the “area’s role in the American economy of the future.”<sup>43</sup> While this view garnered some support, others saw more of a trade-off with federal spending on “regional development” directly connected to at least a partial “reduction in national economic growth.”<sup>44</sup>

Both arguments might have failed but for a much broader trend of recognizing the spatialities of governing across a vast territory. Even without looking specifically at Appalachia, the federal government realized that “[t]he failure of certain geographic regions to participate in the overall national prosperity has become a major domestic problem.”<sup>45</sup>

Claims of discrimination proved less forceful against the realization that the federal government had already been spending unequally at the local level—and particularly neglecting Appalachia in its spending, although no one had noticed.<sup>46</sup> Prior to the Employment Act of 1946, Congress

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40 Rep. of the President’s Appalachian Regional Commission xv, *in* Presidential Papers, Box 264, Lyndon B. Johnson Library; *see also* Rep. Comm. on Pub. Works, *supra* note 7, at 1 (using this same opening line at the beginning of the report).

41 Rep. Comm. on Pub. Works, *supra* note 7, at 2.

42 Press Release, Comm. on Pub. Works, Chairman of the House Committee on Public Works Names Robert E. Jones Chairman of the Subcommittee on Appalachian Regional Development (Jan. 22, 1965), *in* Aides Files, Office Files of Richard N. Goodwin, Box 27, Lyndon B. Johnson Library.

43 APPALACHIAN REG’L COMM’N, ANNUAL REPORT 6 (1967), *in* Presidential Papers, Box 264, Lyndon B. Johnson Library.

44 U.S. DEPT. OF COMMERCE, REPORT OF THE INDEPENDENT STUDY BOARD ON THE REGIONAL EFFECTS OF GOVERNMENT PROCUREMENT AND RELATED POLICIES xi (Dec. 1967), *in* Aides Files, Files of James Gaither, Box 41, Lyndon B. Johnson Library [hereinafter REP. OF THE INDEP. STUDY BD.].

45 *Id.* at vi.

46 *See* PRESIDENT’S APPALACHIAN REG’L COMM’N, APPALACHIA 28 (1964) (“[T]otal Federal investment in Appalachia has not been proportionate to either the population or its needs.), *available at* <http://www.arc.gov/about/ARCAppalachiaAREportbythePresidentsAppalachian-RegionalCommission1964.asp>; *id.* at 29 fig.15 (describing the “federal expenditures gap” in Appalachia).

had paid little attention to how federal spending fit into the national and local economic pictures. The problem was that “[d]espite the importance of Government procurement to the national economy, little was known of the immediate and subsequent impacts of this procurement upon the individual regions of the United States.”<sup>47</sup> However, the 1946 Act generated an increasing trend of investigation and concern with the federal government’s role in the national economy, as well as the interrelation between the national, state, and local economies.<sup>48</sup> By the beginning of the 1960s, the federal government was specifically investigating the geographical impacts of its spending practices.<sup>49</sup> Government contracts, particularly those for military defense spending, were questioned publicly for their role in providing unequal federal support to local economies with the release of the Report of the Committee on the Economic Impact of Defense and Disarmament.<sup>50</sup>

Once the details of military spending were out, the Johnson Administration moved to make a more general assessment of how the federal social and economic programs impacted the local communities. The Office of Economic Opportunity, headed by Sargent Shriver, undertook this research project and produced a final report in 1967.<sup>51</sup> This project was, in the words of the Office of Economic Opportunity (OEO), “a probe into a hitherto unexplored frontier—one in which, for the first time, a semblance of order and system is beginning to evolve.”<sup>52</sup> The resulting report not only detailed federal spending in each state but also presented those numbers comparatively so that each state was ranked against the others in terms of federal spending.<sup>53</sup> The report went beyond reviewing federal spending as a whole to examine how each state fared in terms of spending by the various federal departments and agencies.<sup>54</sup>

The report, which detailed spending in OEO programs as of April 1967, also demonstrated how Appalachia was faring in terms of various “war on

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47 REP. OF THE INDEP. STUDY BD., *supra* note 44, at vi.

48 See Salma J. Mushkin & Robert F. Adams, *Emerging Patterns of Federalism*, 19 NAT’L TAX J. 225, 225-47 (1966).

49 *Id.*

50 See Memorandum from Cyrus Vance to Pres. Lyndon B. Johnson on the Estimated Obligations of the Department of Defense Programs Affecting the Appalachian Region (Dec. 16, 1965), in Presidential Files, Confidential File, Box 6 (1 of 2), Lyndon B. Johnson Library.

51 See OFFICE OF ECON. OPPORTUNITY, SUMMARY OF FEDERAL SOCIAL AND ECONOMIC PROGRAMS: A REPORT OF FEDERAL PROGRAM IMPACT ON THE LOCAL COMMUNITY (1966), in Aides Files, Office Files of Fred Bohlen, Box 3, Lyndon B. Johnson Library.

52 *Id.* (quoting the first page of the introduction of the report).

53 See *id.*

54 See *id.* While the Administration began by investigating defense spending because of the comparative impact of this spending, the project quickly expanded not only to other departmental spending, but also to measure how well new socio-economic programs were faring in terms of distributing goods to those most in need.

poverty” and other poverty initiatives, which were supposedly focused on the region.<sup>55</sup> For example, as of 1967, Kentucky was ranked fifteenth in funds for Community Action Programs and eleventh in funds for VISTA Volunteer Programs. While Kentucky has 120 counties, only eighty-eight had HeadStart Programs, only twelve had Small Business Loan Programs, and VISTA volunteers served in only twenty-two.<sup>56</sup>

Uneven federal spending as a cause of failings in the Appalachian economy justified discrete spending in Appalachia, especially when this information was combined with research on the severity of poverty in the region.<sup>57</sup> As a progress report of the Appalachian Regional Commission explained at the close of 1965, when the federal government became interested in poverty in the region during the 1960s, “the first step was the investigation and analysis of the region’s advantages and disadvantages. . . . [T]he first picture was of the region as a whole in relation to the rest of the country.”<sup>58</sup> In the face of this evidence, the arguments against spending in Appalachia were much less convincing. The ARC Act’s detractors no longer had the concept of fairness on their side.

Drawing on this history of unequal spending through government contracts and facilities, Johnson was able to push his ARC Act—which featured extensive local spending directed to particular socioeconomic problems—proclaiming “the pork barrel is over.”<sup>59</sup>

### B. Scaled Legislation in Recent Years

Building on this history of awareness of the spatialities of social problems and the precedent of the ARC, Congress increasingly looked to scales outside the federalist dichotomy to address modern problems in efficient ways.

In recent years, the area-specific phenomenon, or what I call scaled legislation, has grown enormously. Legislation has repeatedly targeted multi-state areas of the country such as “National Heritage Areas,”<sup>60</sup> the

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55 *See id.* Notably, it is arguable whether the war on poverty was focused on Appalachia. On its face, the program was national rather than regional, and the data described here supports that view—with Appalachian areas not disproportionately represented.

56 *See id.*

57 Not everyone appreciated the argument. Detractors suggested that, “[t]his preferential treatment is ‘justified’ by statistics which purport to show that Appalachia lags behind national averages in several categories.” Rep. Comm. on Pub. Works, *supra* note 7, at 27.

58 Letter from Ralph R. Widner, Exec. Dir., Appalachian Reg’l Comm’n, to Co-Chairs of the Appalachian Reg’l Comm’n (Jan. 13, 1966), in Presidential Files, Box 384, Lyndon B. Johnson Library, (carbon-copied to the President with attached report).

59 JAMES BRANSCOME, *THE FEDERAL GOVERNMENT IN APPALACHIA* 8 (1977).

60 *See, e.g.*, National Heritage Areas Act of 2006, Pub. L. No. 109-338, 12 Stat. 178 (2006) (codified as scattered titles of U.S.C.).

"Mississippi River Basin,"<sup>61</sup> and the Mississippi River<sup>62</sup> along with "forest and rangeland" regions<sup>63</sup> and other areas that meet a statutory definition<sup>64</sup> of "rural,"<sup>65</sup> "wilderness,"<sup>66</sup> "urban,"<sup>67</sup> "wetlands,"<sup>68</sup> "deepwater ports"<sup>69</sup> or "coastal zones."<sup>70</sup>

Other recent pieces of legislation target the Colorado River Basin,<sup>71</sup> the Outer Continental Shelf,<sup>72</sup> the Caribbean Basin region,<sup>73</sup> the "High Plains

61 *See, e.g.*, Upper Mississippi River Basin Protection Act, H.R. 3671, 111th Cong. (2010).

62 *See, e.g.*, Mississippi River Protection and Restoration Act of 2004, H.R. 4686, 108th Cong. (2004); S. 2470, 108th Cong. (2004); Mississippi River Corridor Study Commission Act of 1989, Pub. L. No. 101-398, 104 Stat. 855 (1990).

63 *See, e.g.*, Forest and Rangeland Renewable Resources Research Act of 1978, Pub. L. No. 95-307, 92 Stat. 353 (codified as scattered sections of 16 U.S.C.).

64 Where an area is not specifically targeted through a statutory definition, some statutes will apply, by default, only to certain cross-state regions. *See, e.g.*, Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445 (affecting primarily states surface coal mining operations, such as West Virginia, Kentucky, Virginia and Pennsylvania) (codified as scattered sections of 30 U.S.C.).

65 For example, the Crime Control Act of 1990 provided special financial assistance for drug enforcement in rural states. *See* Crime Control Act of 1990, Pub. L. No. 101-647, § 801, 104 Stat. 4789, 4825-26 (codified as scattered sections of 42 U.S.C.). The Act defined a "rural state" as a "State that has a population density of fifty-two or fewer persons per square mile or a State in which the largest county has fewer than one hundred and fifty thousand people." *Id.* at 4825. Similarly, the Cooperative Forestry Assistance Act of 1978, Pub. L. No. 95-313, 92 Stat. 365 (codified as scattered sections of 16 U.S.C.) provided resources specifically for non-federally owned "rural" forest land, such as incentive programs, fire control, and so forth. Other examples include the Rural Crisis Recovery Program Act of 1987, Pub. L. No. 100-219, 101 Stat. 1456 (codified at 7 U.S.C. § 2661); Rural Health Clinics Act of 1983, Pub. L. No. 98-194, 97 Stat. 1345 (codified as scattered sections of 42 U.S.C.); and Rural Law Enforcement Assistance Act of 2001, H.R. 1348, 107th Cong. (2001).

66 *See, e.g.*, Wilderness Act, Pub. L. No. 88-577, 78 Stat. 890 (1964) (codified as scattered sections of 16 U.S.C.); Act of Jan. 3, 1975, Pub. L. No. 93-622, 88 Stat. 2096 (codified as scattered sections of 16 U.S.C.); Endangered American Wilderness Act of 1978, Pub. L. No. 95-237, 92 Stat. 40 (codified as scattered sections of 16 U.S.C.).

67 *See, e.g.*, Urban Mass Transportation Act of 1964, Pub. L. No. 88-365, 78 Stat. 302 (codified as scattered titles of U.S.C.), *amended by* Act of Nov. 16, 1977, Pub. L. No. 95-187, §§ 1-2, 17-18, 91 Stat. 1385, 1385-86 (codified at 49 U.S.C. § 1613).

68 *See, e.g.*, Emergency Wetlands Resources Act of 1986, Pub. L. No. 99-645, 100 Stat. 3582 (codified as scattered sections of 16 U.S.C.).

69 *See, e.g.*, Deepwater Port Act Amendments of 1984, Pub. L. No. 98-419, 98 Stat. 1607 (amending the Deepwater Port Act of 1974) (codified as scattered titles of U.S.C.).

70 Coastal Zone Management Act Amendments of 1976, Pub. L. No. 94-370, 90 Stat. 1013 (codified as scattered titles of U.S.C.); Coastal Zone Management Act of 1972, Pub. L. No. 92-583, 86 Stat. 1280 (codified as scattered sections of 42 U.S.C.).

71 Colorado River Basin Salinity Control Act, Pub. L. No. 93-320, 88 Stat. 266 (1974) (codified as scattered sections of 43 U.S.C.).

72 Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629 (codified as scattered sections of 43 U.S.C.).

73 Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, §§ 211-30, 97 Stat. 369, 384-97 (1983) (codified as scattered sections of 19 U.S.C.).

States,”<sup>74</sup> the Chesapeake Bay watershed area,<sup>75</sup> the Northwest Straits area,<sup>76</sup> the Delaware River Basin,<sup>77</sup> and the San Juan Basin area.<sup>78</sup> A recurring favorite is the “United States-Mexico Border Region”<sup>79</sup> or the “Southwest Border region.”<sup>80</sup> For more than a decade, Senator Jeff Bingaman of New Mexico has introduced multiple bills to create a regional authority focused on public works and economic development in the southwest border area.<sup>81</sup>

Some such regional programs are explicitly designed to mirror the structure and mission of the Appalachian Regional Commission. For example the Delta Regional Authority was established in 2000 and covers 252 counties and parishes across eight states (Alabama, Arkansas, Illinois, Kentucky, Louisiana, Mississippi, Missouri, and Tennessee); this structure is similar to the structure of the ARC.<sup>82</sup>

A similar proposal was made for the Northern Great Plains Rural Development Authority.<sup>83</sup> While specific legislation for this Authority

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74 High Plains States Groundwater Demonstration Program Act of 1983, Pub. L. No. 98-434, 98 Stat. 1675 (1984) (codified as scattered sections of 43 U.S.C.).

75 H.R. 1652, 112th Cong. (2011) (amending the Water Resources Development Act of 1996 to “make modifications to the Chesapeake Bay environmental restoration and protection program”) (as referred to the Subcomm. on Water Res. and Env’t, Apr. 18, 2011).

