

ARTICLES

THE NEW TEXTUALISM

William N. Eskridge, Jr.*

An analytical conundrum besets a court's interpretation of a statute: The statute's text is the most important consideration in statutory interpretation, and a clear text ought to be given effect. Yet the meaning of a text critically depends upon its surrounding context. Sometimes that context will suggest a meaning at war with the apparent acontextual meaning suggested by the statute's language. How should the judge proceed? Is contextual evidence even admissible in such cases? How can it be excluded? The Supreme Court's traditional resolution of this conundrum has been to consider virtually any contextual evidence, especially the statute's legislative history, even when the statutory text has an apparent "plain meaning." This traditional approach has been challenged by a few commentators and, now, from within the Court itself. Consider the case of *Immigration & Naturalization Service v. Cardoza-Fonseca*.¹

Luz Marina Cardoza-Fonseca, a citizen of Nicaragua, entered the United States in 1979. She had fled Nicaragua with her brother, after he had been imprisoned and tortured by the Sandinista government. The Immigration & Naturalization Service (INS) subsequently initiated deportation proceedings to return her to her country, and she sought refuge through two provisions of the Immigration & Nationality Act of 1952. Section 243(h) of the 1952 Act requires that the Attorney General withhold deportation of an alien who demonstrates, through specified factors, that her "life or free-

* Professor of Law, Georgetown University Law Center. I appreciate helpful comments on an earlier draft of this Article from Dan Farber, Phil Frickey, Dick Posner, and Roy Schotland. Bob Schoshinski provided wonderful research assistance.

1. 480 U.S. 421 (1987).

dom would be threatened.”² In 1984, the Supreme Court interpreted the section to require a showing that “it is more likely than not that the alien would be subject to persecution” in the country to which she would be returned.³ Section 208(a), added by Congress in 1980,⁴ gives the Attorney General discretion to grant asylum to a “refugee” who is unwilling to return to her home country because of a “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”⁵

The INS concluded that Cardoza-Fonseca could not remain in this country under either provision because there was no “clear probability” that she would be persecuted if deported to Nicaragua. Arguing that the INS applied an incorrect burden of proof to her section 208(a) request for asylum, Cardoza-Fonseca appealed. The Supreme Court agreed, holding that section 208(a) only requires applicants to show either past persecution or “good reason” to fear future persecution. Both the opinion for the Court and the dissent considered legislative history in construing the statute. Beginning with the text of the statute, the majority reasoned that the “ordinary and obvious meaning” of section 208(a) is that the applicant’s burden of proof is more lenient than the probability standard of section 243(h).⁶ The Court found confirmation of this “plain language” in the statute’s legislative history. The Court viewed as particularly persuasive the pre-1980 experience with a prior statutory asylum provision; the evidence of legislative expectations that the 1980 amendment would bring U.S. asylum practice into conformity with an international convention and practice, which required less than a probability standard for refugees seeking asylum; and the rejection of a proposal in conference committee that would have made the burden of persuasion the same under both sections.⁷ Conversely, three dissenters believed the statutory text to be ambiguous as to the burden of proof, the legislative history to provide no

2. 8 U.S.C. § 1253(h) (1982) (originally enacted as Immigration & Nationality Act, ch. 477, § 243(h), 66 Stat. 163, 214 (1952)).

3. *INS v. Stevic*, 467 U.S. 407, 429–30 (1984).

4. The Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 102, 105 (amending 8 U.S.C. § 1158(a) (1976)).

5. 8 U.S.C. § 1101(a)(42)(A) (1988) (definition of “refugee” entitled to asylum under § 208 (a)).

6. *Cardoza-Fonseca*, 480 U.S. at 430–32.

7. *Id.* at 432–43.

greater clarity, and, hence, the INS interpretation and practice to be entitled to deference.⁸

The debate between the majority and dissenting Justices in *Cardoza-Fonseca* is, on the whole, unremarkable. The Justices have engaged in this same debate for decades in statutory interpretation cases: Is the statute ambiguous on its face, or does it have a "plain meaning"? Is the plain meaning of the statute rebutted by compelling legislative history to the contrary? Or does the legislative history only reinforce the apparent meaning of the statutory text? The questions have recurred.

