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Dueling Views of Statutory Interpretation and the Canon of Constitutional Doubt

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NOTE

DUELING VIEWS OF STATUTORY INTERPRETATION AND THE CANON OF CONSTITUTIONAL DOUBT: *Almendarez-Torres v. United States*, 118 S. Ct. 1219 (1998)

Roberta Sue Alexander[*]

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I. INTRODUCTION

"If the Court wishes to abandon the doctrine of constitutional doubt, it should do so forthrightly, rather than by declaring certainty on a point that is clouded in doubt."[1]

With these words, Justice Antonin Scalia challenged the Supreme Court either to apply the doctrine of constitutional doubt rigorously or not at all. But, as the case of *Almendarez-Torres v. United States* illustrates, the problem is not with either applying or abandoning the doctrine. Rather, the challenge is to articulate clear standards so the doctrine can be applied consistently. Only then will the Court be able to accomplish the canon's purpose—to encourage judicial restraint when a statute's text does not clearly raise constitutional concerns.[2]

In *Almendarez-Torres*, the Court was confronted with interpreting portions of the Immigration and Nationality Act of 1994 ("the Act").[3] The Act makes it a crime for previously-deported aliens to return to the United States without special permission from the Attorney General.[4] Previously-deported aliens who return illegally can be fined, imprisoned for not more than two years, or both.[5] But, according to section 1326(b)(2) of the Act, if that previously-deported alien is deported "subsequent to a conviction" for an aggravated felony, he or she could be imprisoned for up to, but no more

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[1] Almendarez-Torres v. United States, 118 S. Ct. 1219, 1239 (1998) (Scalia, J., dissenting).

[2] *See* DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (pointing out that the canon "not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution").

[3] *Almendarez-Torres*, 118 S. Ct. at 1222-24; Immigration and Nationality Act, 8 U.S.C. § 1326 (1994). While the Act has since been amended twice, the 1994 version was the statute in effect when Almendarez-Torres was charged.

[4] 8 U.S.C. § 1326.

[5] *Id.*

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than, twenty years.[6] The issue before the Court was whether section 1326(b)(2) was a penalty-enhancing provision, as the United States argued, or whether it created a separate crime which had to be charged in the indictment and proven to a jury beyond a reasonable doubt.[7]

Almendarez-Torres presents a duel between two of the major analytical frameworks of statutory construction: contextualism[8] and textualism.[9] Justice Stephen Breyer, writing for the majority, resolved the case using a "contextual" approach to statutory construction.[10] Examining not only the text of the statute, but also the statute's subject matter and legislative history, the majority held that section 1326(b)(2) was a penalty-enhancing provision.[11] Thus, Almendarez-Torres' previous aggravated felony convictions did not have to be included in his indictment nor proven to a jury beyond a reasonable doubt.[12] Rather, the aggravated felonies were merely a factor for the judge to apply in determining the length of his sentence.[13] Moreover, section 1326(b)(2), as a penalty-enhancing provision, presented no due process or other constitutional problems.[14]

Justice Scalia, in dissent, employed a textualist analysis which focused on dictionary definitions, the structure of the statute, rules of grammar, and the surrounding body of law.[15] Scalia contended that section 1326(b)(2) could be read either as creating a separate indictable offense or as a sentence-enhancing provision.[16] Since he claimed that the latter interpretation raised serious constitutional concerns, he concluded that the Court should choose the interpretation that did not raise these doubts.[17]

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6 *Almendarez-Torres*, 118 S. Ct. at 1222-24; 8 U.S.C. § 1326(b)(2).

7 *Almendarez-Torres*, 118 S. Ct. at 1222-24.

8 Others have labeled Justice Breyer an intentionalist, but for reasons which are articulated elsewhere in this Note, contextualism is a more appropriate label. *See* Richard J. Pierce, Jr., *Justice Breyer: Intentionalist, Pragmatist, and Empiricist*, 8 ADMIN. L.J. AM. U. 747 (1995).

9 *See infra* note 15; *infra* notes 76-96 and accompanying text.

10 *See* Pierce, *supra* note 8 and accompanying text; *see also* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 424-34 (1989).

11 *Almendarez-Torres*, 118 S. Ct. at 1223-33.

12 *Id.* at 1222.

13 *Id.*

14 *Id.* at 1228-29.

15 *See, e.g.*, Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring); ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); R. Randall Kelso, *Statutory Interpretation Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-making*, 25 PEPP. L. REV. 37 (1998); Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597 (1991).

16 *Almendarez-Torres*, 118 S. Ct. at 1233.

17 *Id.*

Scalia found, therefore, that section 1326(b)(2) created a separate indictable offense for those who, like Almendarez-Torres, had been deported subsequent to an aggravated felony conviction.[18]

While the canon of constitutional doubt has been recognized for almost two centuries,[19] it is now the focus of some debate.[20] This Note argues that the division between the Court's two dramatically different camps on statutory interpretation has adversely affected the use of the canon of constitutional doubt. The result is that each side defines and applies the canon quite differently, undermining its usefulness as a device for judicial restraint. At issue is how much textual ambiguity is necessary or how much constitutional doubt needs to be present in order to trigger the canon.

This Note argues that Justice Breyer's approach, as articulated in *Almendarez-Torres* and which requires higher standards for the canon's use than does Justice Scalia's approach, provides the better direction for the Court to take. The canon of constitutional doubt should be used only where the two possible interpretations are nearly equal possibilities for interpreting the statute and where the constitutional doubt raised by one of those interpretations is "exceedingly real."[21] If this strict approach to the canon is not taken, the rule becomes, in the words of Henry Friendly, not a rule of constitutional adjudication, but, instead, one "of constitutional nonadjudication."[22]

Section II of this Note provides a brief discussion of *Almendarez-Torres*,[23] including the reasoning of the Court's majority and dissent.[24] Section III critically analyzes the different approaches to defining and applying the doctrine of constitutional doubt and evaluates which is more appropriate in this case.[25] This Note concludes that the doctrine of constitutional doubt, while an appropriate tool, should be used only after strict standards of "plausible interpretations" and "grave constitutional

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[18] *Id.* at 1233-34.

[19] *See, e.g.*, DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 448 (1830); Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

[20] *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992); Kelso, *supra* note 15, at 37 & n.1; Jonathon R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647; David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921 (1992).

[21] HENRY J. FRIENDLY, BENCHMARKS 211-12 (1967).

[22] *Id.*

[23] *See infra* notes 27-41 and accompanying text.

[24] *See infra* notes 42-75 and accompanying text.

[25] *See infra* notes 76-217 and accompanying text.

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doubt" have been applied. Indeed, this Note suggests that perhaps the canon of avoiding constitutional invalidity would be a better device for dealing with constitutional doubt because of its stricter standards.[26]

II. BACKGROUND

A. *The Facts of the Case*

On September 12, 1995, a federal grand jury indicted Hugo Almendarez-Torres for violating section 1326 of the United States Code.[27] The single-count indictment charged Almendarez-Torres with illegally re-entering the United States in violation of section 1326.[28] In December, Mr. Almendarez-Torres pled guilty to the indictment, admitting that he had been deported, that he had unlawfully returned to the United States, and that his original deportation had occurred "pursuant to" three previous "convictions" for aggravated felonies.[29] At the hearing at which Almendarez-Torres entered his guilty plea, the district court judge carefully explained the law and the maximum sentence under that law, which was the maximum under section 1326(b)(2), the penalty for returning aliens with prior convictions.[30] Four months after entering his guilty plea, Almendarez-Torres appeared for his sentencing hearing.[31] At the hearing, he argued that the court could not sentence him to more than two years imprisonment because the original indictment did not include counts of his previous convictions.[32] Rejecting this argument, the district court applied section 1326(b)(2) and imposed an eighty-five month prison sentence.[33] On appeal, the Fifth Circuit affirmed the lower court, and the Supreme Court granted certiorari.[34]

Certiorari was granted to determine whether section 1326(b)(2) "is a penalty provision which simply permits a sentencing judge to impose a

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[26] *See infra* notes 218-31 and accompanying text.