76 Northwest Straits Marine Conservation Initiative Act, Pub. L. No. 105-384, §§ 401-05, 112 Stat. 3451, 3458-59 (1998).

77 Delaware River Basin Conservation Act of 2011, H.R. 2325, 112th Cong. (2011) (as referred to the Subcomm. on Water Res. and Env’t, June 24, 2011).

78 San Juan Basin Wilderness Protection Act of 1984, Pub. L. No. 98-603, 98 Stat. 3155 (codified as scattered titles of U.S.C.).

79 *See, e.g.*, United States-Mexico Border Regional Development Act of 1988, S. 1870, 101st Cong. (1989); United States-Mexico Border Regional Development Act of 1989, H.R. 1679, 101st Cong. (1989).

80 *See, e.g.*, H.R. 1922, 112th Cong. (2011) (as referred to the Subcomm. on Border and Mar. Sec., June 2, 2011); Border Security Enforcement Act of 2011, S. 803, 112th Cong. (2011) (as referred to Comm. on Homeland Sec. and Gov’t Affairs, Apr. 13, 2011); *see also* Southern Borderlands Public Safety Communications Act, H.R. 1277, 112th Cong. (2011) (as referred to Subcomm. on Conservation, Energy, and Forestry, Apr. 8, 2011).

81 *See* Southwest Regional Border Authority Act, S. 458, 108th Cong. (2003); Southwest Regional Border Authority Act, S. 2522, 107th Cong. (2002). Other members of Congress have sponsored or co-sponsored similar bills. *See* Southwest Regional Border Authority Act, H.R. 2068, 110th Cong. (2007) (proposed by Rep. Reyes with six co-sponsors); Southwest Regional Border Authority Act, H.R. 1071, 108th Cong. (2003) (proposed by Rep. Reyes with a dozen co-sponsors); Southwest Regional Border Authority Act, H.R. 4847, 107th Cong. (2002) (proposed by Rep. Reyes and five co-sponsors). Other bills have focused more narrowly on specific needs of the border region such as transportation or environmental issues. *See, e.g.*, Border Infrastructure Safety and Congestion Relief Act of 1996, H.R. 3669, 104th Cong. (1996); United States – Mexico Border Environmental Protection Act, S. 281, 103d Cong. (1993).

82 Delta Regional Authority Act of 2000, Pub. L. No. 106-554, § 382B, 114 Stat. 2763, 2763A-269-74. *See DRA Counties and Parishes Maps*, DELTA REGIONAL AUTHORITY, <http://www.dra.gov/about-us/eight-state-map.aspx> (last updated 2012) (showing map of coverage area for the commission).

83 Northern Great Plains Rural Development Authority Act, S. 1681, 107th Cong. (2001).

lingered endlessly in Congress, the Authority was later established under the Farm Security and Rural Investment Act of 2002. The Authority focuses on “acquiring and developing land” and “carrying out other economic development activities” including highway construction.<sup>84</sup> The funding is centrally allocated to “serve the needs of distressed counties and isolated areas of distress in the region.”<sup>85</sup>

Other areas of the country continue to seek similar legislation. Recent proposals include the Northeast Regional Development Commission,<sup>86</sup> the Southern Regional Commission,<sup>87</sup> the Gulf Coast Region Redevelopment Commission,<sup>88</sup> and the Northern Border Region.<sup>89</sup> In 2002, an “Authority” was proposed for the “SouthEast Crescent Region,” citing, just as proponents of the Appalachian bill did, the “special needs” of the area.<sup>90</sup> Finally, in response to the BP oil spill, legislation had been directed to the “Gulf” zone, as well as to the specific multi-state area affected by the spill.<sup>91</sup>

While legislation has remained true to Herbert Wechsler’s famous characterization—“interstitial”<sup>92</sup>—these programs have evolved to become much more tailored than the ARC. In direct contrast to the ARC, which includes broad directives, the regional commissions listed above have developed objectives that instead focus on designated sub-national spaces for specific federal programs through individual pieces of legislation.

Some areas of law particularly inspire scalar solutions. In environmental law, one approach suggests that “governance and the provision of public goods by authorities” should be at the “geographic scale that encompasses substantially all cost bearers and beneficiaries of the policy in question, but [is] no broader.”<sup>93</sup> Environmental federalism—or the allocation of authority

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84 *Overview – Northern Great Plains Regional Authority*, NGPLAINS.ORG (Nov. 4, 2007).

85 *Id.*

86 Northeast Regional Development Commission Act of 2005, H.R. 1695, 109th Cong. (2005).

87 Southern Regional Commission Act of 2003, S. 527, 108th Cong. (2003).

88 Gulf Coast Region Redevelopment Commission Act, H.R. 4691, 109th Cong. (2006).

89 Northern Border Economic Development Commission Act of 2007, S. 2249, 110th Cong. (2007).

90 To Provide a Framework for Coordinating Federal, State, and Local Efforts to Meet the Special Needs of the SouthEast Crescent Region, H.R. 3618, 107th Cong. (2002). The Authority was re-proposed in 2005 in Senate Bill 1865 by Senator Elizabeth Dole of North Carolina. SouthEast Crescent Authority Act of 2005, S. 1865, 109th Cong. (2005).

91 Implementing the Recommendations of the BP Oil Spill Commission Act of 2011, H.R. 501, 112th Cong. (2011) (pending as of July 11, 2012); Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2011, H.R. 3096, 112th Cong. (2011) (pending as of July 11, 2012).

92 HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 435 (1st ed. 1953) (“Federal law is generally interstitial in its nature. It rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states.”).

93 Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495, 1524 n.88 (1999).

between states and the federal government—has continually been a question at the very heart of the field with scholars adopting a number of conflicting approaches.<sup>94</sup> In an effort to address this debate—and to respond to cross-jurisdictional environmental issues<sup>95</sup>—we have creatively adopted scales of governance that are neither federal, nor state, but rather regional.<sup>96</sup> Federal legislation now often focuses on specific multi-state regions. For example, the Highlands Conservation Act, introduced in 2003, addresses the “Highlands Region,” which is defined as upland areas of Connecticut, New Jersey, New York, and Pennsylvania;<sup>97</sup> a similar effort was proposed for the forests of Maine, New Hampshire, New York and Vermont in the Northern Forest Stewardship Act.<sup>98</sup> Efforts have been in the works for years to establish an environmental plan specific to the Southwest border.<sup>99</sup>

Regional governance crosses traditional jurisdictions of the states.<sup>100</sup> Such creative and cross-jurisdictional governance mechanisms date back at least to the Tennessee Valley Authority and have been viewed with renewed interest since the Environmental Movement of the 1960s and

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94 *See id.* at 1496 n.3-4. “Much of the recent debate about environmental governance and regulatory reform has centered on the question of where we should lodge authority to address environmental problems.” *Id.* at 1496. Not everyone is excited about the debate, however. Esty has argued that our many debates on environmental federalism are rather wasted because “[b]etter environmental results depend less on fine tuning theories of environmental federalism than on improving regulatory performance,” or in other words, “how we regulate is more important than where we regulate.” *Id.* at 1495.

95 *See* Marc J. Hershman & Craig W. Russell, *Regional Ocean Governance in the United States: Concept and Reality*, 16 DUKE ENVTL. L. & POL’Y F. 227, 238 (2006) (examining cross-jurisdictional responses and “networks of responsibility” within regional economies).

96 *See id.* at 228 (discussing how new reports “emphasize new regional approaches in the United States to strengthen our economies, sustain our ecosystem resources, preserve our cultural and biogeophysical treasures, and shore up national security.”).

97 Highlands Conservation Act, Pub. L. No. 108-421, 118 Stat. 2375 § 3 (2004).

98 Northern Forest Stewardship Act, H.R. 971, 105th Cong. § 3(a) (1997).

99 *See, e.g.*, United States–Mexico Border Environmental Protection Act, S. 281, 103rd Cong. (1993) (establishing specific environmental protections for the area).

100 The term “regional” is applied to a number of different scales that do not align with the traditional federal-state categories. At times, “regional” is understood to be a scale greater than the city, but smaller than the state; at other times as portions of multiple states; and other authorities use the word to refer to groupings of multiple countries. Hershman & Russell, *supra* note 95, at 239 (“In geography and metropolitan planning, the geographic scope of regions is variable in scale and reflects the extent of common problems or interests. In some instances region refers to towns, and in other situations it refers to whole nations.”).

Within the United States, most often the term “regional” is used to describe less traditional levels of governance that are created to map the geographical bounds of either a particular topographical feature, such as in the Tennessee Valley Authority, which matched the Tennessee River watershed, or to a particular problem in need of governmental attention, such as the justification of the Appalachian Regional Commission in terms of a “unique” poverty in the area.



70s<sup>101</sup> and President Lyndon B. Johnson's assorted research and policy projects on the coordination of multiplying bureaucracies.<sup>102</sup>

More recently, both law and the social sciences have looked to regional scales for solutions to modern social problems. Within public policy literature, "[r]egionalism has experienced a renaissance."<sup>103</sup> A similar resurgence of the concept of regional scales occurred within the discipline of geography.<sup>104</sup> While regional solutions have been adopted for many sociolegal problems such as water quality, waste management, and transportation, advocates argue that regionalism could offer even more substantial benefits and continue to press for legislative developments on this front.<sup>105</sup>

Regional level governments are advantageous in that they may effectively deliver service within economies of scale. For example, oceanic resource issues may be best tackled through "regional ocean governance" through the creation of "regional stewards."<sup>106</sup> In planning and zoning law, regional governance is being advocated and adopted to deal with the regional impacts of modern trends in development, such as big box development.<sup>107</sup> This trend follows that of local governments increasingly consolidating certain functions at a regional level.<sup>108</sup> "At different levels and across sectors, people are arguing for a new regional approach."<sup>109</sup>

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101 Unfortunately, it is not uncommon for one area to bear the brunt of environmental degradation while another area reaps the benefits. *See, e.g.*, Andrew D. Thompson, *Public Health, Environmental Protection, and the Dormant Commerce Clause: Maintaining State Sovereignty in the Federalist Structure*, 55 CASE W. RES. L. REV. 213, 213 (2004) (providing a discussion of acid deposition and regionalism). The Appalachian Regional Commission's creation served as a model for later calls for regional governance mechanisms. In 1978, Senator Jennings Randolph of West Virginia introduced Senate Bill 3626 "[t]o extend the Appalachian Regional Development Act and to provide for a nationwide system of multistate regional development commissions." S. 3626, 9th Cong. 2d Sess. (1978).

102 *See generally* JILL M. FRALEY, *BECOMING APPALACHIAN: LAW & GEOGRAPHY IN THE MAKING OF APPALACHIA: 1930-1970* (publication forthcoming).

103 Victoria Basolo, *US Regionalism and Rationality*, 40 URB. STUD. 447, 447 (2003).

104 *See generally* Andrew Jonas, *A New Regional Geography of Localities?*, 20 AREA 101 (1988); Andrew Sayer, *The 'New' Regional Geography and Problems of Narrative*, 7 ENV'T & PLANNING D: SOC'Y & SPACE 253 (1989); Edward W. Soja, *Regions in Context: Spatiality, Periodicity, and the Historical Geography of the Regional Question*, 3 ENV'T & PLAN. D: SOC'Y & SPACE 175 (1985).

105 *See* Basolo, *supra* note 103, at 448.

106 Hershman & Russell, *supra* note 95, at 264.

107 Patricia E. Salkin, *Supersizing Small Town America: Using Regionalism to Right-Size Big Box Retail*, 6 VT. J. ENVTL. L. 48, 49-50 (2005) (stating that developers should use regionalism techniques in building big box developments "to preserve small town quality of life and maintain local economic boosts that big box stores offer communities.").

108 *See* Joseph C. LaValley III, *Showdown over Snake Mountain: How a New Local Government Was Formed to Resolve a Land-Use Dispute*, 65 ALB. L. REV. 475, 489 (2001) ("[M]any local governments have regionalized such traditionally municipal services.").

109 Hershman & Russell, *supra* note 95, at 264. There is also, certainly, a good measure of pessimism about the practical possibilities for regional governance in this country. *See, e.g.*,

In many ways, the arguments for regionalism today significantly mirror those offered by Lyndon Johnson in the 1960s: the existence of cross-jurisdictional issues of modern life, the confusion resulting from a multiplicity of small governmental bodies, and the efficiency of matching governance to the scale of the problem.<sup>110</sup> For example, regional governance has been justified in instances where local authorities have failed to provide residents of all economic levels with housing, leading to “regionalism [as] an essential component to a workforce housing strategy.”<sup>111</sup> More generally, Laurie Reynolds argues for regionalism because “more than 80% of our population now lives in what can be defined as metropolitan areas, with their multiplicity of local government units and the corresponding overlapping and intersecting boundary lines.”<sup>112</sup> The Obama Administration has responded positively to these and other arguments, establishing the Sustainable Communities Regional Planning Grant Program, which encourages regional level solutions to cross-jurisdictional problems.<sup>113</sup>

For our purposes, there is no need to argue for or against regional models of governance. The important point is simply that laws and governance

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Myron Orfield, *The Region and Taxation: School Finance, Cities, and the Hope for Regional Reform*, 55 *BUFF. L. REV.* 91, 92 (2007) (“[M]ost scholars and activists who believe in regional reform are pessimistic about the prospects for reform.”).

110 The Johnson Administration drew on the preliminary draft of a paper eventually published in the *National Tax Journal*. See Selma J. Mushkin & Robert F. Adams, *Emerging Patterns of Federalism*, 19 *NAT’L TAX J.*, 225, 225–30 (1966) (describing the need for intergovernmental cooperation in light of multiple local governments dealing with sprawling metropolises and interstate problems such as transportation and water). A copy of the preliminary draft of this article is located in the Aides Files, Office Files of Frederick Panzer, Box 357, Lyndon B. Johnson Presidential Archives. Selma J. Mushkin & Robert F. Adams, *Emerging Patterns of Federalism*, (March 1966) (unpublished draft), reprinted in 19 *NAT’L TAX J.*, 225 (1966). Similar sentiments are found in a pamphlet, produced by the administration for a Conference of Governors on Federal-State Relations, held at the White House on March 18, 1967. *The New Federalism* (1967), in Aides Files, Office Files of Charles Maguire, Box 3, Lyndon B. Johnson Presidential Archives.