What is remarkable about *Cardoza-Fonseca* is that newly appointed Justice Antonin Scalia wrote a jarring concurring opinion which rejected the terms of the debate. Justice Scalia agreed with the Court that the plain meaning of section 208(a) supports *Cardoza-Fonseca*, but refused to join the Court's opinion, on the ground that *any* discussion of legislative history was irrelevant. Scalia contended: "Although it is true that the Court in recent times has expressed approval of this doctrine [that legislative history can sometimes trump plain meaning], that is to my mind an ill-advised deviation from the venerable principle that if the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity."⁹

Since *Cardoza-Fonseca*, a decision handed down early in his first Term with the Court, Justice Scalia has criticized the Court for relying on legislative history to confirm or rebut the apparent plain meaning of a statute in other specially concurring and dissenting opinions.¹⁰ These opinions, together with his opinions for the Court and a speech he gave in 1985, have developed the outlines of what I call "the new textualism."¹¹ The new textualism posits that once the Court has ascertained a statute's plain meaning, consideration of legislative history becomes irrelevant. Legislative history should not even be consulted to confirm the apparent meaning of a statutory text. Such confirmation comes, if any is needed, from ex-

8. *Id.* at 455–65 (Powell, J., dissenting).

9. *Id.* at 452 (Scalia, J., concurring in the judgment) (citing cases).

10. See cases cited *infra* note 116.

11. I call this movement the "new" textualism, even though the pre-Scalia Court had tightened up the plain meaning rule somewhat, see Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982), and even though Justice Scalia's methodology is a return to the nineteenth century treatise approach to statutory interpretation. What is "new" about the new textualism is its intellectual inspiration: public choice theory, strict separation of powers, and ideological conservatism.

amination of the structure of the statute, interpretations given similar statutory provisions, and canons of statutory construction. It is not clear that Justice Scalia would eliminate consideration of legislative history altogether, but his approach would severely curtail its use.

Justice Scalia's approach, if adopted, would represent a significant change in the way the Court writes its statutory interpretation decisions, and probably even the way the Court conceptualizes its role in interpreting statutes. The new textualism is the most interesting development in the Court's jurisprudence (the jurisprudence of legislation) in the 1980s and is well worth understanding. This Article will examine the new textualism critically and historically. Part I outlines the Court's "traditional" approach: The plain meaning of a statute governs its interpretation, unless negated by strongly contradictory legislative history. Under this approach, if a statute is ambiguous, legislative history often will be decisive, and even an apparently plain meaning can be rebutted by legislative history. In reviewing legislative history, the Court consults a wide variety of sources, including committee reports, floor debates, hearings, rejected proposals, and even legislative silence.

Part II provides context as well as elaboration for Justice Scalia's critique of the traditional approach.¹² Commentators have long expressed reservations about the Court's proliferate use of legislative history. Yet these critiques have tended to be at the margins (e.g., the Court should be more cautious in using legislative history, or certain sources should not be used). On the whole, the critiques have accepted the Court's underlying assumptions that its role is to divine the intent of Congress, legislative history is evidence of that intent, and no constitutional problems inhere in the Court's use of legislative history. Justice Scalia's new textualism is a radical, as opposed to marginal, critique. It is a bold rethinking of the Court's role. Partly because of its analytical boldness, and partly because Justice Scalia is an intellectually aggressive member of the Court,

12. Note here that Justice Scalia in *Cardoza-Fonseca*, 480 U.S. at 452, argues that what this Article calls the "new" textualism is actually a return to the Court's traditional approach before World War II. See, e.g., *United States v. Sullivan*, 332 U.S. 689, 693 (1948) (Black, J.); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 492 (1947) (Jackson, J.); *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820) (Marshall, C.J.). This is a fair point, though it should be noted that it is a frequent strategy of radical reformers to overturn a tradition upon a claim to return to an older, original tradition, and that the Court has actually relied on legislative history during this entire century. See Eskridge, *Legislative History Values*, 66 CHI.-KENT. L. REV. __ (1990) (forthcoming); note 16 *infra*.

the critique has already changed the Court's practice in statutory interpretation cases. Particularly during the last two Terms, the Court has been much more willing to ignore legislative history, has been slightly more reluctant to deviate from the apparent meaning of the statutory text, and has relied more heavily than before on structural arguments and canons of statutory interpretation.