[27] Almendarez-Torres v. United States, 118 S. Ct. 1219, 1222 (1998).

[28] Brief for Petitioner at Statement, *Almendarez-Torres* (No. 96-6839), *available in* LEXIS, U.S. Supreme Court Briefs Library.

[29] *Id.* at Excerpts from Guilty Plea Hearing in Joint Appendix.

[30] *Id.*

[31] *Almendarez-Torres*, 118 S. Ct. at 1222.

[32] *Id.* at 1222-23.

[33] *Id.* at 1223.

[34] *Id.*

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higher sentence when the unlawfully returning alien also has a record of prior convictions" or whether subsection (b)(2) sets forth a separate crime.[35] If the subsection was merely a sentencing enhancement, increasing the term of imprisonment if the unlawfully-returning alien had been deported subsequent to a prior felony conviction, then the indictment need not include the defendant's prior convictions.[36] However, if the subsection established a new crime, different from the one in subsection (a), then the indictment, which must set forth every element of the crime charged, must include prior convictions.[37]

Mr. Almendarez-Torres contended that because the indictment did not mention his prior convictions, he could only be sentenced under subsection (a) which imposes a maximum two-year prison term.[38] The government responded that the indictment was complete—it had charged Almendarez-Torres with a violation of section 1326; no subsection was mentioned.[39] The government argued that subsection (b)(2) was a sentence-enhancing provision, written in language typical of such provisions.[40] The subsection merely increased the sentence for aliens convicted under subsection (a) "whose deportation was subsequent to a conviction for commission of an aggravated felony" from a maximum of two years to a maximum of twenty years.[41]

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[35] *Id.* (citing United States v. Vasquez-Olvera, 999 F.2d 943, 945-47 (5th Cir. 1993)).

[36] *Id.*

[37] *Id.*

[38] *Id.* at 1222-23.

[39] Brief for Petitioner at Indictment in Joint Appendix, *Almendarez-Torres* (No. 96-6839), *available in* LEXIS, U.S. Supreme Court Briefs Library.

[40] Brief for United States at Summary of Argument, *Almendarez-Torres* (No. 96-6839), *available in* LEXIS, U.S. Supreme Court Briefs Library.

[41] *Id.* The statute reads:

> § 1326. Reentry of deported alien; criminal penalties for reentry of certain deported aliens
>
> (a) Subject to subsection (b) of this section, any alien who—
>
> (1) has been arrested and deported . . . , and thereafter
>
> (2) enters, . . . or is at any time found in, the United States, unless (A) prior to [reentry] . . . , the Attorney General has expressly consented to such alien's reapplying for admission; . . . shall be fined under title 18, . . . or imprisoned not more than 2 years, or both.
>
> (b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection—
>
> . . .
>
> (2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both.

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B. Justice Breyer's Opinion for the Majority

In resolving the issue before the Court, Justice Breyer, writing for the majority, employed a contextual analysis. For Justice Breyer, to determine the meaning of a statute where the language is unclear, the Court must "ask what Congress intended."[42] To find Congress' intent, Breyer "look[ed] to the statute's language, structure, subject matter, context, and history—factors that typically help courts determine a statute's objectives and thereby illuminate its text."[43]

Breyer began his contextual analysis by focusing on the statute's "subject matter," that is, recidivism.[44] Breyer argued that to understand the statute's language, the Court must place section 1326 within the context of similar statutes which impose higher penalties for "serious recidivists" as well as within the entire concept of sentencing guidelines which require "judge[s] to consider an offender's prior record in every case."[45] In this context, one understands that recidivism is viewed as a sentence enhancement and not "an offense element."[46] In fact, Congress has never, Breyer claimed, used words such as those employed in section 1326 to create separate offenses.[47] Next, Breyer analyzed, in detail, the plain meaning of the key words in the statute's language.[48] Based on this analysis, he concluded that while the text must be read closely, its language reflects a "reasonably clear" indication that Congress "intended subsection (b)(2) to set forth a sentencing factor" rather than a separate crime.[49] Finally, Breyer analyzed the legislative history of the Act.[50] He reviewed both the historic evolution of the statute, comparing the different congressional versions enacted from 1952 to 1996, and other legislative documents, including the original title of the bill, a section-by-section analysis from the Senate, and remarks by several of the bill's sponsors.[51]

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8 U.S.C. § 1326 (1994); *see also* Brief for United States at Statutory Provision Involved, *Almendarez-Torres* (No. 96-6839), *available in* LEXIS, U.S. Supreme Court Briefs Library.

[42] *Almendarez-Torres*, 118 S. Ct. at 1223.

[43] *Id.*

[44] *Id.* at 1224.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* at 1223-26.

[49] *Id.* at 1224.

[50] *Id.* at 1226-27. For Breyer, legislative history is a crucial tool for resolving textual ambiguity. *See infra* notes 97-113 and accompanying text.

[51] *Almendarez-Torres*, 118 S. Ct. at 1223-27.

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Breyer reasoned that all of this evidence indicated that subsection (b) was intended to be a sentence-enhancing provision.[52] Indeed, he concluded, it was "as typical a sentencing factor as one might imagine."[53]

Because Breyer maintained that his contextual analysis resolved section 1326's textual ambiguity, he concluded that the canon of constitutional doubt was inapplicable to this case.[54] He argued that the canon should only be triggered when the statute is subject to two plausible interpretations. Moreover, he asserted, the canon should not be applied "mechanically whenever there arises a significant constitutional question the answer to which is not obvious."[55] Rather, the Court should apply the canon only when it believes an interpretation would lead it "gravely to doubt" the statute's constitutionality under a specific interpretation.[56] For Breyer, because past precedents clearly indicated that the majority's interpretation of subsection (b) did not violate any constitutional requirements, there was no grave doubt.[57]

C. *Justice Scalia's Dissent*

Justice Scalia, joined by Justices Stevens, Souter, and Ginsburg, dissented, claiming that the canon of constitutional doubt should, indeed, be applied in this case.[58] Scalia rejected the Court's conclusion that there was only one plausible interpretation of the statute. To him, a textual analysis of the statutory language proved that it was "fairly susceptible" to two different meanings.[59] Scalia also rejected the majority's methodology of focusing on a supposed subject matter like recidivism and some "stray

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[52] *Id.* at 1226. Breyer also examined the statute's title, "Criminal penalties for reentry of certain deported aliens," which he contended merely reinforced this legislative history. *Id.*

[53] *Id.* at 1224 (basing this conclusion on the fact that there is "no statute that clearly makes recidivism an offense element . . . at least where the conduct, in the absence of the recidivism, is independently unlawful").

[54] *Id.* at 1228. See *infra* notes 111-13 and accompanying text for a discussion of Breyer's view of the canon of constitutional doubt.

[55] *Almendarez-Torres*, 118 S. Ct. at 1228.

[56] *Id.*

[57] *Id.* 1228-33. Petitioner contended that the Court's holding violated the United States Constitution's Fifth Amendment due process clause which requires the indictment to include the recidivism element, and also violated the Sixth Amendment's requirement that the accused be fully informed of the accusations against him. Brief for Petitioner at Argument, II, A, B, *Almendarez-Torres* (No. 96-6839), *available in* LEXIS, U.S. Supreme Court Briefs Library. Petitioner argued that these amendments require his previous aggravated felony convictions to be included in his indictment and proven to a jury beyond a reasonable doubt. *Id.*

[58] *Almendarez-Torres*, 118 S. Ct. at 1233-34.