111 Catherine Durkin, *The Exclusionary Effect of “Mansionization”: Area Variances Undermine Efforts to Achieve Housing Affordability*, 55 *CATH. U. L. REV.* 439, 465 (2006). For a general discussion of new regionalism see Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 *WASH. L. REV.* 93 (2003) (analyzing new regionalism and explaining the underlying values of new regionalist arguments). See also Richard Briffault, *Localism and Regionalism*, 48 *BUFF. L. REV.* 1 (2000) (discussing the background of regionalism and its core elements).

112 Laurie Reynolds, *Home Rule, Extraterritorial Impact, and the Region*, 86 *DENV. U. L. REV.* 1271, 1272 (2009). Reynolds describes regionalism’s central goal as “more equitable resource distribution across the metropolitan area.” Laurie Reynolds, *Taxes, Fees Assessments, Dues, and the “Get What You Pay For” Model of Local Government*, 56 *FLA. L. REV.* 373, 377 (2004).

113 For an examination of the grant program, see Lisa T. Alexander, *The Promise and Perils of “New Regionalist” Approaches to Sustainable Communities*, 38 *FORDHAM URB. L.J.* 629, 649–73, (2011). There are, of course, substantial barriers to the new regionalist approach. See Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 *GEO. L.J.* 1985, 2015–27 (2000).

structures exist that do not match our federalist structures. While it is true that “regional interests can and do play a role in legislative decisions,”<sup>114</sup> increasingly there is a willingness to use a particular governance scale to legislate for some unit that is less than the entire whole—generally to address a discrete social or economic problem.<sup>115</sup>

## II. APPROACHES TO STATUTORY INTERPRETATION

In light of the vast literature on the various philosophies of statutory interpretation, the discussion here will be limited to a brief summary of the matters most pertinent to the present inquiry. Additionally, the discussion is developed with a historian’s methodology, preferring primary over secondary sources. Therefore, every effort has been made to rely more on the words of the Justices and their own understandings of methodology rather than on scholarly summaries or reflections.

The process of statutory interpretation is guided by a single principle: “to give effect to Congress’s intent.”<sup>116</sup> This is the Court’s “preeminent purpose.”<sup>117</sup> The process of interpretation begins first with the statute’s text because we presume that Congress has made its intent most explicitly clear within the text.<sup>118</sup> As Justice Kagan remarked in *Tapia v. United States*, the consideration of the matter begins with the specific text of the congressional statute “and given the clarity of that provision’s language, could end there as well.”<sup>119</sup> As a simple summary, before reaching the

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114 James R. Dalton, Note, *Making Politics De Minimis in the Political Process: The Unworkable Implications of Cox v. Larios in State Legislative Redistricting and Reapportionment*, 2004 BYU L. REV. 1999, 2042 (2004).

115 The greatest support may currently be for regional governance mechanisms that are very narrowly tailored to a single issue. See Todd Swannstrom, *Ideas Matter: Reflections on the New Regionalism*, 2 CITYSCAPE 5, 15 (1996), available at <http://www.huduser.org/intercept.asp?loc=/Periodicals/CITYSCAPE/VOL2NUM2/swannstrom.pdf> (“Clearly, the age of general-purpose regional governments is past.”).

116 *Rosenberg v. XM Ventures*, 274 F.3d 137, 141 (3d Cir. 2001) (citing *Idahoan Fresh v. Advantage Produce, Inc.*, 157 F.3d 197, 202 (3d Cir. 1998)). There are, of course, criticisms of the purpose-centered approach. And while the purpose-centered approach may assume a legislative process that is more fair and effective than the one that we have, I believe it is an entirely different question as to whether the courts are the appropriate place to remedy such systemic defects.

117 *Standifer v. United States*, 641 F.3d 1209, 1212 (10th Cir. 2011).

118 See *Idahoan Fresh v. Advantage Produce, Inc.*, 157 F.3d 197, 202 (3d Cir. 1998) (“Because it is presumed that Congress expresses its intent through the ordinary meaning of its language, every exercise of statutory interpretation begins with plain language of the statute itself.”) (citing *Santa Fe Med. Servs., Inc. v. Segal (In re Segal)*, 57 F.3d 342, 345 (3d Cir. 1995)).

119 *Tapia v. United States*, 131 S. Ct. 2382, 2388 (2011). Notably, courts are loath to look beyond an unambiguous text to find congressional purposes. See *Howe v. Smith*, 452 U.S. 473, 483 (1981) (noting that the Court would look beyond unambiguous language only in “rare and exceptional” cases) (quoting *TVA v. Hill*, 437 U.S. 153, 187 (1978); *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 199 (1977) (stating that if a statute is unambiguous, then legislative

point of methodological divergences, Justices first prefer the text. As Justice Kennedy recently emphasized, “As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature’s understanding of otherwise ambiguous terms.”<sup>120</sup>

By focusing on the type of methodology (because statutory interpretation is, by some accounts, methodology more than law<sup>121</sup>), approaches to interpreting statutes can be roughly grouped into three canons: linguistic, referential and substantive.<sup>122</sup> Roughly, these canons address three critical questions. First, where may evidence of interpretation be found? Second, what language rules or customs may be used to assist in interpretation? Finally what are the foundational legal values that will function, roughly, as trump cards in this process?

### A. *Linguistic Canons*

A variety of linguistic canons are frequently consulted to aid in the interpretation of a statute, generally without reference to anything outside the text (and the canons). The Court will look to the “common—and in context the most natural—definition of the word,” often simply referencing the meaning found in an ordinary dictionary,<sup>123</sup> apply “standard rules of

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history is irrelevant). As Justice Rehnquist wrote, “where [Congress’s] will has been expressed in reasonably plain terms, ‘that language must ordinarily be regarded as conclusive.’” *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982) (quoting *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

The Eleventh Circuit recently explained that courts interpret and apply not congressional purposes, but statutes. “[I]t is not for us to substitute our view of policy for the legislation which has been passed by Congress.” *Myers v. TooJay’s Mgmt. Corp.*, 640 F.3d 1278, 1286 (11th Cir. 2011) (quoting *Fla. Dep’t of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 52 (2008)).

The Court follows this rule because “[i]nvocation of the ‘plain purpose’ of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.” *Id.* (quoting *Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986)). Otherwise stated, the purpose of a statute may not be so simple as, for example, economic recovery, but rather economic recovery achieved while maintaining environmental quality standards. Much of the work of Congress is the balancing of competing social goods.

<sup>120</sup> *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

<sup>121</sup> See Gluck, *supra* note 3, at 1902.

<sup>122</sup> See generally Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Constructed*, 3 VAND. L. REV. 395, 401-06 (1950) (exploring and critiquing the variety of methods of statutory interpretation and assigning them to categories).

<sup>123</sup> *Tapia*, 131 S.Ct. at 2388. While this approach might be thought to naturally yield an answer, in many cases the dictionary will offer different definitions that vary with the context of the word usage. See, e.g., *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325,

grammar” in the process of interpretation;<sup>124</sup> and compare wordings—particularly within statutes of a similar type.<sup>125</sup> Courts will look to surrounding portions of the statute to make an interpretation of a particular provision within its context,<sup>126</sup> which includes not only wording but also the structure of the statute.<sup>127</sup> As Justice Sutherland poetically expressed, “a word may be known by the company it keeps.”<sup>128</sup> Context is a key part

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1331-33 (2011) (discussing the word “file” and whether it can apply to oral statements in addition to written statements).

124 *Tapia*, 131 S. Ct. at 2389.

125 Courts will look beyond one particular act to find other Congressional statutes with similar provisions. *See, e.g., Kasten*, 131 S. Ct. at 1332-33 (interpreting by comparing other statutes containing anti-retaliation provisions); *see generally* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 1039 (3d ed. 2001). Indeed, in some instances courts have looked to similar statutes rather than looking to the legislative history of the statute at issue. *See* Barbara D. Goldberg & Richard J. Montes, *Recent Interpretations of the CPLR by New York Appellate Courts*, 74 ALB. L. REV. 745, 765 (2010-11) (discussing and applying the “amended saving statute”).

Reference to similar or analogous statutes is particularly common when wording is often repeated across multiple statutes within a particular field, such as in the Clean Air Act, which served as a model for a number of subsequent environmental statutes. *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (“[W]hen Congress uses the same language in two statutes having similar purposes . . . it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.”). Courts may also look to “contemporaneous judicial usage” when interpreting a legal term of art. *E.g., Kasten*, 131 S. Ct. at 1332 (2011) (considering such usage to determine that the word “file” encompasses oral filings).

126 *See, e.g., Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (“[W]e construe language in its context and in light of the terms surrounding it.”) (citing *Smith v. United States*, 508 U.S. 223, 229 (1993)).

127 *See, e.g., Tristani ex rel. v. Richman*, 652 F.3d 360, 375 (3d Cir. 2011) (interpreting the Social Security Act in light of its structure).

128 *Russell Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923). While this case is often cited on this particular proposition, (see, for example, *Samantar v. Yousuf*, 130 S. Ct. 2278, 2287-88 (2010)), it is important to note that the Court immediately qualified the rule, stating that the contextual approach is “not an invariable rule” and that a “word may have a character of its own not to be submerged by its association.” *Russell*, 261 U.S. at 519.

Context remains, however, a significant part of the process of interpreting a statutory term. The Court’s view of context extends to adjacent definitions. *See McNeill v. United States*, 131 S. Ct. 2218, 2222 (2011) (comparing “adjacent definition of ‘violent felony’” in interpreting “serious drug offense”) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). The Court also draws relevant conclusions from statutory silences. *See Tapia*, 131 S. Ct. at 2390 (describing the “[e]qually illuminating . . . statutory silence”). If “Congress uses similar statutory language . . . in two adjoining provisions, it normally intends similar interpretations.” *Nijhawan v. Holder*, 129 S. Ct. 2294, 2301 (2009) (citing *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005)); *see Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972) (noting that similar interpretations are preferred unless something in the legislative history would suggest that Congress intended material differences between the two instances). Where one possible interpretation “gives effect ‘to every clause and word of a statute,’” the “canon against superfluity” applies to assist in avoiding excess language. *Microsoft Corp. v. i4i Ltd. P’ship*, 131 S. Ct. 2238, 2248 (2011) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). Additionally, the statutory

of the process of statutory interpretation and the outcome “often turns on context.”<sup>129</sup> Context may illuminate the “congressional purposes explicit in the statutory text.”<sup>130</sup>

### B. Referential Canons

Unfortunately, context often fails to resolve ambiguities. When this is the case, Justices diverge in their opinions as to whether courts may look beyond the text and structure of the statute itself to seek out additional information regarding congressional intent.<sup>131</sup>

Purposive methods seek an overarching goal or force behind a piece of legislation to serve as a touchstone. Followers cite “the real risks of Rule interpretation when courts rely on text unaided by the touchstones of history and purpose,” which may not be obvious within the text itself.<sup>132</sup> Their point may be supported, for example, by a recent community debate in Evanston, Indiana. An ordinance in the city bans more than three unrelated persons from living together and has recently been used to target Northwestern students who, at times, make less than ideal neighbors for suburbanites—a use likely beyond the scope of the ordinance’s original

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context is utilized during the process of interpretation to ensure that the adopted interpretation does not “rende[r] the statutory scheme ‘[in]coherent and [in]consistent.’” *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 2002 (2011) (Sotomayor, J., dissenting) (quoting *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 222 (2008)).

129 *FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1182 (2011).

130 *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1632–33 (2010) (Kennedy, J., dissenting) (examining the Fair Debt Collection Practices Act and the statutes within to argue that the majority’s holding frustrates an explicit congressional purpose).

131 Ambiguity is, of course, frequently alleged—perhaps often creatively—by parties with competing interests. The role of parties’ competing definitions in determining ambiguity was raised in *Sossamon v. Texas*. *See Sossamon v. Texas*, 131 S. Ct. 1651, 1659–60 (2011) (discussing two plausible interpretations of “appropriate relief” and holding that the phrase could not be subject to ambiguity when one possible interpretation contained a waiver of sovereign immunity). The majority opinion noted that the parties’ plausible and contradictory interpretations indicated that the statute was ambiguous. *Id.* at 1660. Justice Sotomayor strongly disagreed in her dissent, arguing that such an approach would render “our capacity to interpret authoritatively the text of a federal statute . . . held hostage to the litigants’ strategic arguments.” *Id.* at 1668 (Sotomayor, J., dissenting). She concludes that “[i]f this were true, there would be few cases in which we would be able to decide that a statute was unambiguous.” *Id.* Justice Sotomayor’s concern echoes previous decisions, which have noted that where the parties agree on an interpretation of an ambiguous term, the court “will not flout all usual rules of statutory interpretation to take the side of the bare majority.” *Milner v. Dep’t of Navy*, 131 S. Ct. 1259, 1269 (2011). *See also In re Visteon Corp.*, 612 F.3d 210, 221 (3d Cir. 2010) (stating that the general rule regarding ambiguity is when a text is ambiguous where it is “reasonably susceptible of different interpretations”).