Part III preliminarily evaluates the new textualism. It begins with Justice Scalia's analytical critique, concluding that it is quite powerful but not completely persuasive. Three problems with the critique are identified. First, the critique overstates its case against legislative history. While Justice Scalia makes a good case against treating legislative history as binding on the Court, he is less persuasive in arguing that it should almost never be relevant. Second, there appears to be some value in considering background evidence when interpreting legal texts, and Justice Scalia himself uses legislative history when interpreting the Constitution. Third, Justice Scalia's criticisms of the traditional approach can also be applied to his own approach.

Notwithstanding reservations about the new textualism, I endorse its critique of the "archaeological" rhetoric used by the Court. I also agree with Justice Scalia's suggestion that the Court rethink the role of legislative history in statutory interpretation. First, the Court should devote more of its energy to analyzing statutory *texts*, through structural arguments, analogues from other statutes, and consideration of consequences of an interpretation for the statute as a whole. This recommendation is the most important contribution of the new textualism—reminding courts and attorneys that legislative history is, at best, secondary and supporting evidence of statutory meaning. Second, the Court should develop clear statement rules (applicable prospectively) that obviate recourse to legislative history in a greater variety of settings. For a possible example, where a statutory text is clear, and where that clarity is consistent with the statutory structure and the apparent statutory policy, the Court should not delve into legislative history. Third, the Court should be more critical of the legislative history it uses, especially when the statute is an old one and the immediate concerns of the legislative history have been overtaken by changed circumstances.

I. THE TRADITIONAL APPROACH: THE SOFT PLAIN MEANING RULE AND OMNIBUS LEGISLATIVE HISTORIES

The Court's opinion in *Cardoza-Fonseca* is fairly representative of the traditional approach to statutory construction: At least rhetorically, the Court views its role as implementing the original intent or purpose of the enacting Congress. In this endeavor, legislative history is usually relevant, either to supply meaning for an ambiguous statute or to confirm or rebut the plain meaning of a clear statute. The relevant legislative history runs the gamut from footnotes and appendices in committee reports, to legislators' statements on the floor or in committee, to statements by bureaucrats and law professors, to proposals rejected in committee or on the floor, to significant legislative silences. In short, almost anything that casts light upon what Congress attempted to do when it enacted a statute is potentially relevant. The Court does, however, consider certain evidence to be more significant than other evidence.

A. The "Soft" Plain Meaning Rule

Although *Cardoza-Fonseca* started with statutory language, the opinion's rhetoric emphasized the Court's role in implementing the original intent and purpose of the enacting Congress.¹³ This emphasis is consistent with a long line of Supreme Court decisions stating or suggesting that the "sole task" of the Court in statutory interpretation is to determine congressional intent or purpose.¹⁴ This rhetoric appeals to the metaphor in which the Court is viewed as an honest agent of the Congress, the supreme lawmaking body whose will or purpose is faithfully implemented. Under this vision of the Court's responsibility, statutory text is important as the best evidence of legislative intent or purpose.¹⁵

Given this vision of the Court's role, the plain meaning rule has traditionally been a "soft" rule—the plainest meaning can be trumped by contradictory legislative history.¹⁶ Hence, *Cardoza-*

13. See *Cardoza-Fonseca*, 480 U.S. at 431–32 & n.12, 436, 441–43.

14. See, e.g., *Commissioner v. Engle*, 464 U.S. 206, 214 (1984).

15. See *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543 (1940) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes."); *Caminetti v. United States*, 242 U.S. 470, 490 (1917) ("when words are free from doubt they must be taken as the final expression of the legislative intent").