[59] *Id.*

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statements that the Court culls from the Congressional record"; he argues this methodology merely distorts the law, that is, the plain meaning of the statute.[60]

Applying his methodology to the issue in *Almendarez-Torres*, Scalia first examined the body of law into which he claimed the statute must fit—the common law and the practices in state courts.[61] After reviewing this law, Scalia concluded that, under common law, "the fact of prior convictions *had* to be charged in the same indictment charging the underlying crime, and submitted to the jury for determination."[62] Scalia also found several federal statutes along with the common law tradition and state practices to counter the majority's claim that there were "no statute[s] that clearly [make] recidivism an offense element."[63]

Turning to the language of the statute itself, Scalia pointed out that neither subsection stated that the convicted person was guilty of a felony or any crime; both merely noted that, if convicted, the person would be "fined under Title 18" and imprisoned for a certain length of time.[64] Thus, he reasoned, if subsection (a) defines a crime, why does not subsection (b)? He rejected the idea that phrases like "'notwithstanding'" or "'in the case of any alien described in . . . subsection (a)'" proved that subsection (b) did not establish a separate offense.[65] If Congress wanted subsection (b) to be a sentence-enhancing provision, it could have easily written: "any alien 'convicted under' subsection (a)."[66] Instead, the statute merely "applies to an alien 'described in' subsection (a)."[67] For Scalia, the phrase "'[s]ubject to subsection (b)' means that subsection (a) is inapplicable to an alien covered by subsection (b)."[68]

Based on this analysis of the meaning of the words of the text, their syntax, and their relationship with the whole body of law, Scalia concluded that there remained two plausible interpretations of the statute, and that the one the majority adopted raised a serious constitutional concern.[69] He stated that because that interpretation raised serious constitutional issues, it should be rejected in favor of a plausible alternative interpretation that did

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[60] *Id.* at 1239, 1242.

[61] *Id.* at 1238-39.

[62] *Id.* at 1239.

[63] *Id.*

[64] *Id.* at 1240.

[65] *Id.* at 1241 (quoting 8 U.S.C. § 1326(b) (1994)).

[66] *Id.*

[67] *Id.* (quoting 8 U.S.C. § 1326(b)).

[68] *Id.* (quoting 8 U.S.C. § 1326(a)). Compare Scalia's interpretation with the majority's interpretation of this language. *Id.* at 1224.

[69] *Id.* at 1243-44.

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not raise any constitutional doubts.[70] Thus, he concluded that Almendarez-Torres' "sentence must be set aside."[71]

Scalia admitted that his analysis did not produce black-letter answers.[72] It did raise doubts, however, as to the statute's meaning. That is all he needed to do, according to his definition of the canon of constitutional doubt. He emphasized:

> The doctrine of constitutional doubt does not require that the problem-avoiding construction be the *preferable* one—the one the Court would adopt in any event. Such a standard would deprive the doctrine of all function. . . . Rather, the doctrine of constitutional doubt comes into play when the statute is "susceptible of" the problem-avoiding interpretation.[73]

The alternative interpretation must only be "*reasonable*, though not necessarily the best."[74] Scalia concluded by calling upon the Court to join him in requiring Congress to use "unambiguously clear" language if it wants "to increase the maximum sentence without altering the substantive offense."[75]

III. ANALYSIS

In *Almendarez-Torres*, both the majority and the dissent agree that the text of section 1326 can be read in two ways. The issue over which they disagree is how to resolve that ambiguity. Central to this dispute is whether the canon of constitutional doubt is the most appropriate means. An analysis of each side's approach to resolving textual ambiguity and using the canon of constitutional doubt will demonstrate that the majority reached the correct conclusion in *Almendarez-Torres*; legislative history and other contextual materials effectively resolved the textual ambiguity in section 1326. Given the Court's current split on interpretive approaches and the type of inquiry required by the canon of constitutional doubt, this analysis will also demonstrate that the canon needs either to be reformulated or replaced to be an effective interpretive tool. If it is replaced by a different version, that version should have clearer standards and a higher threshhold before it is triggered.

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[70] *Id.*

[71] *Id.* at 1234.

[72] *Id.* at 1243-44.

[73] *Id.*

[74] *Id.* at 1244.

[75] *Id.*

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A. Justice Scalia's Textual Approach to Statutory Interpretation

Justice Scalia's approach to statutory interpretation is founded on the belief that the Court's role is to enforce the law as written. "Law" is the specific text that Congress enacted and the President signed, and no more.[76] Therefore, it is the text that must provide the clues to the statute's meaning. Guidance in interpreting the words of the text is obtained from dictionaries and texts of related statutes, and, if ambiguity remains, from canons of construction.[77] Scalia insists that such a textual approach will ensure that the meaning given to a statute will be the one that is "most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute."[78] Scalia also claims that this approach will ensure that the interpretation given to a particular provision of a statute is the one "most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind."[79]

For Scalia, the use of nontextual sources, and especially legislative history, undermines "democratic government."[80] Scalia argues that contextualists believe they should search for and apply Congress' intent even if that intent is not clearly expressed in the words of the statute.[81] For Scalia, this is judicial usurpation of the policy-making role of Congress and the President.[82] Judges are not free to replace the clear language of the statutes, which is "the law," with an unenacted legislative intent.[83] Courts "interpret laws"; they do not, or at least they should not, "reconstruct legislators' intentions."[84]

Moreover, Scalia contends, the notion of congressional intent is ludicrous.[85] As a public choice theorist,[86] Scalia views statutes as the result

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[76] Chishom v. Roemer, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting).

[77] *See supra* note 15.

[78] Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring).

[79] *Id.*

[80] SCALIA, *supra* note 15, at 17.

[81] *See, e.g.*, *Chishom*, 501 U.S. at 404-05 (Scalia, J., dissenting); Almendarez-Torres v. United States, 118 S. Ct. 1219, 1239-44 (1998).

[82] SCALIA, *supra* note 15, at 17-18, 36.

[83] Immigration and Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 453 (1987).

[84] *Id.* at 452-53.

[85] SCALIA, *supra* note 15, at 31-32.

[86] *See* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION 52-61 (2d ed. 1995) (providing a brief, but clear, overview of public choice theory and citations to the leading works on the subject).

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of "deals" made between legislatures and various interest groups.[87] Individual legislators, therefore, might have some specific purpose or intent in advocating the passage of a specific policy, but legislatures, as collective bodies, are neither rational nor purposive.[88] Seldom, if ever, do they have any unified purpose or intent when they enact statutes.[89] Indeed, for "99.99 percent of the issues of construction reaching the courts, there *is* no legislative intent."[90]

Even if there were such a thing as a legislative intent, using committee reports, floor debates, and other random bits of legislative history is no way to determine what that intent was.[91] First, legislative history may merely reflect the opinions of various interest groups that can easily insert into the legislative history opportunistic comments.[92] Moreover, there is no evidence that "more than a handful of the Members of Congress" are even aware of any of this history.[93] Such legislative history merely provides opportunities for judges to impose their subjective views of what the law should be.[94]

Rather than resort to contextual materials when a textual analysis fails to clarify meaning or to resolve ambiguity, Scalia employs "established canons of construction."[95] For Scalia, using these canons of construction deprives justices of the opportunity of imposing their views on Congress' work by manipulating legislative history.[96]

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[87] *See* Zeppos, *supra* note 15, at 1617-18.

[88] *Id.*

[89] *See* SCALIA, *supra* note 15, at 31-32.

[90] *Id.* at 31.

[91] *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989).

[92] *See* Zeppos, *supra* note 15, at 1605.

[93] *Green*, 490 U.S. at 527; *see also* National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2182 (1998).

[94] SCALIA, *supra* note 15, at 17-18.

[95] Chishom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting).

[96] SCALIA, *supra* note 15, at 35-36.