132 Bernadette Bollas Genetin, *Reassessing the Avoidance Canon in Erie Cases*, 44 AKRON L. REV. 1067, 1108 (2011).

purpose.<sup>133</sup> While the students fall within the bounds of the ordinance text, some would argue that the creative re-use of this law is unjust—or, more specifically, lacks the requisite democratic support. To avoid such potential pitfalls and to ascertain congressional intent, intentionalists and modern textualists<sup>134</sup> search beyond the enacted text by looking to the legislative history<sup>135</sup> or even further to other historical sources and trends.<sup>136</sup>

Textualists would cite a different democratic conundrum: “the possibility that legislation does not pursue its goal at all costs . . . [and] only the text that passed through the legislative process can possess the force of law.”<sup>137</sup> As the Court itself has explained, “Application of ‘broad purposes’ of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action.”<sup>138</sup> Even if Congress’s intent is unanimous, legislators may have dramatically different concepts of the means to effectuate that intent; therefore, “the final language of the legislation may reflect hard-fought compromises.”<sup>139</sup> Others, Justice Scalia in particular, would cite the risk that “judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field.”<sup>140</sup> This conflict has resulted in a number of Supreme Court cases where separate opinions argue the appropriateness of consulting legislative history.<sup>141</sup>

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133 Reportedly, the purpose of the ordinance was not to police living accommodations, but to target brothels. See Alex Kane Rudansky, *In Focus: Evanston Will Enforce “Brothel Rule” Starting in July, NU Administration Won’t Fight It*, DAILY NORTHWESTERN, Jan. 24, 2011, available at <http://dailynorthwestern.com/2011/01/24/city/in-focus-evanston-will-enforce-brothel-rule-starting-in-july-nu-administration-wont-fight-it/>.

134 ESKRIDGE, *supra* note 4, at 234–36 (comparing approaches of intentionalists and new textualists).

We are rich in scholarship—and opinions—on the appropriate method of textual interpretation. Perhaps surprisingly given the scholarly and judicial angst, our methods are quite similar to ones used historically across cultures. See Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1183–91 (1990).

135 See, e.g., *Carcieri v. Salazar*, 555 U.S. 379, 397 (2009) (Breyer, J., concurring) (noting his “examination of the provision’s legislative history”).

136 See, e.g., *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 590–91 (2004) (using a “social history” in combination with the legislative history to interpret a federal statute).

137 Note, *Textualism as Fair Notice*, 123 HARV. L. REV. 542, 552–53 (2009).

138 *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373–74 (1986).

139 *Id.* at 374.

140 Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION*, 17–18 (Amy Gutmann ed., 1997).

Arguably a similar issue arises when the courts try to use legislative history to avoid their own doctrine of agency deference. See, e.g., *Entergy Corp. v. Riverkeeper, Inc.*, 566 U.S. 208, 217–20 (2009) (arguing precisely such a maneuver).

141 E.g., *Bd. of Governors of Fed. Reserve Sys.*, 474 U.S. at 373–74 (discussing the problems

Even if a court is willing to be “informed by the statutory history,”<sup>142</sup> which “may illuminate ambiguous text,”<sup>143</sup> the primordial text may provide little guidance.<sup>144</sup> As Justice Kennedy has observed, “legislative history is itself often murky, ambiguous, and contradictory,” which may serve as an invitation to interpreting courts to “loo[k] over a crowd and pic[k] out your friends.”<sup>145</sup> Additionally, relying on legislative history may “give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.”<sup>146</sup> Therefore, it is important to consider both the purpose and context, which will yield a single reasonable interpretation for a provision that might otherwise, when “considered in isolation, . . . be open to competing interpretations.”<sup>147</sup>

These varied approaches to the legislative history must, however, be held within their proper context. Despite their methodological differences, Justices privilege the text and only reluctantly resort to legislative history. As a result, the linguistic and substantive canons carry greater significance because they may be partnered with the text alone, without recourse to the legislative history.

### C. Substantive Canons

Karl Llewellyn, who has been widely regarded for his early taxonomy of statutory interpretation, described the substantive canons as unique from the other categories because these canons departed from value-neutral methods and were justified based on their reliance on foundational principles found in the constitutional structure or the common law.<sup>148</sup> While

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incurred in divining congressional intent from statutes).

<sup>142</sup> *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2633 (2011).

<sup>143</sup> *Milner v. Dep’t of the Navy*, 131 S. Ct. 1259, 1266 (2011).

<sup>144</sup> See, e.g., Debra Carfora, *United States v. Newmark: Semantics and Misrepresentation in Mail and Wire Fraud, Does It Really Matter Who Was Deceived?*, 60 CATH. U. L. REV. 779, 800 (2011).

<sup>145</sup> *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (citing Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983)).

<sup>146</sup> *Exxon Mobil Corp.*, 545 U.S. at 568. Justice Kennedy continues, noting that “[w]e need not comment here on whether these problems are sufficiently prevalent to render legislative history inherently unreliable in all circumstances, a point on which Members of this Court have disagreed.” *Id.* at 568–69.

<sup>147</sup> *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1331 (2011).

<sup>148</sup> Karl N. 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 (1950). Notably, the Supreme Court recently affirmed the role of the common law in statutory interpretation. See *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2325 (2011) (citing *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003)).



Llewellyn critiqued the substantive canons as determinative policy choices of the Court that would be reflected in case decisions, Eskridge and Frickey later argued that the substantive canons were not causally related to the Court's decisions, but rather "reflect[] an underlying 'ideology,' or mix of values and strategies that the Court brings to statutory interpretation."<sup>149</sup> In either formulation, substantive rules stand out among the methodological choices for their significance in either persuading the Court or in reflecting the Court's commitment to certain fundamental notions of republican government, including the canon of legislating for the common good and for the federalist structure.

With respect to the federalist structure, recently the Court has favored grounding all statutory interpretations in fundamental constitutional concepts unless Congress has specifically directed the Court to otherwise in the text of the statute. The newly developed "clear statement rule" exemplifies this approach; this rule institutes a scalar decision about power where constitutional principles reign supreme unless expressly rebutted in the statutory text.<sup>150</sup> These rules appear to be particularly designed to protect "structures associated with federalism."<sup>151</sup> On the one hand, there are advantages to this approach. As Eskridge and Frickey explain, "structural constitutional protections, especially those of federalism, are underenforced constitutional norms."<sup>152</sup> On the other hand, while perhaps the majority of scholars would say that federalism must reach beyond the mere representation of the states in Congress,<sup>153</sup> this approach could be seen as judicial activism by another name because the Court could potentially bolster tenuously accepted constitutional concepts as law through the guise of a statutory interpretation case.<sup>154</sup> For our purposes here, the merits of clear statement rules may be set aside. Our primary concern is that the Court's recent adoption of this approach generally and the clear statement rule specifically reflects a willingness to look to the basic constitutional structures, particularly federalism, to fill in gaps or reinforce arguments within the process of statutory interpretation. Such willingness may influence the Court as it engages the canon of the common

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149 William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 596 (1992).

150 *See id.* at 597 (describing the clear statement rules as a new form of Court activism that allows the Court to protect constitutional structures through the use of presumptions that must be rebutted by Congress in the text).

151 *Id.*

152 *Id.*

153 *See* Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1357 (2001) ("Modern 'political safeguards' theorists have . . . focused on the representation of the states in Congress as the critical, even exclusive, constitutional protection for federalism. Many judges and scholars have been properly skeptical of these claims.").

154 *See* Eskridge & Frickey, *supra* note 149, at 598.

good, particularly when benefits are generated at both regional and national scales.

#### D. *The Canon of the Common Good*

The canon of the common or public good stands on a lengthy legal history, and its significance is frequently affirmed. Madison’s version of classical republican thought tied the political process to deliberation about the nature of the public good.<sup>155</sup> Within English law the monarch held a unique prerogative or executive power—that of “acting for the public good, where the positive laws are silent.”<sup>156</sup> As Justice Stone wrote in 1937, our “most fundamental principle of government” is that it is created “primarily to provide for the common good.”<sup>157</sup> As Justice Brennan explained, “[G]overnment regulation—by definition—involves the adjustment of rights for the public good.”<sup>158</sup> The state “has no other excuse for being.”<sup>159</sup>

By virtue of this principle, the job of the legislature is to “by . . . reasonable enactment” determine “what the health, morals and safety of the public require for the common good.”<sup>160</sup> As Justice Brennan explained, legislators’ sphere of legitimate activity is “formulating and expressing their vision of the public good within self-defined constitutional boundaries.”<sup>161</sup> Those constitutional boundaries are themselves created by an “overriding definition of the ‘public good,’ and a court’s valid command to obey constitutional dictates is not subject to override by any countervailing preferences of the polity, no matter how widely and ardently shared.”<sup>162</sup> The court must endeavor to “select an interpretation that best promotes or

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<sup>155</sup> See THE FEDERALIST NO. 10, at 43 (James Madison) (Terence Ball ed., 2003) (“If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote: It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution.”).

<sup>156</sup> *Myers v. United States*, 272 U.S. 52, 234 (1926) (Holmes, J., dissenting).

<sup>157</sup> *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 523 (1937). There is, however, a certain irony in that some courts have used the common good as a test for determining a governmental function, which, therefore, creates a circular definition. See, e.g., *Daugherty v. State Dep’t of Natural Res.*, 283 N.W.2d 825, 827 (Mich. Ct. App. 1979). A similar circularity often is found in the definitions of public policy and the common good. See, e.g., *Dille v. St. Luke’s Hosp.*, 196 S.W.2d 615, 619–20 (Mo. 1946).

<sup>158</sup> *Andrus v. Allard*, 444 U.S. 51, 65 (1979).

<sup>159</sup> *Fordyce & McKee v. Woman’s Christian Nat’l Library Ass’n*, 96 S.W. 155, 159 (Ark. 1906).

<sup>160</sup> *City of Fayetteville v. S & H, Inc.*, 547 S.W.2d 94, 100 (Ark. 1977) (Fogleman, J., dissenting).

<sup>161</sup> *Spallone v. United States*, 493 U.S. 265, 300 (1990) (Brennan, J., dissenting).

<sup>162</sup> *Id.* at 301.

least harms the public good,"<sup>163</sup> or to "govern [its] actions (interpreting law) in accordance with the common good of all mankind."<sup>164</sup>

One limit to the courts' powers of statutory interpretation with respect to the common good arises from a conflict between the powers of the court and the delegated powers of statutory interpretation given to an administrative agency. Courts are not able to supersede the agency's judgment based on their own idea of some "vague, undefined public good."<sup>165</sup> This qualification of courts' powers of interpretation does not at all detract from the significance of the common good imperative: deference to the administrative agency is grounded on the agency being "in the best position to determine what is and what is not in the public good."<sup>166</sup>

With such a long history, there has been both too much and too little judicial and scholarly engagement with the concept of the common good. On the one hand, there is an ongoing litany of public debate about the best interests of the people that rises and falls, cresting every four years with tidal regularity. On the other hand, within judicial decision-making there has been a tendency to gloss over the common good as obvious even while treating it as a part of a deeply significant substantive canon. In part, this may result from the fact that even the most aggressive political contenders tend to agree that certain services must be provided as part of the common good, including public schools,<sup>167</sup> public hospitals,<sup>168</sup> playgrounds,<sup>169</sup> public

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163 Richard J. Scislowksi, *The U.C.C. Section 4-205(2) Payment/Deposit Warranty: Allow a Drawer to Hold a Depository Bank Liable for Collecting an Item with a Forged Indorsement*, 28 AKRON L. REV. 573, 605 (1995).

164 *United States v. Shannon*, 110 F.3d 382, 413 (7th Cir. 1997).

165 *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1977); *see also Vial v. First Commerce Corp.*, 564 F. Supp. 650, 667 (E.D. La. 1983).

166 *State Health Planning & Dev. Agency v. AMI Brookwood Med. Ctr.*, 564 So. 2d 63, 73 (Ala. 1990) (Maddox, J., concurring in part, dissenting in part). Courts are not, of course, necessarily confident of the agencies' superior ability to locate and define common public goods. This hesitance on the part of the courts appears in decisions that acknowledge agency deference and yet note that the agency is "supposedly" in a better position to determine the common good. *See, e.g., id.*

167 *See, e.g., Wartsila NSD N. Am., Inc. v. Hill Int'l, Inc.*, 530 F.3d 269, 275 (3d Cir. 2008); *Rural Special Sch. Dist. No. 21 v. Common Sch. Dist. No. 87*, 35 S.W.2d 587, 588 (Ark. 1931); *Davis v. Moon*, 289 P.2d 614, 618 (Idaho 1955). Many courts also expand this understanding of public goods to incorporate a host of related activities, such as supporting high school sports. *See, e.g., Cotto v. Bd. of Educ.*, 2006 Conn. Super. LEXIS 1966, at \*10 (Conn. Super. Ct. June 30, 2006); *see also Citizens Coal. v. D.C. Bd. of Zoning Adjustment*, 619 A.2d 940, 952 (D.C. 1993) (regarding generating power for a university).

168 *Parker v. City of Highland Park*, 273 N.W.2d 413, 421 (Mich. 1978) (Ryan, J., dissenting); *see also Kromko v. Ariz. Bd. of Regents*, 718 P.2d 478, 481 (Ariz. 1986); *Citizens Coal.*, 619 A.2d at 952.