16. Early examples of this phenomenon are *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 46–48 (1928); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474–77 (1921); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 50–51 (1911); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 458–59 (1892) (discussed

Fonseca refused to stop its interpretive inquiry with the plain meaning of the statute. While the "ordinary and obvious meaning of the phrase is not to be lightly discounted," the Court cautioned that it will only "assume that the legislative purpose is expressed by the ordinary meaning of the words used."¹⁷ The Court looked to the legislative history "to determine only whether there is 'clearly expressed legislative intention' contrary to that language, which would require us to question the strong presumption that Congress expresses its intent through the language it chooses."¹⁸ *Cardoza-Fonseca* is typical of the Court's traditional practice: In almost all of the leading plain meaning cases of the Warren and Burger Courts, the Court checked the legislative history to be certain that its confidence in the clear text did not misread the legislature's intent.¹⁹

The leading plain meaning case of the Burger Court, *TVA v. Hill*,²⁰ illustrates the operation of the soft plain meaning rule. Section 7 of the Endangered Species Act of 1973 required federal agencies to ensure that "actions authorized, funded, or carried out" by them not "jeopardize the continued existence of such endangered

infra text accompanying notes 26–32). Thus, Professor Harry Jones could accurately say in 1940 that "close consideration of [legislative history] is today the dominant feature of the interpretive technique employed by federal judges. Even the so-called 'plain meaning rule' . . . has been so greatly relaxed in practice that it is actually applied to exclude relevant and persuasive [legislative history] only upon infrequent occasions." Jones, *Extrinsic Aids in the Federal Courts*, 25 IOWA L. REV. 737, 737 (1940) (footnote omitted).

17. *Cardoza-Fonseca*, 480 U.S. at 431 (quoting *INS v. Phinpathya*, 464 U.S. 183, 189 (1984)) (internal quotation marks and citations omitted).

18. *Id.* at 432 n.12 (quoting *United States v. James*, 478 U.S. 597, 606 (1986)).

19. Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, "that language must ordinarily be regarded as conclusive." . . . Nevertheless, in rare cases the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, and those intentions must be controlling.

Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570–71 (1982) (quoting a leading case, *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)); see also *United States v. James*, 478 U.S. 597, 606 (1986) (also relying on *Consumer Prod. Safety Comm'n*); *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 371 (1986) ("Furthermore, the legislative history supports this plain reading of the statute."); *INS v. Phinpathya*, 464 U.S. 183, 189 (1984) (superseded by statute as stated in *INS v. Hector*, 479 U.S. 85, 90 n.7 (1986)); *Rubin v. United States*, 449 U.S. 424, 430 (1981) ("When . . . the terms of a statute [are] unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances.'") (internal quotations omitted) (quoting *TVA v. Hill*, 437 U.S. 153, 187 n.33 (1978)); *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 198–203 (1977); *Allied Chem. & Alkali Workers, Local No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166–68 (1971); *FTC v. Sun Oil Co.*, 371 U.S. 505, 512–17 (1963); *Hanover Bank v. Commissioner*, 369 U.S. 672, 687–88 (1962).

20. 437 U.S. 153 (1978).

species and threatened species or result in the destruction or modification of habitat of such species.”²¹ Soon after the Act was passed, environmentalists used it to halt construction of a nearly completed \$107 million TVA dam that threatened the habitat of the snail darter, a tiny and endangered fish. The Supreme Court affirmed that such a draconian application of the statute was required by its plain language. “One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act,” the Court opined.²² Yet the Court lingered only briefly on the textual argument and, instead, spent virtually all of the opinion on a lengthy “examination of the language, history, and structure of the legislation” which “indicate[d] beyond doubt that Congress intended endangered species to be afforded the highest of priorities.”²³

The soft plain meaning rule, as applied in *TVA v. Hill*, *Cardoza-Fonseca*, and other cases, suggests that strongly contradictory legislative history can trump plain meaning. The Court’s practice for most of this century has in fact been consistent with this view. The Court has repeatedly said that “[t]he circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect.”²⁴ In a significant number of cases, the Court has pretty much admitted that it was displacing plain meaning with apparent legislative intent or purpose gleaned from legislative history.²⁵

21. 16 U.S.C. § 1536 (1976).

22. *Hill*, 437 U.S. at 173. Without much elaboration, the dissenting Justices argued that the language was not “plain.” The Court responded with a quotation from Lewis Carroll’s *Through the Looking Glass*: “‘When I use a word,’ Humpty Dumpty said, in rather a scornful tone, ‘it means just what I choose it to mean—neither more nor less.’” *Id.* at 173 n.18 (quoting L. CARROLL, *Through the Looking Glass*, in *THE COMPLETE WORKS OF LEWIS CARROLL* 196 (1939)).