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B. *Justice Breyer's Contextual Approach and Critique of Scalia's Methodology*

Justice Breyer rejects both Scalia's approach to statutory construction and the foundational assumptions underlying that approach.[97] Breyer sees law as more than words on a piece of paper enacted by Congress and signed by the President.[98] To him, law is a coherent body of workable, fair rules.[99] To discover that law, courts must first look to "the language of the statute."[100] But, from Breyer's perspective, words are often ambiguous; their meaning "depends heavily on context and purpose."[101] Using "[l]egislative history helps a court understand [that] context and purpose."[102] Thus, to verify their textual analysis, judges must also employ a contextual methodology to ensure that they implement Congress' intent.[103] If the Court fails to implement Congress' intent, it undermines the Court's main purpose—to "maintain coherent, workable statutory law."[104]

Breyer believes that legislative history is a crucial tool to resolving textual ambiguity because of the way he views the legislative process and the role of the courts in statutory construction. Breyer spent several years directing the staff of the Senate Judiciary Committee.[105] He saw Congress as a "bureaucratic organization" enacting law through the interaction of legislators, their staffs, and other institutions and groups including the executive branch, interest groups, and experts in the field.[106] This experience led him to conclude that legislation is a delicate process of negotiation and compromise, with legislators serving essentially as managers of a very decentralized, bottom-up process.[107] Through this process, he concludes, workable and fair laws are enacted.[108]

For Breyer, when courts fail to use legislative history, they reach conclusions that fail to "comport with the legislators' basic statutory

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[97] Breyer, *supra* note 10, at 863-67.

[98] *Id.* at 847.

[99] *Id.*

[100] Drysdale v. Spirito, 689 F.2d 252, 256 (1st Cir. 1982).

[101] Breyer, *supra* note 10, at 848.

[102] *Id.*

[103] *Drysdale*, 689 F.2d at 256.

[104] Breyer, *supra* note 10, at 874.

[105] *Id.* at 867.

[106] *Id.* at 858-59.

[107] *Id.*

[108] *Id.* at 847.

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objectives."[109] Because a statute's general objectives reflect the work of so many different groups, "[t]o take from the courts the power to refer to legislative history . . . is to cut an essential channel for communications with these informed communities of groups and individuals."[110]

Because Breyer views "legislative history produced by the interest groups, executive departments, experts, legislators, staff members, and others directly involved in the legislative process" as the most effective tool in implementing Congress' objectives, he is skeptical of the utility of "court-produced canons of interpretation."[111] For him, these canons can be manipulated far more easily than can his carefully applied legislative history.[112] Moreover, using legislative history makes law fairer. To be fair, average citizens must be able to understand the law so they can obey it. Breyer contends that legislative history is "far more accessible" to those looking to understand a statute than are centuries-old canons of construction.[113]

C. *Differences in Interpretive Approaches Lead to Insurmountable Differences over When to Use the Canon of Constitutional Doubt*

At the heart of the disagreement between Scalia and Breyer in *Almendarez-Torres* is their different views on the appropriate standards needed to trigger the canon of constitutional doubt. Based on the assumption that Congress would not enact a statute that it deemed to exceed constitutional limits, the doctrine of constitutional doubt is designed "to minimize disagreement between the Branches by preserving congressional enactments that might otherwise founder on constitutional objections."[114] Because Scalia, as a public choice theorist, rejects the notions of such concepts as congressional intent and congressional purpose,[115] he views the canon of constitutional doubt as an extremely valuable tool for resolving textual ambiguity.[116] It is triggered any time a statute can plausibly be read in more than one way.[117] On the other hand,

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[109] *Id.* at 855; *see also id.* at 873-74.

[110] *Id.* at 856.

[111] *Id.* at 868-70. A search of Breyer's cases while he was a judge for the First Circuit and a justice on the Supreme Court shows that he rarely uses canons of construction.

[112] *Id.* at 869-70.

[113] *Id.* at 870.

[114] Almendarez-Torres v. United States, 118 S. Ct. 1219, 1228 (1998).

[115] *See supra* notes 76-96 and accompanying text.

[116] *Almendarez-Torres*, 118 S. Ct. at 1234 (Scalia, J., dissenting).

[117] *See* Chishom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting).

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because Breyer views statutes as a series of hard-fought compromises threshed out by various groups, he minimizes the use of the canon and emphasizes the value of legislative history instead.[118] For him, the canon is used only if contextual sources do not resolve any textual ambiguity the Court might find in a statute.[119] Breyer accuses Scalia of overusing the canon, thereby aggravating, rather than minimizing, conflict with the legislative branch "by creating . . . statutes foreign to those Congress intended, simply through fear of a constitutional difficulty that, upon analysis, will evaporate."[120]

1. Scalia's Approach to the Canon of Constitutional Doubt

For Scalia, because "law" is only what Congress has enacted, he rejects the use of contextual materials as unreliable and as an illegitimate source for resolving textual ambiguity.[121] Instead, he views the canon of constitutional doubt as a more effective means of respecting Congress' work which he sees as only the text of the statute.[122] Because he sees the canon as such a valuable and essential tool in resolving textual ambiguity, he invokes it any time a statute is "'susceptible of'" two meanings.[123] In defining "susceptible of," he explained that while it does not mean "every construction," it does include "every *reasonable* construction."[124]

Once statutory ambiguity is apparent and two plausible interpretations discerned, courts should, according to Scalia's approach, next examine if either of the two possible interpretations raise any constitutional doubt. If one of them does, the court resolves the textual ambiguity by rejecting the interpretation that raises the constitutional doubt in favor of the plausible alternative interpretation that avoids the constitutional issues. For Scalia, that problem-avoiding alternative does not have to "be the *preferable* one—the one the Court would adopt in any

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118 *See supra* notes 97-113 and accompanying text.

119 *See* Breyer, *supra* note 10, at 868-70.

120 *Almendarez-Torres*, 118 S. Ct. at 1228.

121 *See supra* notes 91-96 and accompanying text.

122 *See supra* notes 76-96 and accompanying text; *see also Chisom*, 501 U.S. at 404 (Scalia, J., dissenting).

123 *Almendarez-Torres*, 118 S. Ct. at 1244 (quoting United States *ex rel.* Attorney Gen. v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909)).

124 United States v. X-Citement Video, Inc., 513 U.S. 64, 86 (1994) (Scalia, J., dissenting) (quoting Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)); *see also* Pennsylvania Dep't of Corrections v. Yeskey, 118 S. Ct. 1952, 1955-56 (1998).

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event."[125] Scalia argues that such a standard "would deprive the doctrine of all function."[126] Thus, the interpretation Scalia would adopt need not be "the right one,"[127] or the one Congress truly intended. It merely needs to be "reasonable, though not necessarily the best."[128]

In addition to a liberal standard for ascertaining the possibility of alternative meanings, Scalia does not necessarily demand that "grave" constitutional doubt exists before the canon is employed; there need only be "a determination of serious constitutional doubt."[129] Scalia accuses Breyer of requiring, in reality, a "determination of unconstitutionality" before he would employ the canon.[130] For Scalia, however, it is irrelevant whether either of the plausible interpretations of a statute is, or is not, constitutional.[131] To analyze precedents to reach a definitive conclusion on the constitutional issues, he maintained, "would defeat [his] whole purpose, which is to honor the practice of not deciding doubtful constitutional questions unnecessarily."[132]

2. Breyer's Approach to the Canon of Constitutional Doubt

For Breyer, the threshold for triggering the doctrine of constitutional doubt is much higher. As a general rule, he believes that using legislative history is a more effective way to resolve statutory ambiguity than is reliance on judge-made canons of interpretation.[133] Specifically, Breyer contends that the canon of constitutional doubt can be too easily manipulated by judges to reach results that match their preconceived views.[134] Thus, the canon of constitutional doubt should only be invoked when the statute is "genuinely susceptible to two constructions," after using all available contextual materials to try to resolve the textual ambiguity.[135]

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[125] *Almendarez-Torres*, 118 S. Ct. at 1243.

[126] *Id.*

[127] *Id.* at 1243-44.

[128] *Id.* at 1244.