169 *See, e.g., Pichette v. Manistique Pub. Schs.*, 269 N.W.2d 143, 151 (Mich. 1978) (citing *Gunther v. Cheboygan Cnty. Road Cmm'rs*, 196 N.W. 386 (Mich. 1923)).

works,<sup>170</sup> emergency services,<sup>171</sup> law enforcement,<sup>172</sup> public utilities,<sup>173</sup> and public transportation.<sup>174</sup> Ironically, while some cases treat the common good as obvious, others suggest the question is inherently political and beyond the scope of the judiciary. The Tenth Circuit recently suggested that “[a]s a creature of politics, the definition of the public good changes with the political winds.”<sup>175</sup> The Louisiana Supreme Court has taken a more drastic view, opining that the common good is “in every case a question of public policy” and “[t]he meaning of the term is flexible.”<sup>176</sup>

This is not to say that the common good lacks substantive content. Like other substantive rules in Eskridge and Frickey’s formulation, common good may reflect a “mix of values and strategies that the Court brings to statutory interpretation.”<sup>177</sup> Cases invoking the public good as a sort of trump card also indicate substantive content. For example, when the Court considered an issue of privileges in *Jaffee v. Redmond*, Justice Stevens explained that even though testimonial privileges are disfavored, there are moments when a “public good [may transcend] the normally predominant principle of utilizing all rational means for ascertaining truth.”<sup>178</sup> Similarly, elected officials are provided certain unusual immunities because these are understood to be necessary to ensure the public good of effective democratic representation.<sup>179</sup> As a result of such decisions, the common good has accumulated substantive content over the years. Some common goods, such as the physical and mental health of our citizens, have been identified as transcendent, superseding other admittedly admirable ends.<sup>180</sup> Justice Breyer cited a similar superseding common good in *Rubin v. United States*, explaining that “the President’s physical safety amounts to the kind of transcendent public good that, in principle, might justify the recognition of a new privilege.”<sup>181</sup>

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170 See, e.g., *Wiles v. Bagley*, 561 F.3d 636, 643 (6th Cir. 2009) (Martin, J., concurring).

171 See, e.g., *id.*

172 See, e.g., *id.*

173 See, e.g., *Wartsila NSD N. Am., Inc. v. Hill Int’l, Inc.*, 530 F.3d 269, 275 (3d Cir. 2008); *Williams v. United States*, 1999 U.S. Dist. LEXIS 22818, at \*10 (W.D.N.C. Sept. 9, 1999).

174 See, e.g., *Wiles*, 561 F.3d at 643 (Martin, J., concurring).

175 *Powers v. Harris*, 379 F.3d 1208, 1218 (10th Cir. 2004).

176 *ExxonMobil Pipeline Co. v. Union Pac. R.R. Co.*, 35 So. 3d 192, 198 (La. 2010) (quoting *City of New Orleans v. New Orleans Land Co.*, 136 So. 91, 92–93 (La. 1931)).

177 Eskridge & Frickey, *supra* note 149, at 596.

178 *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)) (internal quotation marks omitted).

179 *Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998).

180 See *Jaffee*, 518 U.S. at 11 (“The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.”).

181 *Rubin v. United States*, 525 U.S. 990, 991 (1998) (Breyer, J., dissenting) (citing *In re Sealed Case*, 148 F.3d 1073, 1076 (D.C. Cir. 1998)).

The common good is, historically, something held distinct from the idea of simply aggregating “competing private interests.”<sup>182</sup> Determining the public good in any particular circumstance “entails not merely economic and mathematical analysis but value judgment.”<sup>183</sup> Therefore, legislation “is not universally considered contrary to the public good if the net economic loss to the losers exceeds the net economic gain to the winners.”<sup>184</sup> As a result, when agencies are charged with determining the public good in a particular context, their governing statutes often fail to “prescribe a precise formula” for such determinations.<sup>185</sup>

The power of eminent domain illustrates how the pursuit of the common good can in fact operate detrimentally to private interests.<sup>186</sup> Eminent domain powers are often used to “provide quintessentially public goods, such as public roads, toll roads, ferries, canals, railroads, and public parks.”<sup>187</sup> However, the elimination of a private interest does not invalidate the state’s use of eminent domain to generate common goods,<sup>188</sup> such situations are justified because the private benefit is incidental to a more significant purpose of creating the public good.<sup>189</sup>

The common good imperative also shapes statutory interpretation in another significant way. Where a statute is recognized to be “remedial in nature and designed to promote the public good,” courts will allow more leeway and “interpret[] [the statute] broadly to effectuate its purpose.”<sup>190</sup> When the statute makes explicit reference to the common good, the

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182 Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 68 (1992).

183 *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 377 (1991).

184 *Id.*

185 *E.g.*, *Appeal of Conservation Law Found., Inc.*, 507 A.2d 652, 684 (N.H. 1986).

186 *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992). In defining a taking, the majority explained that compensation is required “when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good.” *Id.*

187 *Kelo v. City of New London*, 545 U.S. 469, 512 (2005).

188 *See id.* at 485 n.14. *Kelo* is perhaps best known for this proposition, but the majority noted a number of precedents in the way of private benefits resulting from the use of eminent domain powers, including a transfer of rail track between private companies and the provision of legal services to the poor. *Id.* (citing *Nat’l R.R. Passenger Corp. v. Bos. & Me. Corp.*, 503 U.S. 407 (1992). *See also Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003). *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984)).

189 Patents and copyrights, for example, are justified because of their ability to “promote the progress of science.” *Eldred v. Ashcroft*, 537 U.S. 186, 187 (2003) (discussing the statutory justification for the Copyright and Patent Clause, U.S. CONST. ART. I, § 8, cl. 8). The Copyright and Patent Clause further exists to “stimulate artistic creativity for the general public good.” *Id.* at 245 (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)). The Court explains that the copyright is a reward, but such a reward “is a means, not an end,” and therefore the copyright is limited rather than perpetual in duration. *Id.* at 245–46.

190 *Mike Smith Pontiac, GMC, Inc. v. Mercedes-Benz of N. Am., Inc.*, 32 F.3d 528, 534 (11th Cir. 1994).

court may not apply a “strict [or] narrow interpretation,”<sup>191</sup> but rather must interpret the statute “liberally.”<sup>192</sup> This is a principle of statutory interpretation that has dated to the earliest years of our republic.<sup>193</sup>

In the end, however, while there is ample evidence of substantive meaning within the common good canon, the argument in the following section suggests that the canon takes on a new significance when scale enters the discussion.

### III. AMBIGUITY OF SCALE & STATUTORY INTERPRETATION

#### A. *Defining & Theorizing Scale*

Like place, space, and landscape, scale is a central theoretical concept in the discipline of geography.<sup>194</sup> While place and space were well developed as concepts, scale lagged behind in the theorization of geography.<sup>195</sup> However, modern developments such as web-based commerce and low cost telecommunications solutions such as Skype have encouraged theorists to redirect their attention to the nature of scale.<sup>196</sup>

Thinking specifically about scale has generated opportunities for critiquing the ontological nature of scale—for thinking about whether units

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191 *City and Cnty. of Denver v. Stenger*, 295 F. 809, 816 (8th Cir. 1924). This approach to statutory interpretation is also a parallel to the requirement that remedial statutes are interpreted broadly. *See, e.g., Fed. Home Loan Mortg. Corp. v. N.Y. State Div. of Hous. and Cmty. Renewal*, 854 F. Supp. 151, 159 (E.D.N.Y. 1994). Indeed, in some decisions courts combine the two approaches, noting that remedial statutes must be interpreted for the common or public good. *See, e.g., Mortenson v. Leatherwood Constr., Inc.*, 137 S.W.3d 529, 536 (Mo. Ct. App. 2004).

192 *First Iowa State Bank v. Iowa Dep't. Natural Res.*, 502 N.W.2d 164, 166 (Iowa 1993).

193 *See, e.g., United States v. State Bank of N.C.*, 31 U.S. 29, 35 (1832).

194 Andrew Herod, *Scale: The Local and the Global*, in *KEY CONCEPTS IN GEOGRAPHY* 229 (Sarah L. Holloway et. al. eds., 2003) (explaining that scale was initially overlooked by geographers, but later became a central point of theorizing within the discipline).

195 *See id.* at 230 (stating that various research projects looked at issues from both a national and regional scale, yet neglecting to theorize “on the nature of scale itself”). To some degree, problems of scale were simply relegated to discrete theoretical questions in geography as opposed to more general philosophical debates in the field. For example, scale is, of course, an important concept to consider in the history of cartography, which has long recognized how variables such as scale may pretend a level of scientific neutrality but, in fact, harbor significant persuasive power. *See J. Brian Harley, Maps, Knowledge, and Power*, in *THE ICONOGRAPHY OF LANDSCAPE: ESSAYS ON THE SYMBOLIC REPRESENTATION, DESIGN AND USE OF PAST ENVIRONMENTS* 292 (Denis Cosgrove & Stephen Daniels eds., 1988).

196 *See Herod, supra* note 194, at 229. These modern developments underline the scholarship that has long worked to establish the “fundamentally interconnected” nature of scales. Linda McDowell, *Spatializing Feminism: Geographic Perspectives*, in *BODYSPACE: DESTABILIZING GEOGRAPHIES OF GENDER AND SEXUALITY* 28, 31 (Nancy Duncan ed., 1996); *see Doreen Massey, Politics and Space/Time, in PLACE AND THE POLITICS OF IDENTITY* 141, 155 (Michael Keith & Steve Pile eds., 1993).

such as the local, the state, the national, and the global are predetermined or “material social products.”<sup>197</sup> More to the point, thinking specifically about scale has encouraged questioning of the idea of a natural hierarchy in the local, national, and global<sup>198</sup> and has encouraged recognition of the degree to which political and social struggles occur across a variety of scales.<sup>199</sup> The hierarchical history of the concept of scale is indeed so strong that some theorists have argued against the category of scale on the grounds that it too easily reifies the hierarchy; scholars are much in agreement that scale is a material social product and, therefore, deeply culturally contingent and colored by existing power structures.<sup>200</sup> The hierarchy of scale is one that too easily passes unnoticed; scale provides a definitive quantitative distinction, however, because scale is viewed as a materially social product this quantitative distinction is, unfortunately, often mistaken for a qualitative determination.<sup>201</sup> The danger of scale, therefore, is the degree to which it is treated as a neutral and predetermined backdrop rather than a variable, shifting and relevant in the process of governance.

Most importantly for purposes of this article, scale crystalizes a central problem at the intersection of law and geography: the tendency in our society to treat our federalist system as the simple answer to all questions of law and geography, cutting off the need for either inquiry or debate.<sup>202</sup>

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197 Herod, *supra* note 194, at 230. This approach to scale has complemented work on the nature of boundaries, their creation and maintenance, and the existence of communities that span boundary lines, resulting in porousness rather than rigidity. See, e.g., Joel S. Migdal, *Mental Maps and Virtual Checkpoints*, in BOUNDARIES AND BELONGING: STATES AND SOCIETIES IN THE STRUGGLE TO SHAPE IDENTITIES AND LOCAL PRACTICES 3, 5-14 (Joel S. Migdal ed., 2004).

198 See Nicholas Blomley, *Landscapes of Property*, 32 LAW & SOC'Y REV. 567, 569 (1998) (stating that experiences, rather than “determinable segments of the physical world” also contribute to the idea of scale) (citation omitted).

199 See David Harvey, *Notes Towards a Theory of Uneven Geographical Development*, in SPACES OF NEOLIBERALIZATION: TOWARDS A THEORY OF UNEVEN GEOGRAPHICAL DEVELOPMENT, HETTNER-LECTURE 2004 55, 58 (Hans Gebhardt et al. eds. 2005) (proposing a general theory of uneven geographical development within capitalism based, in part, on “political, social and ‘class’ struggles at a variety of geographical scales”).

200 See Sallie A. Marston, et al., *Human Geography Without Scale*, 30 TRANSACTIONS OF THE INST. OF BRITISH GEOGRAPHERS 416 (2005) (arguing that scale is a dangerous category even when acknowledged as socially constructed due to the naturalization or reification of hierarchical power relations).

201 See David Laven & Timothy Baycroft, *Border Regions and Identity*, 15 EUR. REV. HIST. 255, 256 (2008) (“[S]imply by applying the epithet ‘national’ or ‘regional’ or ‘local,’ we appear to be making a qualitative or hierarchical distinction between what are fundamentally the same sort of identities . . .”).

202 See Lisa R. Pruitt, *Gender, Geography & Rural Justice*, 23 BERKELEY J. GENDER L. & JUST. 338, 383 (2008) (“When geography meets law, scale often equates with jurisdiction, which is a proxy for where the power of decision-making resides, or the level of governmental interests that are implicated.”) (footnote omitted).

Notably, the concept of the public good is used to readily affirm the static nature of the relationship between the states and the federal government in our system. See Perez v.

Courts have long recognized that our federal system generates public goods at a number of different scales. While the federal government primarily operates at the national scale, our local and state governments work to “provide public goods and services on their own” because they too are charged with “the responsibility of protecting the health, safety, and welfare of [their] citizens.”<sup>203</sup> With this approach, theoretical examinations of scale were left unexamined in favor of solving quandaries about efficiencies, transaction costs, and externalities in choosing the appropriate scale from which to deliver public services.<sup>204</sup>

Often, attention focuses on the problem of alignment (or mismatches) in the scale of government when compared to the geographical reach of a particular public good.<sup>205</sup> For example, Robert C. Ellickson suggests a device known as the Block Improvement District in order to facilitate the improvement of neighborhoods through the repair of broken windows, something Ellickson describes as a “block-level public good.”<sup>206</sup> While recognizing that “some local public goods, such as a mosquito abatement program, a sewage treatment facility, or a tourism office, can benefit an entire metropolitan area,” Ellickson distinguishes these from the category of public goods that “typically benefit only a few blocks.”<sup>207</sup> While Ellickson notes that formal governance structures are not necessary and often property owners can succeed in providing these goods themselves through social norms, he recognizes that without a significant amount of social cohesion within a group, structures that are both formal and coercive may be required.<sup>208</sup> The question then becomes the appropriate scale for creating

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Ledesma, 401 U.S. 82, 129 (1971) (Brennan, J., concurring in part and dissenting in part).

203 *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 340 (2008) (citing *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343 (2007) (explaining that the pursuit of the common good at the state and local levels justifies a certain amount of “protectionism” which is only limited by constitutional concerns).