[129] *Id.* at 1234. Scalia does not define these terms, but throughout the case he seems to minimize the level of doubt needed, sometimes saying there needs to be "serious" doubt. *Id.* at 1243. At other times, Scalia claims all that is needed is for the issue to be "doubtful." *Id.* at 1239.

[130] *Id.* at 1234. Scalia admitted that the basis for his difference with the majority was the dispute of whether either "of the two conditions for the application of this rule is present." *Id.*

[131] *Id.* at 1239.

[132] *Id.*

[133] Breyer, *supra* note 10, at 868-69.

[134] *Id.* at 869-70.

[135] *Almendarez-Torres*, 118 S. Ct. at 1228.

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Breyer contends that Scalia invokes the canon too readily. Rather than resolving ambiguity by examining legislative history to discover Congress' intent, Scalia demands clear textual language. Without such clarity, he will use the canon to resolve ambiguity.[136] This, according to Breyer and other critics, leads textualists like Scalia to interpret statutes in ways that Congress did not intend.[137] Such an approach, Breyer complains, puts a great burden on Congress; given the need for compromise and the press of business, it is unrealistic to expect Congress to follow every judicial decision and to have the time to reenact ambiguous legislation with clearer language.[138] Moreover, the canon should only be used if those invoking the doctrine truly believe that one of the two acceptable constructions will, in all likelihood, result in the statute being held unconstitutional.[139]

D. *The Superiority of the Contextual Approach in* Almendarez-Torres

In *Almendarez-Torres*, Breyer's contextual approach is superior to Scalia's reliance on the canon of constitutional doubt for several reasons. First, Breyer's careful examination of the historical evolution of the Act sheds light on Congress' intent and provides compelling evidence that section 1326(b) is best read as a sentence-enhancing provision.[140] Second, Breyer's conclusion that section 1326(b) is a sentence-enhancing provision fits better into the current body of law than does Scalia's claim that the section established a separate crime.[141] Third, the majority demonstrates that its conclusion that section 1326(b) is a sentence-enhancing provision does not raise any grave constitutional doubts. Indeed, Scalia's contention that section 1326(b) is a separate offense raises equal if not graver doubts than does the majority's view.[142] And finally, Scalia's quick invocation of the canon of constitutional doubt, without first considering reliable historical and legal materials, allows him and others who employ his methodology to manipulate the outcome of cases more readily than those using a contextual approach.[143]

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[136] *See* Breyer, *supra* note 10, at 860, 868; *Almendarez-Torres*, 118 S. Ct. at 1228.

[137] *See, e.g.*, Breyer, *supra* note 10, at 850-51; Eskridge & Frickey, *supra* note 20, at 639; Sunstein, *supra* note 10, at 430-31.

[138] *See* Breyer, *supra* note 10, at 863-64, 873.

[139] *Almendarez-Torres*, 118 S. Ct. at 1228.

[140] *See infra* notes 144-53 and accompanying text.

[141] *See infra* notes 154-62 and accompanying text.

[142] *See infra* notes 163-83 and accompanying text.

[143] *See infra* notes 184-217 and accompanying text.

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1. The Majority Properly Considers the History of the Act

The majority, using a contextual approach, convincingly analyzes the historical development of the Act to demonstrate that Congress always viewed section 1326(b) as a sentence-enhancing provision. In 1988, when Congress first amended the Act to provide additional penalties for those who had been deported subsequent to committing a felony, it did so in clear, unambiguous language.[144] Even Justice Scalia conceded that in the 1988 version of the statute, subsection (a) established the crime and subsection (b) enhanced the penalty for recidivism.[145] Ambiguity arose in 1990, when Congress changed the statute's structure.[146] While Breyer admitted that Congress created ambiguity with its changes, he argued that these changes were merely part of a whole series of amendments whereby Congress "updated and simplified the phrasing" in numerous penalty provisions.[147] In addition to looking at the totality of Congress' 1990 efforts, the majority examined the legislative history and concluded that because there was no indication that Congress intended to change the statute's meaning when it changed the statute's structure, Congress must have intended to retain subsection (b)'s original meaning as a sentence-enhancing provision.[148]

To Scalia, the absence of evidence is no evidence at all—or at least not convincing evidence. "[L]egislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its natural meaning."[149] To Scalia, the 1990 changes were of utmost significance. Scalia emphasized "the parallel structure" Congress created in its 1990 version.[150] He concluded that this parallel construction changed the relationship between subsections (a) and (b).[151]

In *Almendarez-Torres*, Breyer's approach is the more realistic one. All the justices agreed both that the 1988 version of the statute clearly presented subsection (a) as defining the crime and subsection (b) as a

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144 *Almendarez-Torres*, 118 S. Ct. at 1225.

145 *Id.* at 1241 n.6.

146 *Id.* at 1225-26.

147 *Id.*

148 *Id.*

149 *Id.* at 1241 n.6 (quoting Morales v. Trans World Airlines, Inc., 504 U.S. 374, 385 n.2 (1992)).

150 *Id.* at 1240.

151 *Id.*

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sentence enhancement, and that Congress made numerous changes in the federal criminal code in 1990 in order to make that code a more unified whole. Because Congress often writes statutes in sections and amends them in a casual, haphazard fashion, it is quite logical to assume that it never considered how its change could be misinterpreted.[152] The lack of comment in the legislative history is a good indication that Congress intended to make no substantive change. It is highly unlikely that Congress would have made such a significant change as Scalia suggested without one comment about it. To demand precision and complete coherence in the entire body of law, as Scalia does, is unrealistic.[153]

2. The Majority's View Fits into the Current Body of Law

The majority considered section 1326 within the context of an increasingly pervasive movement in federal criminal law to utilize sentencing guidelines and to enhance sentencing based on the convicted person's previous criminal record. Because of his role in promulgating the Federal Sentencing Guidelines, Breyer observed "[t]he spirit of compromise" that was essential for their passage.[154] To achieve the goals of honesty and consistency in sentencing, Congress had to accommodate "the practical needs of administration, institutional considerations, and the competing goals of a criminal justice system."[155] For Breyer, Scalia's reliance on the text of section 1326, without reference to the context in which it was enacted, promotes a naive, if not unrealistic, view of the legislative process.[156] Moreover, having invested so much time in developing the Federal Sentencing Guidelines, Breyer must fear that Scalia's approach could undermine all the hard-fought compromises. While Breyer's perspective could lead one to conclude that his reading of

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[152] *See, e.g.*, Breyer, *supra* note 10, at 854, 858-60, 863-67. *See also* Eskridge, *supra* note 15, at 679.

[153] *See, e.g.*, United States v. Locke, 471 U.S. 84, 95 (1984) (acknowledging that, for the statute involved in this case, "Congress might have acted with greater clarity or foresight"); United States v. Jackson, 824 F.2d 21, 25 (D.C. Cir. 1987) (admitting that the sentence-enhancing statute under consideration was "[l]amentably . . . not meticulously drafted"). *See also* Eskridge, *supra* note 15, at 679; Sunstein, *supra* note 10, at 425; Zeppos, *supra* note 15, at 1620-23.

[154] Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 2 (1988).

[155] *Id.*

[156] Breyer, *supra* note 10, at 863-64. Breyer rejects Scalia's view that the "law" is only what dictionary definitions determine it is. *Id.* at 862-63. "[T]his argument misunderstands how Congress works as an institution." *Id.* at 863. Moreover, "nothing in the Constitution . . . prohibit[s] Congress from using staff and relying upon groups and institutions." *Id.* at 863-64.

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the statute in this case is biased, it is better viewed as an insistence that section 1326 fit within this current body of law.

It is now commonplace for Congress to create one substantive crime and then add sentence-enhancing provisions to be applied to persons who have previously been convicted of other crimes.[157] Section 1326(b) is just such a typical sentence-enhancing statute. Sentencing factors are only submitted to a jury when the factors at issue are ones that could be subject to dispute, thereby requiring "accurate factfinding."[158] Because "[p]rior convictions are highly verifiable matters of record," judges can easily determine them.[159] Besides, as Justice Ginsburg concluded in a decision interpreting a statute similar to the one at issue in *Almendarez-Torres*, judicial determination of such easily verifiable factors is preferred to a determination by the jury because of "[t]he inherently prejudicial nature of this kind of evidence."[160] To assume that Congress meant to have a jury made aware of a defendant's previous aggravated felony convictions when a judge, in sentencing the defendant, could easily verify that person's criminal record, does a disservice to Congress' sense of fairness.[161] In dissent, Scalia violated his own approach to statutory construction. Rather than trying to fit section 1326 into this current body of criminal law, he focused on a long-defunct common law tradition and cases from decades ago in an attempt to demonstrate that previous convictions need to be proved to a jury by the preponderance of the evidence.[162]

3. There Is No Grave Issue of Constitutional Doubt

Having resolved the statute's apparent ambiguity with its contextual analysis, the majority then presented a persuasive argument to demonstrate that its interpretation of the Act did not raise any grave doubt about the statute's constitutionality.[163] The majority argued that, as far back as 1912, the Court has upheld sentence-enhancing provisions.[164] Indeed, in

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[157] *See* William W. Wilkins & John R. Steer, *Relevant Conduct: The Cornerstone of Federal Sentencing Guidelines*, 41 S.C. L. REV. 495 *passim* (1990).

[158] United States v. Forbes, 16 F.3d 1294, 1299 (1st Cir. 1994).

[159] *Id.*

[160] United States v. Jackson, 824 F.2d 21, 25 (D.C. Cir. 1987).

[161] *Id.*

[162] *See supra* notes 61-63 and accompanying text.

[163] Almendarez-Torres v. United States, 118 S. Ct. 1219, 1228 (1998).

[164] *Id.* at 1231. The majority pointed out that in 1912, the Court had even upheld enhanced sentencing after the defendants were convicted and incarcerated once their previous convictions were discovered. *Id.* (citing Graham v. West Virginia, 224 U.S. 616, 624, 629 (1912)).

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McMillan v. Pennsylvania,[165] the Court noted that "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all."[166] In 1962, in *Oyler v. Boles*,[167] the Court again emphasized that a "habitual criminal charge does not state a separate offense."[168] However, the *Oyler* Court did insist that "a defendant must receive reasonable notice and an opportunity to be heard relative to the recidivist charge even if due process does not require that notice be given prior to the trial on the substantive offense."[169] Because, in *Oyler*, the petitioners appeared before the sentencing court with lawyers, did not challenge the previous conviction charges,[170] and acknowledged "in open court that they were the same persons who had previously been convicted," the *Oyler* Court concluded that they were "in no position . . . to assert that they were not given a fair opportunity to respond" to the recidivism charges.[171]

The facts in *Oyler* demonstrate that the notice and hearing requirements necessary to conform with due process requirements were met in *Almendarez-Torres*. Almendarez-Torres appeared at his pleading hearing with counsel, acknowledged his previous convictions, and admitted that he understood he could be sentenced to imprisonment for many more than two years.[172] At his plea hearing, he raised no objections to the indictment.[173] Hearing the charges against him, which included recidivism and the possibility that he could be subject to twenty years imprisonment, he pled guilty, acknowledging his three previous aggravated felony convictions.[174] Thus, Almendarez-Torres, like the defendants in *Oyler*, was in no position to contest his sentence. All his constitutional rights had, according to Supreme Court precedents, been preserved.

In addition, the *Almendarez-Torres* majority pointed out that if the dissent's interpretation of the statute were adopted, that interpretation would raise constitutional issues as well: "[i]f subsection (b)(2) sets forth a separate crime, the Government would be required to prove to the jury that the defendant was previously deported 'subsequent to a conviction for

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[165] 477 U.S. 79 (1986). The Court pointed out that this was "the case upon which petitioner must primarily rely." *Almendarez-Torres*, 118 S. Ct. at 1230.

[166] *McMillan*, 477 U.S. at 91.

[167] 368 U.S. 448 (1962).

[168] *Id.* at 452.

[169] *Id.*

[170] *Id.* at 453.

[171] *Id.*

[172] Brief for Petitioner at Excerpts from Guilty Plea Hearing in Joint Appendix, *Almendarez-Torres* (No. 96-6839), *available in* LEXIS, U.S. Supreme Court Briefs Library.

[173] *Id.*

[174] *Id.*

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commission of an aggravated felony.'"[175] This would create a "fairness" issue which many courts have contended raises serious issues of unfair prejudice.[176] Indeed, some circuits have held that such a procedure violates a defendant's constitutional right to a fair and impartial trial.[177]

Scalia's rebuttal evidence is not convincing. Although he chastised the Court for distorting the holdings in the leading precedent cases,[178] he focused on only one early case as well as the common law that all states and the federal government have replaced with statutes.[179] Scalia also rejected the majority's fairness argument. He maintained that if it were unfair for a jury to hear about a defendant's prior convictions, it was equally unfair to deprive a "defendant of a jury determination (and a beyond-a-reasonable-doubt burden of proof)."[180] This superficial dismissal of the majority's constitutional concern avoids constitutional analysis and demonstrates a key weakness in Scalia's approach. If both plausible interpretations raise constitutional issues, in the interest of providing needed guidance to legislators, the Court needs to analyze the issue fully. This the majority did. Scalia's approach, on the other hand, rejects the need for such an analysis.[181] He insists that all he needs to do is to show that some constitutional issue is plausible for him to choose the interpretation that raises no doubt.[182] But, in this case, he can only do that by ignoring the doubt the majority raises about the interpretation he chooses.[183]

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[175] *Almendarez-Torres*, 118 S. Ct. at 1226.

[176] *Id.*

[177] Washington v. Kirkpatrick, 43 P.2d 44, 45 (Wash. 1934); Note, *Recidivism Procedures*, 40 N.Y.U. L. REV. 332, 337 (1965) (citing Lane v. Warden, 320 F.2d 179, 186 (4th Cir. 1963)). Most courts, acknowledging the fairness problem, have nonetheless upheld such procedures. *See Almendarez-Torres*, 118 S. Ct. at 1232.

[178] *Almendarez-Torres*, 118 S. Ct. at 1233-37.

[179] *Id.* at 1237. Scalia, for example, concluded that "[n]o one can read our pre-*McMillan* cases . . . without entertaining a serious doubt as to whether the statute as interpreted by the Court in the present case is constitutional." *Id.* But, he reaches this conclusion by ignoring *Oyler* and other more recent cases cited by the majority. *Id.*

[180] *Id.* at 1242.

[181] *Id.* at 1239.

[182] *Id.*

[183] *Id.* at 1242.

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4. The Doctrine of Constitutional Doubt Permits Subjective Manipulation

The majority's approach in *Almendarez-Torres* is superior to Scalia's because it provides a methodology for resolving textual ambiguity without having to resort to the canon of constitutional doubt. The chief problem with that canon is that it is as open to manipulation as is legislative history, if not more so. Justices using the canon have three distinct occasions to make subjective determinations, all of which provide opportunities for manipulation: (1) when determining if the text of the statute is ambiguous; (2) when determining if one of the possible meanings is open to constitutional doubt; and (3) when determining whether the constitutional issue rises to the level of gravity necessary before the Court chooses the statute's alternative meaning.

a. Is the Statute Ambiguous?