204 See Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 *DUKE L.J.* 75, 80 (1998) (“An adjustment in territorial size simultaenously affects the efficiency of the scale of production, the transaction costs of internal governance, and the seriousness of transboundary spillover effects.”) (footnote omitted). In an earlier article, Ellickson discussed these issues in more detail, although in that case he directed his attention to the ideal parcel size for land as opposed to the question of the scale of governance. Robert C. Ellickson, *Property in Land*, 102 *YALE L.J.* 1315, 1332 (1993). While the issues are, of course, quite distinct, Ellickson’s reflections on the ideal placement of boundary lines for the purposes of obtaining social goods are relevant to generalizing the types of concerns relevant to questions of the appropriate scale of governance and the common good.

205 See Bradley C. Karkkainen, *Biodiversity and Land*, 83 *CORNELL L. REV.* 1, 76 (1997) (discussing who is best positioned to structure programs that provide a social good—individuals or the government); James J. Kelly, *Land Trusts that Conserve Communities*, 59 *DEPAUL L. REV.* 69, 105 (2009) (stating that laws should be “recast” to maximize the common good).

206 Ellickson, *supra* note 204, at 75, 78–79.

207 *Id.* at 78.

208 *Id.* at 79.



the block-level public goods. After considering the block, neighborhood, and city as possible levels for governance structures, Ellickson relies on data from new block-level institutions in new developments as well as theoretical analyses of the advantages of the smallest scale to conclude that block-level structures are most effective and efficient.<sup>209</sup>

Ellickson's approach reflects both the existence of a deficiency and an important innovation in our thinking about scales. On the one hand, the debate about the appropriate scale for the delivery of goods is part of the problem: it has allowed us to treat scale as a variable rather than a theoretical concept in need of development. On the other hand, Ellickson's idea of block-level governance steps beyond the assumption that scale is constitutionally dictated in the federalist structure. Hopefully Ellickson's work indicates a trend of examining scale thoughtfully within the context of determining the common good.

### *B. Conflicts in Scale & the Common Good Canon*

When it comes to the common good, the concept is empty without scalar application. There is an implied subject or beneficiary that must be a community of some type. In discussing the public or common good, H.L.A. Hart described the failure of coherent definitions, a problem that he specifically attributed to the possibility of ambiguities in scale: "[I]t is not clear what these phrases [like "public good" and "common good"] mean, since there seems to be no scale by which contributions of the various alternatives to the common good can be measured and the greater identified."<sup>210</sup>

Consider, for example, a recent Louisiana Supreme Court case involving the question of the constitutional threshold for "public use."<sup>211</sup> After noting the difficulty of defining the public good, the court noted that one approach is to authorize eminent domain "to promote such public benefit, etc., especially where the interests involved are of considerable *magnitude*, and it is sought to use the power in order that the natural resources and advantages of a locality may receive the fullest development in view of the general welfare" (whose scale is not clarified).<sup>212</sup> The Louisiana Supreme Court did explain that other courts would decide the matter based on

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209 *Id.* at 79-90.

210 H.L.A. HART, *THE CONCEPT OF LAW* 162-63 (1961).

211 *ExxonMobil Pipeline Co. v. Union Pac. R.R. Co.*, 35 So. 3d 192, 198 (La. 2010) (quoting *City of New Orleans v. New Orleans Land Co.*, 136 So. 91, 92-93 (1931)). Regarding the public good, the court explained "No general definition of what degree of public good will meet the constitutional requirements for a 'public use' can be framed, as it is in every case a question of public policy. The meaning of the term is flexible and is not confined to what may constitute a public use at any given time, but in general it may be said to cover a use affecting the public generally, or any number thereof, as distinguished from particular individuals." *Id.*

212 *Id.* (emphasis added).

“[t]he character of the use, and not its extent,” therefore to those courts “[the fact that] the number of persons who are expected to avail themselves thereof is small. . . is immaterial provided it is open to all upon the same terms.”<sup>213</sup> Both the theoretical understanding and practical applications of scale are outcome determinative for the common good canon.

With the intended scale of the benefit so rarely addressed in any depth, the more common approach appears to be to emphasize the magnitude of the impacts for the public.<sup>214</sup> More is better. Larger is better.<sup>215</sup> Indeed, philosophers have debated whether, morally, a state’s common good must be at the largest possible scale.<sup>216</sup> In the same vein, Richard Posner’s pragmatic method of statutory interpretation is centered on the idea that decisions should be outcome driven—although not consequentialist<sup>217</sup>—because the primary purpose should always be the optimization of social welfare.<sup>218</sup>

With the common good canon viewed as continually pushing for the larger scale, there is a distinct possibility that courts will allow this canon—particularly when it is combined with the federalism canon—to manipulate the interpretation of scaled legislation to optimize national over smaller scale goods. And, unfortunately, the idea that care should be taken to align the common good with the appropriate scale seems to be mentioned only in passing.<sup>219</sup> Case precedents suggest that in the event of an ambiguity in the meaning of the common good that may be attributable to the lack of a specifically defined scale, courts will default to the larger expressions of

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213 *Id.*

214 *Id.* at 198–99.

215 One concern is that a smaller scale may facilitate a tyranny of the majority at the lower levels of government. One court points to James Madison’s warning that “majorities in small communities can define the common good in a way that ‘will invade the rights of other citizens.’” *Associated Gen. Contractors of Cal., Inc. v. City and Cnty. of S.F.*, 813 F.2d 922, 932 n.17 (9th Cir.1987) (citing *THE FEDERALIST* No. 10, at 22 (James Madison) (2d ed. Johns Hopkins Univ. Press 1966)).

216 See A.S. McGrade, *What Aquinas Should Have Said? Finnis’s Reconstruction of Social and Political Thomism*, 44 *AM. J. JURIS.* 125, 133 (1999). On the other hand, deliberation on the nature of public good is increasingly difficult as the scale of the debate increases. See Robert A. Dahl, *A Democratic Dilemma: System Effectiveness Versus Citizen Participation*, 109 *POL. SCI. Q.* 23, 30 (1994) (“Thus even if transnational democratic institutions are created, they cannot overcome the limitations imposed by scale and time.”). These issues have encouraged some scholars to suggest that small-scale governance is necessary because a “coherent common good” cannot be established at a larger scale. See Kelly, *supra* note 205, at 105–06.

217 See RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 59–60 (2003) (explicitly defending against the idea that the theory is consequentialist).

218 See Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 *S. CAL. L. REV.* 1653, 1664 (1990) (defining the theory in terms of the optimum possible outcomes).

219 See, e.g., Bobby L. Dexter, *Rethinking “Insurance,” Especially After AIG*, 87 *DENV. U. L. REV.* 59, 95 (2009) (mentioning briefly the idea that common good can be measured on either a “national or individual community scale.”).

scale: those of the nation and mankind more generally. As Judge Coffey of the Seventh Circuit explained in *United States v. Shannon*, the obligation of the court is to interpret the law consistent with “the common good of all mankind.”<sup>220</sup>

Repeatedly, courts have held that statutes must be interpreted “so as to accomplish the greatest public good.”<sup>221</sup> In litigation, parties justify their arguments by claiming that their choices are “most compatible with the greatest public good.”<sup>222</sup> This default to the largest possible impact also leads to a default to the largest practical scale in the vast majority of cases. Similarly, state courts apply legislation to their own largest scale; for example, within Vermont, the public good has been defined as “that which shall be for the greatest benefit of the people of the State of Vermont.”<sup>223</sup>

In the case of scaled legislation, there are likely two tiers of benefits—one directed to the local area and another directed to a larger, likely national, scale. Explicit prioritization of these is unlikely—both because of the practicalities of coalition building and because the two tiers of benefits may be seen as somewhat overlapping or coordinating. In such circumstances, when legislation is challenged, the common good canon is likely to combine with the preference for a federalist structure, generating an interpretation that optimizes benefits to the national scale. Indeed, in the worst-case scenario, the smaller scale may even accept certain detriments in furtherance of the national good that was set out in the statute.

Unlike true constitutional holdings of the Court, these statutory interpretation decisions can be overturned through the ordinary congressional process. Although this is much less burdensome for Congress than the constitutional amendment process necessary in other circumstances, such outcomes would impact locations that may have limited resources for lobbying efforts—and may have expended the bulk of them on previous efforts. More importantly, congressional intent may be repeatedly skewed because the benefits and detriments are assigned unequally based on the geography and population of an area. As a result, those who suffer due to the misinterpretation of the intended beneficiary of the public good—limited populations in specific, often rural areas—are those most unlikely to voice their challenges.

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220 *United States v. Shannon*, 110 F.3d 382, 413 (7th Cir. 1997) (en banc) (Coffey, J., concurring and dissenting in part).

221 *Missouri ex rel. Griffin v. R.L. Persons Constr., Inc.*, 193 S.W.3d 424, 428 (Mo. Ct. App. 2006) (quoting *Long v. Interstate Ready-Mix, L.L.C.*, 83 S.W.3d 571, 574 (Mo. Ct. App. 2002)).

222 *See, e.g., Watson v. Los Altos Sch. Dist.*, 308 P.2d 872, 874 n.2 (1957).

223 *In re Bellows Falls Hydro-Elec. Corp.*, 49 A.2d 561, 561 (Vt. 1946).

#### IV. AMBIGUITIES OF SCALE IN THE COMMON GOOD, OR A CAUTIONARY TALE OF THE TVA'S LEGISLATIVE HISTORY

Within this final section, this article explores the consequences associated with wrongfully interpreting ambiguously worded scaled legislation, which necessarily involves the common good, by examining a micro-history of the legislative process leading up to the creation of the Tennessee Valley Authority. Scholarly analysis of the TVA has focused on the agency's operations;<sup>224</sup> very little has been said about the legislative history—a notable gap in light of the previously discussed historical fact that Congress legislated primarily for national goods prior to the 1960s. This account sheds light on the important legislative history of the TVA and reveals how support was garnered for such an unusual piece of geographically specific legislation. This history supplies the necessary baseline for an additional argument that a scalar ambiguity on the point of the common good positioned the TVA for an extraordinary transformation. Critical ambiguities in the TVA's mission stemmed from a conflict between the visions of Senator Norris and President Roosevelt, the two primary proponents of the TVA, who applied two very different scales for determining the “common good.” With focus on the crises at hand, the ambiguities of scale went unnoticed by the two men and their supporters, resulting in an ambiguous text. As a result, the TVA was highly vulnerable both to the individual visions of its early leaders and also to the prevailing political winds.

Before proceeding to explain how the common good ambiguity crippled the TVA, at least as compared to what Roosevelt had imagined, it is important to note that this issue should not be subsumed into the heading of regulatory capture. Regulatory capture refers to agencies “ceasing to serve the wider collective public interest,” generally due to the agencies’ being hijacked by special interests.<sup>225</sup> The TVA history displays something far less obvious, and indeed, far more slippery for not being so pernicious. While the TVA did not cease to serve the public good, it has switched from understanding the public as a regional designation to a national designation, thereby allowing the agency to pursue national goods to the detriment of the local area. In terms of the visibility of the problem, to the national public, the agency appears not only benign, but also beneficial, despite the localized and less visible fallout.

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<sup>224</sup> See, e.g., WALTER L. CREESE, *TVA'S PUBLIC PLANNING: THE VISION, THE REALITY* (1990); ROBERT F. DURANT, *WHEN GOVERNMENT REGULATES ITSELF: EPA, TVA AND POLLUTION CONTROL IN THE 1970S* (1985); PHILIP SELZNICK, *TVA AND THE GRASS ROOTS: A STUDY IN THE SOCIOLOGY OF FORMAL ORGANIZATION* (1966).

<sup>225</sup> Mark N. Wexler, *Which Fox in What Henhouse and When? Conjectures on Regulatory Capture*, 116 *BUS. & SOC'Y REV.* 277, 278 (2011) (citation omitted).

A. *In the Beginning: Senator Norris's Vision*

Senator George W. Norris, largely regarded as the TVA's greatest supporter, became passionate about the TVA not because of the Valley itself, but because of one specific resource in it: Muscle Shoals, a natural river formation ideal for the generation of massive quantities of hydroelectric power. This power had been purchased by the government during World War I for the purposes of generating hydroelectric power for a nitrate plant that failed to reach completion before the end of the war.<sup>226</sup>

Ownership by the national public was at the heart of Norris's plans. Norris explained, "It has seemed always to me that the development and conservation of such resources ought to be under public control, public operation, and public ownership."<sup>227</sup> Norris believed he could bring the benefits of Muscle Shoals and hydroelectric power to the people, keeping the profits out of the hands of big business. Just as importantly, the network of dams could be used systematically for flood control, irrigation, and navigation.<sup>228</sup>

Senator Norris was specifically interested in "a further transition in the role of government. Replacing private enterprise in particular sectors of the economy, the government would engage in broad planning with a set of objectives that did not regard pecuniary concerns as primary."<sup>229</sup> After the passage of the TVA Act, Norris bravely proclaimed the dawn of a "'New Civilization' in which human rights would take precedence over property rights, in which the weak would be protected against the oppression of the powerful."<sup>230</sup> Norris declared, "[T]he right to acquire property and make unlimited profits is not a sacred right."<sup>231</sup> Norris went on to invoke the threat that private enterprise poses to democracy: "All along the pathway of history there stand the tombstones of dead governments because the people failed to preserve the rights of man as against the rights of property, and to protect the weak against the oppression of the powerful."<sup>232</sup> Norris believed that he had saved a public resource from private greed, reserving it to the benefit of the nation as a whole.<sup>233</sup> Norris secretly held out hope that the TVA "would serve as a model by which this country could see the

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226 See T. J. Woofter, Jr., *The Tennessee Valley Regional Plan*, 12 SOC. FORCES 329 (1934).