Justice Scalia gives the impression that the task of determining whether there is any textual ambiguity is a relatively easy one, but the many 5-4 decisions where justices have argued over whether there was enough ambiguity to trigger the canon indicates that the task is open to significant debate.[184] While Scalia found ambiguity in *Almendarez-Torres*, in other cases, Scalia found no ambiguity where other justices were convinced that there was a great deal. For example, Scalia claimed that in *United States v. Locke*,[185] "the Court [correctly] found the doctrine [of constitutional doubt] inapplicable . . . because the statutory language did not permit an interpretation that would 'avoid a constitutional question.'"[186] But the three *Locke* dissenters claimed that the Act did, indeed, have two plausible meanings and that the one the majority chose was "contrary to the intent of Congress, engage[d] in unnecessary constitutional adjudication and unjustly create[d] a trap" for unwary citizens.[187] They argued, much like Scalia did in *Almendarez-Torres*, that the *Locke* majority should have avoided the constitutional issue by acknowledging the text's ambiguity and

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[184] *See, e.g.*, *infra* notes 185-93 and accompanying text. *See also* Rust v. Sullivan, 111 S. Ct. 1759 (1991). Compare Justice Breyer's opinion in *United States v. Gendron*, 18 F.3d 955, 957-60 (1st Cir. 1994) (interpreting a child pornography statute to avoid constitutional doubt) with Justice Scalia's dissent in *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 80, 85-86 (1994) (rejecting Breyer's interpretation as a plausible one in a case requiring analysis of the same statute).

[185] 471 U.S. 84 (1985).

[186] *Almendarez-Torres*, 118 S. Ct. at 1234 n.1 (quoting United States v. Locke, 471 U.S. 84, 96 (1985)).

[187] *Locke*, 471 U.S. at 117 (Stevens, J., dissenting).

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adopting a different interpretation which raised no grave constitutional doubt.[188] In *United States v. Monsanto*,[189] Scalia again held that the doctrine of constitutional doubt was inapplicable because "'the language of the statute was plain and unambiguous.'"[190] But the four dissenting justices argued that there was textual ambiguity.[191] They maintained that there was a plausible alternative interpretation which would have avoided a constitutional judgment.[192] Indeed, they contended, the Act "should have been so interpreted, given the grave 'constitutional and ethical problems' raised" by the majority's holding.[193]

b. Does One of the Statute's Possible Meanings Raise a Constitutional Issue?

A second opportunity for such subjective judgment arises if the majority does find ambiguity and can argue that one interpretation is open to some constitutional doubt. The Court can then impose an interpretation that is less than highly plausible. This, for example, is what Justice Scalia did in *Feltner v. Columbia Pictures Television, Inc.*[194] One week after filing his dissent in *Almendarez-Torres*, Scalia concurred in *Feltner*. In this case, too, he employed the canon of constitutional doubt, finding an interpretation that would avoid confronting the issue of whether the statute was constitutional or not.[195] But to do so, he had to grossly distort the meaning of the word "court." At issue in *Feltner* was the meaning of section 504(c) of the Copyright Act, which permits copyright owners to recover statutory damages of between $500 and $20,000, depending on what "the court considers just."[196] Because the Seventh Amendment requires a jury determination of the amount of statutory damages, the statute would violate that protection if "court" meant a judge rather than a jury. Employing Webster's *New International Dictionary*, Scalia "demonstrates" that it is "fairly possible" for the word "court" to have a

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[188] *Id.* at 120.

[189] 491 U.S. 600 (1989).

[190] *Almendarez-Torres*, 118 S. Ct. at 1234 n.1 (quoting United States v. Monsanto, 491 U.S. 600 (1989)).

[191] *Monsanto*, 491 U.S. at 637 (Blackmun, J., dissenting).

[192] *Id.* at 636-37 (Blackmun, J., dissenting).

[193] *Id.* at 636 (Blackmun, J., dissenting).

[194] 118 S. Ct. 1279 (1998).

[195] *Id.* at 1288-90.

[196] *Id.* at 1282.

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broad meaning which includes both judge and jury.[197] Granting that "[t]he Court is perhaps correct" that all indications point to Congress' intent to mean judges and not juries, he concluded, by citing his dissent in *Almendarez-Torres*, that "[t]he doctrine of constitutional doubt does not require that the problem-avoiding construction be the *preferable* one."[198]

This is precisely the kind of manipulation Justice Breyer feared when he demanded higher standards before the canon is employed.[199] Because ambiguity is inherent in English language usage, a statute, as Judge Learned Hand explained, can easily be misinterpreted "even though the facts answer the dictionary definitions of each term used in the statutory definition" and "the meaning of a sentence may be more than that of the separate words."[200] With only a dictionary and without context, the meaning of words are easily distorted.[201] As Scalia's opinion in *Feltner* well demonstrated, with a little imagination and a good dictionary, a skillful judge can find an alternative interpretation to almost any statute.[202]

Not only are words almost always open to alternative interpretations, but statutes are often vague and ambiguous because they are products of fallible human beings. As Breyer cogently noted, human vision is limited; it is impossible for legislators to "specify in advance all possible future circumstances."[203] If it were, courts would only need "fact-finding power, not the power to interpret statutes."[204] Thus, statutes "will typically contain many ambiguities."[205] It is the job of the courts to resolve such ambiguity as honestly as possible by using all the tools available to them, including contextual material vital to understanding statutory language.[206]

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[197] *Id.* at 1288-89.

[198] *Id.* at 1289.

[199] *See supra* notes 134-35 and accompanying text.

[200] Dickenson v. Petit, 692 F.2d 177, 180 (1st Cir. 1982) (quoting Helvering v. Gregory, 69 F.2d 809, 810-11 (2d Cir. 1934)).

[201] *See* Sunstein, *supra* note 10, at 504; *see also* United States v. Jackson, 824 F.2d 21, 25 (D.C. Cir. 1987) (citing an example of a statute that needed interpretation because it was "not meticulously drafted"); Breyer, *supra* note 10, at 863 (arguing that dictionaries are no more "the law" than is legislative history and that their use provides as much opportunity for manipulation, if not more).

[202] *See supra* notes 194-98 and accompanying text.

[203] Breyer, *supra* note 10, at 854.

[204] *Id.* at 854, 860.

[205] William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1064 (1989); *see also* SCALIA, *supra* note 15, at 27.

[206] *See* Eskridge, *supra* note 205, at 1064-65; Sunstein, *supra* note 10, at 430-31, 504.

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c. Does the Constitutional Issue Raised by One of the Statute's Possible Meanings Reach the Level of Gravity Necessary for the Court to Choose the Alternative Meaning?

The final way courts can manipulate the canon of constitutional doubt is by claiming doubt when such doubt is not very "grave" at all. Unlike Breyer who argues that the canon of constitutional doubt should not be applied "mechanically whenever there arises a significant constitutional question the answer to which is not obvious,"[207] Scalia insists that whenever Congress wishes to enact a statute that *might* raise a constitutional doubt, "it must make that intention unambiguously clear."[208] In this way, Scalia seems to agree with the majority in *National Labor Relations Board v. Catholic Bishops*.[209] In that case, the Court held that "in absence of a clear expression of Congress' intent, . . . we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult [constitutional] questions."[210] In reality, Scalia is using the doctrine of constitutional doubt to impose a super-clear statement requirement on the legislature.

"[C]lear statement rules embody the view that the legislature can achieve a particular result only by *explicit* statement."[211] In this case, Scalia seems to be requiring a clear statement, if not a super-clear statement, to rebut the presumption that Congress will not enact statutes that raise constitutional doubt.[212] The problem with requiring Congress to state its intent in super-clear language is that it "unnecessarily burden[s] the legislative process."[213] In an increasingly complex regulatory state, Congress does not have the ability to continually revise and amend legislation the Court finds ambiguous.[214] Moreover, such an approach assumes Congress works in a much more precise, consistent, and coherent

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[207] Almendarez-Torres v. United States, 118 S. Ct. 1219, 1228 (1998).

[208] *Id.* at 1244.

[209] 440 U.S. 490 (1979).

[210] *Id.* at 507; *see also* DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (defining the canon as one that requires the Court, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, . . . [to] construe the statute to avoid such problems unless such construction is *plainly contrary* to the intent of Congress") (emphasis added).