227 GEORGE W. NORRIS, *FIGHTING LIBERAL: THE AUTOBIOGRAPHY OF GEORGE W. NORRIS* 248-49 (1945). Conservatives, however, wished to use Muscle Shoals for private enterprise. See *id.* at 250-51.

228 See *id.* at 262.

229 RICHARD LOWITT, *GEORGE W. NORRIS: THE TRIUMPH OF A PROGRESSIVE, 1933-1944* 36 (1978).

230 *Id.* at 47.

231 *Id.* (internal quotation marks omitted).

232 *Id.* (internal quotation marks omitted).

233 See *id.* at 16 (emphasizing Norris's "dream for public ownership").

happiness, material progress, and prosperity to be attained if the American people act promptly and properly in the preservation of God-given natural resources of the country.”<sup>234</sup>

*B. President Roosevelt & the New Deal:  
A National Experiment in Regional Planning*

President Roosevelt integrated the development of Muscle Shoals with his package of economic development and recovery incentives.<sup>235</sup> Others appeared to share this understanding of the TVA’s mission: when Congress had determined that no bills except those related to “present emergency” (i.e., the depression) were allowed to the floor for consideration, the majority leader, Joseph T. Robinson, allowed the TVA bill as relating to the New Deal packages and economic measures.<sup>236</sup> When questioned about his plans for the TVA, Roosevelt explained, “What we are doing there is taking a watershed with about three and a half million people in it, almost all of them rural, and we are trying to make a different type of citizen out of them from what they would be under their present conditions.”<sup>237</sup> Roosevelt acknowledged the struggles of this population, noting, “They have never had a chance . . . . So TVA is primarily intended to change and to improve the standards of living of the people of that valley.”<sup>238</sup> Roosevelt didn’t expect national results – he expected results for those 3.5 million residing within the watershed. The national value, in Roosevelt’s mind, was that the TVA experiment could be replicated across the country if it proved successful.<sup>239</sup> On December 11, 1934, Roosevelt addressed members of the National Emergency Council, explaining, “There is a much bigger situation behind the Tennessee Valley Authority. If you will read the message on which the legislation was based you will realize that we are conducting a social experiment . . . .”<sup>240</sup> Roosevelt described his experiment as

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234 NORRIS, *supra* note 227, at 249.

235 See Franklin D. Roosevelt, Presidential Address to Congress (Jan. 15, 1940), in 9 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 37, 38 (Samuel I. Rosenman ed., 1941) (explaining that the TVA was “intended—in part as an experimental project—to raise the standards of life by increasing social and economic advantages in a given area”).

236 LOWITT, *supra* note 229, at 5.

237 Franklin D. Roosevelt, The One Hundred and Sixtieth Press Conference (Excerpts), Warm Springs, Ga. (Nov. 23, 1934), in 3 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, 465, 466 ((Samuel I. Rosenman ed., 1941).

238 *Id.* at 466-67.

239 *Id.* (discussing the President’s belief that the TVA can be used as an example on a national scale).

240 MICHAEL J. McDONALD & JOHN MULDOWNY, TVA AND THE DISPOSSESSED 263 (1982) (footnote omitted).

[T]he first of its kind in the world, as far as I know, covering a convenient geographical area—in other words, the watershed of a great river. The work proceeds along two lines, both of which are intimately connected—the physical land and water and soil end of it, and the human side of it.<sup>241</sup>

Thus, Roosevelt planned the TVA as “a national experiment in a regional laboratory,”<sup>242</sup> “a dramatic experiment”<sup>243</sup> in social planning for regional development. It has been described as “the most remarkable of the schemes fostered by the United States overnment to promote economic recovery.”<sup>244</sup> The idea was a regional, small-scale test that would have enormous national implications for the continuing depression. In Chairman Morgan’s words, “[T]he President craves demonstration, justification, before the general application of a policy.”<sup>245</sup> Therefore, the Tennessee Valley was serving as “a laboratory for the Nation.”<sup>246</sup>

### C. Norris and Roosevelt: The Scale of the Common Good

With the election of Franklin D. Roosevelt, Senator Norris found a kindred spirit who was willing to share both his concerns about poverty and his idea of a river basin as a natural unit for legal intervention. Both Norris and Roosevelt built their visions around the Valley’s natural resources as public property—resources to be managed for the good of the public rather than private individuals.<sup>247</sup> With significant opposition to the TVA from both private utility interests (worried about the government as competition)<sup>248</sup> and Henry Ford (interested in owning the resources privately),<sup>249</sup> Norris and Roosevelt naturally gravitated toward each other in their mutual ideas of public ownership. Each leader had his own preoccupation—Norris with flood control and Roosevelt with poverty relief—but in such measures their visions were not particularly competitive or contradictory.

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<sup>241</sup> *Id.*

<sup>242</sup> T. J. Woofter, Jr., *The Tennessee Basin*, 39 AM. J. SOC. 809, 809 (1934).

<sup>243</sup> TENN. VALLEY AUTH., *TVA TODAY* 1975 2 (1975).

<sup>244</sup> George B. Barbour, *The Tennessee Valley Project*, 89 GEOGRAPHICAL J. 393, 393 (1937).

<sup>245</sup> Arthur E. Morgan, *Purposes and Methods of the Tennessee Valley Authority*, 172 ANNALS AM. ACAD. POL. & SOC. SCI. 50, 51 (1934).

<sup>246</sup> *Id.*

<sup>247</sup> See *supra* notes 227, 237, and accompanying text.

<sup>248</sup> This opposition culminated in *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288 (1936). Norris describes the opposition of public utilities in detail in his autobiography. See NORRIS, *supra* note 227, at 245-51.

<sup>249</sup> See Jack Neely, *Clash of the Titans*, TENNESSEE VALLEY AUTHORITY, <http://www.tva.gov/heritage/titans/> (last visited Jan. 3, 2012) (“Ford wanted to use cheap power from Wilson Dam to produce nitrate fertilizer. His proposal, which gave rise to hopes among local farmers that Muscle Shoals would experience the kind of growth Ford had set off in Detroit, spurred rampant land speculation in the Tennessee Valley region.”).

Unfortunately, underneath models that shared similar elements, the two men held divergent philosophies about the meaning of public property, particularly in the context of regional development. Roosevelt saw local natural resources as a way out of poverty for a particularly distressed population. In his model the imagined community of beneficiaries lived within the river valley and the surrounding mountain range.<sup>250</sup> Norris, on the other hand, was philosophically a utilitarian whose imagined public beneficiaries were part of a national community. When Norris fought privatization of natural resources, he sought public ownership on a national scale.<sup>251</sup>

The TVA thus emanated conceptually from two divergent sets of priorities. Norris favored flood control, power production, and navigation, while Roosevelt focused on using the region as an experiment in local poverty relief.<sup>252</sup> These ideas merged to create the TVA's legislative text.<sup>253</sup> The TVA's initial purposes were described as follows:

To improve the navigability and to provide for the flood control of the Tennessee River; to provide for reforestation and the proper use of marginal lands in the Tennessee Valley; to provide for the agricultural and industrial development of said valley; to provide for the national defense by the creation of a corporation for the operation of Government properties at and near Muscle Shoals in the State of Alabama, and for other purposes.<sup>254</sup>

Section 1-1 of the Act also specifically empowered the TVA to work for “the economic and social well-being of the people living in said river basin.”<sup>255</sup> The scale of the TVA's mission was unclear. The statute itself referenced the “Tennessee Valley,” while a primary purpose was “reforestation and the proper use of marginal lands in the Tennessee Valley” and “to provide for the agricultural and industrial development of said valley.”<sup>256</sup> Yet, at the same time, the TVA was tasked to “provide for the national defense” by the “operation of Government properties.”<sup>257</sup> The scale of goods being sought was both national and regional—and these two would meet head to head with the beginning of World War II.

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250 *See, e.g., supra* notes 237-38 and accompanying text.

251 *See, e.g., supra* note 227.

252 McDONALD & MULDOWNY, *supra* note 240, at 9-10.

253 *Id.* at 12.

254 Tennessee Valley Authority Act of 1933, § 1, 48 Stat. 58, 58 (1933) (codified at 16 U.S.C. § 831) (stating the purpose of the act).

255 *Id.* at § 23, 48 Stat. at 69.

256 *Id.* at § 1, 48 Stat. at 58.

257 *Id.*



*D. Shaping of TVA Policy: National Pressures on Regionalism*

The TVA's changing policies over the years are to some degree reflective of changing political and intellectual circumstances as socialism developed. Initially, the government very much categorized the TVA as a social experiment and touted the degree to which it relied upon the developing methodologies of the social sciences. The TVA was generated in the intellectual context of the rise of social science information as a basis of social planning.<sup>258</sup>

According to Arthur Morgan, the TVA's first Chairman, President Roosevelt imagined the organization as having been created "in the effort to bring social and economic design into our national life."<sup>259</sup> As Chairman Morgan recalled, the President's plan was not so much a loose assortment of ideas to help the nation as it was a fairly comprehended program of government and social order,<sup>260</sup> or "an inclusive social philosophy that has a large degree of clarity, order and integration."<sup>261</sup> In light of this, "[t]he proper way to treat the Tennessee Valley Authority is not as an isolated undertaking," said the Chairman, but rather "as an integral part of the whole program of the present administration."<sup>262</sup>

The TVA Chairman was also happy to advocate legal changes that sounded in a social control system of land ownership. Morgan explained "the laws of land ownership should be changed so that men shall not be allowed to own and occupy land unless they will manage it in the interest of a permanent agriculture. Such a legal change would constitute one element of a social revolution."<sup>263</sup> He recognized that "[P]ublic ownership will be on trial [in this experiment]."<sup>264</sup> Chairman Morgan's public addresses and publications suggest that he understood President Roosevelt's program to have been influenced by some rather Marxian ideas about class and class revolution. He described Roosevelt's thinking in one publication in terms of "treating human society as having a certain degree of unity, of seeing that we are members of one great family, and that no class can thrive permanently if it is thriving at the exploitation or at the expense of another class."<sup>265</sup>

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<sup>258</sup> See Woofter, *supra* note 242, at 811 (outlining the TVA plan's application of a more general social science methodology of governmental planning and citing the need for additional social science data).

<sup>259</sup> Arthur E. Morgan, *The Tennessee Valley Authority*, 38 THE SCIENTIFIC MONTHLY 65 (1934).

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 64.

<sup>263</sup> *Id.* at 69.

<sup>264</sup> *Id.*

<sup>265</sup> Morgan, *supra* note 245, at 50.

T.J. Woolfer, writing in 1934, explained that regional planning efforts of the TVA were distinguished by “newer connotations which the concept [had] acquired. Its popularity undoubtedly arose first from the exemplification of national planning by Russia and Italy—planning on a larger scale than had hitherto been commonly visaged and planning of a more co-ordinated nature.”<sup>266</sup> Early 1930s intellectual and political culture still supported the United States moving toward social engineering.

By the late 1930s the TVA’s language began to change. Rather than speaking of social planning in the abstract, the TVA grounded its role in a democracy. The TVA explained that “planning of the Valley’s future must be the democratic labor of many agencies and individuals.”<sup>267</sup> The TVA wanted to distance itself from the idea of a dictatorial leadership from afar. It declared, “The TVA has no power or desire to impose from above a comprehensive plan for the social and economic life of the Valley.”<sup>268</sup>

David Lilienthal, Morgan’s successor as Chairman, chose another solution: to drop Morgan’s visions of social planning in favor of pure economic development—power and jobs. Lilienthal concluded that the “the TVA’s chief role is the stimulation and protection of economic opportunity.”<sup>269</sup> For Lilienthal, economic opportunity might not exactly be democracy, but it was capitalism and that was close enough.<sup>270</sup>

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266 Woolfer, *supra* note 242, at 810.

267 TENN. VALLEY AUTH., *TENNESSEE VALLEY AUTHORITY: 1933-1937 2* (Tennessee Valley Authority ed., U.S. Government Printing Office 1937).

268 *Id.*

269 TENN. VALLEY AUTH., *THE WIDENING OF ECONOMIC OPPORTUNITY THROUGH TVA 1* (1940) (adapting an address by Lilienthal at Columbia University for publication). Notably, Lilienthal went on from the TVA to become the first chairman of the Atomic Energy Commission. STEVEN M. NEUSE, *DAVID E. LILIENTHAL: THE JOURNEY OF AN AMERICAN LIBERAL XV* (1997).

270 While Lilienthal is well known for his contribution to the literature on the TVA, specifically for linking the TVA with grassroots regional democracy in his book *TVA: Democracy on the March* (1944), the book unfortunately is more a statement of contemporary liberal ideals than a reflection of TVA practices. While Lilienthal was a champion of people in the region to the degree that he rejected Morgan’s idea of a “mold fashioned from above,” Lilienthal was a master of economics and efficiency, not democracy. Lilienthal understood his work to be fostering democracy simply because he refused to impose “uplift” plans on the region and instead simply answered the local call for job creation. When Lilienthal imagined the mission of the TVA, he did not think in terms of either a grand scheme for regional planning or for creating mechanisms for actual citizen participation in TVA decision-making. Indeed Lilienthal’s writing shows that he used the term planning quite differently from many of his contemporaries. For Lilienthal, planning focused quite narrowly on the ability to apply administrative and technical expertise, which unfortunately was a task that he did assuming its scientific neutrality and without reference to the will of the people in the region. When Lilienthal referred to the grassroots of his programs, he did not mean democratic local participation, but rather decentralized administration—federal plans and statutes adapted to local conditions by trained administrators. See David E. Lilienthal, *The TVA and Decentralization*,

By the 1940s the TVA was working hard to distance itself from association with social planning as a government activity. In the 1930s, TVA documents discussed national security work along with social experimentation and government planning, but by the 1940s, the TVA had conspicuously changed its tune. Suddenly, the Authority carefully spoke of its role in a democracy and disputed any suggestion that the regional Authority was a movement toward government-owned property—an idea it tried to de-emphasize by speaking frequently of rights of private property owners and the TVA's contribution to securing those rights.<sup>271</sup> There is a special tenor to the TVA's propaganda in 1941: a need to defend against the idea that agency intervention is an imposition on private land rights. The TVA proclaimed that it "must take into account the implications of our system of private ownership."<sup>272</sup> The language of TVA reports in this era dwells on the need to support and grow "private enterprise."<sup>273</sup>

A wonderful example of this propagandizing, the TVA Report on Natural Resources for 1947 contains a section labeled "Mineral Fertilizers and the Nation's Security" that describes modern farming as "essential to the future security of the American people."<sup>274</sup> The Report goes on to explain that "[f]armers have a predominant stake in the improvement of the soil because the soil is their private capital and most basic resource."<sup>275</sup> The report emphasized the TVA's aid to farmers and touted farmers as "the greatest private business in America." The TVA also emphasized assistance with the "farmers-cooperative organization," which the agency described as a "voluntary and democratic device."<sup>276</sup> The very last paragraph of the TVA's 1947 Report declared that "[a]t a time when the American form of government is being challenged throughout the world, [the TVA] provides a significant demonstration of the methods of democracy, wherein free citizens and their representative agencies of government at all levels work together effectively in discharging their respective responsibilities."<sup>277</sup>

By the 1950s the TVA faced a serious attack on its continued existence because of its nature as a social planning and government ownership entity.