[211] Shapiro, *supra* note 20, at 940.

[212] *See Almendarez-Torres*, 118 S. Ct. at 1244; *De Bartolo*, 485 U.S. at 575; *see also* Eskridge & Frickey, *supra* note 20, at 646 n.4 (explaining the clear statement rule).

[213] Eskridge & Frickey, *supra* note 20, at 632; *see also* Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 893, 905 (1982) [hereinafter *Intent*].

[214] *See Intent*, *supra* note 213, at 905.

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way than it really does.[215] Thus, in reality, clear statement requirements are "countermajoritarian."[216] As Judge Posner explained, because requiring clear statements and using canons of construction like the doctrine of constitutional doubt makes judicial decision-making appear mechanical, they conceal from both Congress and the public "the extent to which the judge is making new law in the guise of interpreting a statute."[217]

E. Suggestions for Making the Canon of Constitutional Doubt More Effective

Justice Scalia, himself, recently succinctly summarized the problems with statutory ambiguity, clear statement rules, and canons of construction:

> Every statute that comes into litigation is to some degree "ambiguous"; how ambiguous does ambiguity have to be before [canons of construction apply]? . . . And how clear is an "unmistakably clear" statement? There are no answers to these questions, which is why these artificial rules increase the unpredictability, if not the arbitrariness, of judicial decisions.[218]

Thus, as currently formulated, the canon of constitutional doubt is open to too much debate and manipulation to accomplish its intended purpose of minimizing judicial activism and respecting Congress' work. With justices using different methods to resolve ambiguity and employing different standards for determining necessary levels of ambiguity and constitutional doubt, as we have seen, the canon can be used as a tool for judicial activism rather than restraint and as a means to undermine statutory objectives rather than to implement them.[219] Because it does not seem possible, given the current interpretive split in the Court, that the justices will agree on consistent standards for this canon, perhaps a different version of the canon could better accomplish the purpose of encouraging judicial restraint and a respect for Congress' role as policy-maker.

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[215] *See* Eskridge, *supra* note 15, at 679; Sunstein, *supra* note 10, at 425; *supra* notes 106-12 and accompanying text.

[216] Eskridge & Frickey, *supra* note 20, at 632-39 (citing several examples, especially the case of the Education of the Handicapped Act of 1975, where "it took Congress three statutes and fifteen years to accomplish" what it "thought it had done in 1975"); *see also* Breyer, *supra* note 10, at 854, 858-60; *Intent*, *supra* note 213, at 905.

[217] Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816-17 (1983).

[218] SCALIA, *supra* note 15, at 27-28.

[219] *See supra* notes 184-98 and accompanying text; *see also* FRIENDLY, *supra* note 21, at 209-12; Eskridge, *supra* note 205, at 1020-21.

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A few legal scholars have identified the canon of "avoiding constitutional invalidity" as a "milder version" of the canon of avoiding constitutional doubt.[220] The canon of avoiding constitutional invalidity maintains the premise "that statutes should be construed so as to survive constitutional challenge,"[221] but allows for more "mild statutory 'bending,'" for it is only triggered if a court first determines that the statute is invalid based on its initial reading.[222] Thus, only after the court determines that its construction will lead to invalidating the statute will it look to see if the statute can be fairly construed to survive this constitutional challenge.[223] This approach provides less opportunity for judicial manipulation than does the doctrine of constitutional doubt; by requiring the court to determine the constitutional issue before the canon is triggered, it eliminates one of the two variables in the doctrine of constitutional doubt.

Henry Friendly, in analyzing Justice Felix Frankfurter's jurisprudence, clearly described how justices confuse the two canons.[224] Friendly noted how Frankfurter, in *Textile Workers Union v. Lincoln Mills*, "went from one sentence saying, 'Legislation must, if possible, be given a meaning that will enable it to survive,' to another declaring, 'This rule of constitutional adjudication is normally invoked to narrow what would otherwise be the natural but constitutionally dubious scope of the language.'"[225] Frankfurter, at least in this case, seemed to have failed to appreciate the significant differences between the two approaches represented by these two sentences. The first approach urges the Court to avoid an unconstitutional result *after* analyzing the constitutional issue; the second approach avoids the constitutional issue without analysis. Indeed, Scalia maintains that to analyze the constitutional issue "would defeat [his] whole purpose" of the canon of constitutional doubt which to him is "to honor the practice of not deciding doubtful constitutional questions unnecessarily."[226]

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[220] Sunstein, *supra* note 10, at 468-69; *see also* FRIENDLY, *supra* note 21; Eskridge, *supra* note 205, at 1020-21; Posner, *supra* note 217, at 814-17. For cases which seem to apply this version of the canon, see *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138, 141 (1961); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 477 (1957) (Frankfurter, J., dissenting); *United States v. Harris*, 106 U.S. 629, 635-36 (1883); *Stern v. United States Gympsum, Inc.*, 547 F.2d 1329, 1344 (7th Cir. 1977); *Weiss v. Willow Tree Civic Assoc.*, 467 F. Supp. 803, 814 (S.D.N.Y. 1979).

[221] Sunstein, *supra* note 10, at 468-69.

[222] Eskridge, *supra* note 205, at 1020-21.

[223] *Id.*

[224] FRIENDLY, *supra* note 21, at 209-13.

[225] *Id.* at 210.

[226] Almendarez-Torres v. United States, 118 S. Ct. 1219, 1239 (1998).

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Those, like Scalia, who advocate use of the canon of constitutional doubt with easy triggers seem to assume that Congress would wish the courts to adopt what Scalia admits might be a less "preferable" interpretation rather than confront a constitutional question. But, as Friendly concluded, such an assumption "seems rather fanciful."[227] As Breyer pondered, why would Congress prefer the courts to impose a meaning "foreign" to that which "Congress intended, simply through fear of a constitutional difficulty that, upon analysis, will evaporate?"[228] Friendly cogently reasoned:

> It does not seem in any way obvious, as a matter of interpretation, that the legislature would prefer a narrow construction which does not raise constitutional doubts to a broader one which does raise them. For there is always the chance, usually a good one, that the doubts will be settled favorably, and if they are not, the conceded rule of construing to avoid unconstitutionality will come into operation and save the day.[229]

In reality, then, if the canon of constitutional doubt is too liberally applied, it can be viewed, not as a canon of statutory interpretation, but, as Justice Frankfurter admitted, "as one of 'constitutional adjudication.'"[230] The canon of constitutional invalidity better reflects an approach that common sense would lead one to believe Congress would prefer—an approach where the courts consider the constitutional issue, knowing that they can later choose an alternative statutory construction if the preferred one would lead to invalidating the statute. That, Friendly maintains, is most likely "what Congress thinks the Justices are paid to do."[231]

IV. CONCLUSION

The canon of constitutional doubt sought to accomplish a laudable purpose—minimizing judicial activism. Because of the different ways it has been defined and applied and because of the different approaches to statutory construction currently dividing the Court, however, the canon no longer is an effective tool to accomplish this purpose. For the canon of constitutional doubt to be useful, it needs either to be reformulated with clear standards for when it will be triggered or it needs to be replaced by the canon of avoiding constitutional invalidity. Because the Court cannot

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[227] FRIENDLY, *supra* note 21, at 210.

[228] *Almendarez-Torres*, 118 S. Ct. at 1228.

[229] FRIENDLY, *supra* note 21, at 210.

[230] *Id.* at 210-11.

[231] *Id.* at 210.

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agree on how to resolve ambiguity and how much ambiguity is needed to trigger the canon of constitutional doubt, it will be better served by choosing to replace the current canon with the milder version which has a higher threshold and clearer standards. Moreover, because the canon of avoiding constitutional invalidity requires that the constitutional issue be addressed before the canon is triggered, the different interpretive approaches that currently divide the Court do not come into play as often, thereby minimizing conflict and the use of different standards for the canon.

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