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SURVEY GRAPHIC (Jun. 1940).

271 THE WIDENING OF ECONOMIC OPPORTUNITY THROUGH TVA, *supra* note 269, at 2-3 (describing itself as "increasing material benefits that shall be enjoyed under a democratic regime" where "the business of farming is still a private business" and opining that "the issue of governmental action versus free enterprise is a thoroughly false and mythical issue").

272 TENN. VALLEY AUTH., TVA: 1941 1 (1941).

273 *Id.* at 2.

274 TENN. VALLEY AUTH., TENNESSEE VALLEY RESOURCES: THEIR DEVELOPMENT AND USE 81 (1947).

275 *Id.*

276 *Id.*

277 *Id.* at 145.

It struggled to survive “allegations of communism and dictatorship.”<sup>278</sup> According to Julian Huxley, who wrote his observations of the TVA during World War II, the agency was “sharply criticized by most Republicans and many anti-New-Deal Democrats as un-American . . . [and] as Socialism.”<sup>279</sup> The TVA was, by some accounts, a “slice of Soviet Russia.”<sup>280</sup> It was not the best of years to be described as a planning authority.

*E. National Defense & Narrowing the TVA Agenda*

In some sense, the TVA’s origin does align with American military interests. Describing his initial foray into the problem of Muscle Shoals, Norris said he approached the issue with “the feeling that congressional proposals, relating to the ultimate disposition of Muscle Shoals, more properly should have fallen to the Senate Military Affairs Committee.”<sup>281</sup> In this comment, Norris, far from being a fan of military building,<sup>282</sup> was making practical note of the fact that military affairs were responsible for acquiring the Muscle Shoals problem and therefore ought to be the first responders when the deal went bad. The need to address the Tennessee River’s navigation issue was first recommended to President Monroe by John C. Calhoun as Secretary of War in 1824, and the Muscle Shoals development began not with a dam but with canals and locks to increase river navigability.<sup>283</sup>

At the same time, Senator Norris described the military acquisition of Muscle Shoals in relation to the creation of the TVA as largely happenstance.<sup>284</sup> For Norris, the experiment in regional development of a river valley would have occurred anyway; the military ownership of the Muscle Shoals site simply led to its selection as the initial test case. From the beginning, a portion of the TVA’s purposes were allocated to the national defense. While the Authority is “essentially a peacetime enterprise . . . it has statutory obligations to produce materials required for the national

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278 Charles McKinley, *The Valley Authority and Its Alternatives*, 44 AM. POL. SCI. REV. 607, 607 (1950).

279 JULIAN HUXLEY, *TVA: ADVENTURE IN PLANNING* 115 (1943). (internal quotation marks omitted).

280 CLARENCE LEWIS HODGE, *THE TENNESSEE VALLEY AUTHORITY: A NATIONAL EXPERIMENT IN REGIONALISM* 51 (American University Press, 1938). (citation omitted).

281 NORRIS, *supra* note 227, at 246.

282 In fact, Norris was an isolationist who voted against entering the First World War. See Norman L. Zucker, *George W. Norris: Nebraska Moralist*, 42 NEB. HIST., June 1961, at 95, 96.

283 BD. OF DIRS., *TENN. VALLEY AUTH., REPORT TO THE CONGRESS ON THE UNIFIED DEVELOPMENT OF THE TENNESSEE RIVER SYSTEM* 13 (1936).

284 See NORRIS, *supra* note 227, at 247–48. As Norris explains, the initial acquisition of Muscle Shoals involved the production of elements necessary to the national defense, but later it became clear that “there were other goals much to be desired.” *Id.* at 247.

defense.”<sup>285</sup> The Act’s purposes declared the TVA’s duty “to provide for the national defense by the creation of a corporation for the operation of Government properties at and near Muscle Shoals.”<sup>286</sup>

Construction on the TVA’s network of dams “began in the 1930’s, [and] then was rushed in the 1940’s to meet wartime demands for hydroelectric power.”<sup>287</sup> At the end of 1940, due to national security concerns, the TVA was authorized “to carry out an emergency construction program,” adding “approximately 300,000” kilowatts generating capacity.<sup>288</sup> A TVA report from 1941 proclaimed that “TVA power answers the call of national defense.”<sup>289</sup> The TVA explained its role by stating that in 1941 “[a]bout one third of the commodities classified as strategic and critical by the Army and Navy are available in the Tennessee Valley Area.”<sup>290</sup> The TVA accepted a strong role in national defense, noting significant power production (3.6 billion kilowatt hours per year by 1940) and reaffirming its electrical production facilities’ relationships with the Alabama Munitions Plant, the Electro-Metallurgical Plant, Memphis Powder Plant, Columbia Electro-Chemical, the TVA Phosphate Reserves, Alco Aluminum and Stinson Aircraft.<sup>291</sup>

The TVA’s largest role, however, was in the production of power for other agencies to use in the national defense. The TVA desperately needed more power—not for the local region or development, but for the wartime effort. “During the war, approximately 75 percent of TVA’s output of electric power was used for war purposes[] and use of electricity for nonessential purposes was discouraged.”<sup>292</sup> As a result, the TVA specifically refused sale of power to other local agencies and gave preference to wartime energy needs, contributing to places such as a local nitrate plant.<sup>293</sup> Congress expanded the TVA’s authority to construct dams and generating plants in 1941 based on the National Defense Advisory Commission’s strong recommendation.<sup>294</sup> By 1950, the TVA reported that “the region’s power requirements were outgrowing the amount that could be supplied from hydroelectric plants,” and therefore it became necessary to turn to the “abundant coal supplies in and near the region.”<sup>295</sup> While the TVA spoke of

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285 TVA: 1941, *supra* note 272, at 27.

286 Tennessee Valley Authority Act of 1933, § 1, 48 Stat. 58, 58 (1933) (current version at 16 U.S.C. § 831).

287 TVA TODAY 1975, *supra* note 243, at 7.

288 TVA: 1941, *supra* note 272, at 27. For further details on the TVA’s military support, see TENNESSEE VALLEY AUTHORITY, FACTS ABOUT THE TVA AND NATIONAL DEFENSE (1941).

289 TVA: 1941, *supra* note 272, at iv.

290 *Id.* at xxiv.

291 *See id.*

292 TENNESSEE VALLEY RESOURCES: THEIR DEVELOPMENT AND USE, *supra* note 274, at 140.

293 TVA: 1941, *supra* note 272, at 27.

294 *Id.* at 12.

295 TVA TODAY 1975, *supra* note 243, at 28.

the power needs of “the region,” the data demonstrates that the majority of the TVA’s power production went specifically to military efforts.

As the TVA pushed to meet defense industry needs during the World War II era, the agency expanded from hydroelectric power to steam plants, which were coal-fired<sup>296</sup> and brought environmental and social consequences for the region. The TVA “became a major buyer of coal in the early 1950s,” using 40 million tons per year of strip-mined coal,<sup>297</sup> and by 1955 was “the chief source of federal electricity and the largest coal customer in the nation.”<sup>298</sup> In 1950, coal-fired steam plants generated 10% of the power created by the TVA, but by 1956, they generated approximately 72% of all TVA power output.<sup>299</sup> Much of this expansion fed the Oak Ridge facility. The Atomic Energy Commission accounted for less than 14% of the TVA’s total power sales in 1950.<sup>300</sup> By 1956, the Atomic Energy commission accounted for 56% of TVA power sales.<sup>301</sup>

Initially, the TVA’s purposes were broadly outlined to include power production and resource management, but also more generally a program to promote the economic and social development of the Tennessee Valley region. Thus, early commentators could say that “[t]he ultimate objective of the Tennessee Valley Authority program, as defined by Congress, is to promote the economic and social well-being of the people of the region.”<sup>302</sup>

Yet the TVA’s purpose quickly narrowed to one of primarily power production and other forms of assistance to national defense needs. By 1941, a TVA report cited the national defense as at “the nucleus of the present organization.”<sup>303</sup> By 1957, one commentator wrote, “The Act of 1933 projected a general program for the economic and social development of the Valley under which substantial progress was made for almost twenty years. In the last four years, however, the non-power programs have suffered both a relative and an absolute decline.”<sup>304</sup> The TVA struggled to use its resources to meet contradictory public demands. In the war years of the 1940s, and expanding through the atomic development programs of the 1950s, the TVA was barely able to meet the increasing energy demands placed upon it, let alone work on non-power related programs.<sup>305</sup> Eventually, observers

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296 Roscoe C. Martin, *The Tennessee Valley Authority: A Study of Federal Control*, 22 LAW & CONTEMP. PROBS., Winter 1957, at 351, 364.

297 TVA TODAY 1975, *supra* note 243, at 42.

298 WALTER L. CREESE, TVA’S PUBLIC PLANNING: THE VISION, THE REALITY 120 (1990).

299 Martin, *supra* note 296, at 364.

300 *Id.*

301 *Id.*

302 T. Levron Howard, *The Social Scientist in the Tennessee Valley Authority Program*, 15 SOC. FORCES, Oct. 1936 - May 1937, at 29, 29.

303 TENN. VALLEY AUTH., FACTS ABOUT THE TVA AND NATIONAL DEFENSE (1941).

304 Martin, *supra* note 296, at 374.

305 *Id.*

could only conclude that “[t]he overwhelming fact is that in recent years the TVA has become more and more an electric utility enterprise and less and less a regional resource-development undertaking.”<sup>306</sup> Social and local programs were virtually dropped, and natural resources programs suffered significantly in the TVA’s remodeled mission.<sup>307</sup>

The TVA demonstrates how it is possible for divisive ambiguities of scale to be latent through the legislative process and end up resulting in ambiguous statutory mandates for agencies, thus creating programs that may be subject to undemocratic shifts in their operational purpose. Similarly, such latent ambiguities create troublesome legislative histories. Even more problematically, even when there is no latent ambiguity among supporters, the legislative history is likely to mention both local and larger scale goods. Because a location-specific bill must gain support from a sufficient majority to succeed, proponents are motivated to point to second-tier goods that extend beyond the locality. As a consequence, if courts look to the text only, the confluence of federalism and the common good canons may push for national goods coming out of a location-specific program. On the other hand, if courts look to the legislative history, even the history of a bill meant primarily to provide location-specific goods is likely to be ambiguous because location-specific goods will be supported by second-tier national goods. Again, in this case, the confluence of federalism and optimizing the common good may skew the analysis toward the national scale, neglecting—or worse, sacrificing—the local.

#### CONCLUSION

Having treated each piece of scaled legislation as a one-off, we have failed to recognize a congressional trend. These now prevalent pieces of scaled legislation are uniquely susceptible to ambiguous interpretations or misinterpretations because of latent scalar presumptions resulting from the canon of the common good—particularly when it is paired with other trends of including basic constitutional structures such as federalism within the interpretive canon. This susceptibility may not even be remedied by resort to the legislative history. Focus on specifics may allow latent scalar ambiguities to flourish during the legislative process, creating conflicting levels of common goods within the legislative history. In response to this problem, I suggest that drafters of location-specific legislation be textually explicit about the contemplated scale of public goods and the order of priority of scales when the legislation distributes common goods across multiple scales.

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<sup>306</sup> *Id.* at 375.

<sup>307</sup> *Id.*

For statutory interpretation more generally, I suggest that the substantive interpretive canon should refer to the constitutional structure—the federalism canon—only where there is a question of constitutionality of a provision and not in the more general case of an inquiry regarding competing interpretations. Where there is a location-specific legislative text, I suggest that courts must look to the missing element of scale, particularly in the context of determining the common good. I suggest that if courts incorporate federalism into statutory interpretation on questions beyond constitutionality, they are likely to distort location-specific legislation by assuming that the common good is evaluated at the national level, which opens the way to additional geographic inequalities due to uneven distributions of burdens.

One approach would be to allow the federalism-common good push to the national scale to be overridden by recognition of process federalism—that states outside the benefitting region participated in the legislative process, affirming first tier goods to be distributed on a regional basis. Within this process, the federalist structure was affirmed even while goods were being distributed at a scale that did not align specifically with the state or national scale. Thus, there is no need to impose the federal structure in retrospect to affect a rebalancing of the distribution of social goods. In the end, although this article offers a cautionary tale, the conflicts outlined herein also provide opportunities for using latent ambiguities of scale as a method of generating dialogue between the courts and Congress on how statutory interpretation might intersect with our continuing explorations of the nature of federalism.