23. *Id.* at 174. The legislative history discussion in the Court’s opinion runs 20 pages in the U.S. Reports, *id.* at 174–93. This is particularly amusing in light of the Court’s protest that “[w]hen confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning.” *Id.* at 184 n.29 (citing *Ex parte Collett*, 337 U.S. 55, 61 (1949)). The Court explained that it undertook its analysis only to meet the dissent’s argument that the “absurd” result in the case was “not in accord with congressional intent.” *Id.*

24. *Watt v. Alaska*, 451 U.S. 259, 266 (1981), quoted in *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 432 (1986).

25. See, e.g. *Kelly v. Robinson*, 479 U.S. 36 (1986); *Offshore Logistics, Inc. v. Talentire*, 477 U.S. 207 (1986); *Midlantic Nat’l Bank v. New Jersey Dep’t of Env’tl. Protection*, 474 U.S. 494 (1986); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Simpson v. United States*, 435 U.S. 6 (1978); *United States v. Board of Comm’rs*, 435 U.S. 110 (1978); *Train v. Colorado Pub. Interest Research Group*, 426

The leading case for this proposition is the old chestnut, *Church of the Holy Trinity v. United States*.²⁶ The church had hired an English clergyman and provided for his transportation to the United States. The transportation was in apparent violation of a federal statute making it "unlawful for any person . . . in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States . . . to perform labor or service of any kind in the United States"²⁷ The statutory prohibition against employment contracts facilitating immigration was very broad and filled with loophole-plugging language; for example, elsewhere the statute listed specific occupations excluded from the prohibition, with clergy not excluded.²⁸ Nevertheless, the Supreme Court declined to enforce the plain meaning of the statute. The Court reasoned from the familiar rule "that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."²⁹ The Court substantially relied on the statute's legislative history (mainly a committee report) to establish that Congress did not intend to exclude "brain toilers."³⁰

Holy Trinity Church is evidence that there is nothing new about the soft plain meaning rule and the Court's willingness to use legislative history to massage or even negate plain meaning. Also, the soft version of the rule had become an established practice by the end of the Burger Court.³¹ Based upon her reading of the the Court's decisions for the 1981 Term, Judge Patricia Wald confi-

U.S. 1 (1976); *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976); *Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975); *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395 (1975); *Laird v. Nelms*, 406 U.S. 797 (1972); *Leary v. United States*, 395 U.S. 6 (1969); *Sullivan v. United States*, 395 U.S. 169 (1969); *Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190 (1966); *Commissioner v. Bilder*, 369 U.S. 499 (1962); see also *supra* note 16 and cases cited therein.

26. 143 U.S. 457 (1892).

27. Act of February 26, 1885, ch. 164, 23 Stat. 332.

28. *Id.* § 5 (excepting professional actors, artists, lecturers, and singers, among others).

29. *Holy Trinity Church*, 143 U.S. at 459.

30. *Id.* at 464. The Court's opinion closed with the now-notorious invocation of a public value in preserving this as a "Christian nation." *Id.* at 471.

31. During the Burger Court especially, citation of *Holy Trinity Church* was something of an internal signal that the opinion's author was about to escape from the apparent meaning of the statutory text. See, e.g., *California Fed. Savs. & Loan Ass'n v. Guerra*, 479 U.S. 272, 284 (1987); *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 222-23 & n.20 (1981); *United Steelworkers v. Weber*, 443 U.S. 193, 201 (1979); *Muniz v. Hoffman*, 422 U.S. 454, 469 (1975); *United Hous. Found. v. Forman*, 421 U.S. 837, 849 (1975).

dently asserted that "although the Court still refers to the 'plain meaning' rule, the rule has effectively been laid to rest. No occasion for statutory construction now exists when the Court will *not* look at the legislative history."³²

B. *Imaginative Reconstruction and Variety in Legislative History*

Often, the Court's inquiry into legislative history is a brief foray, in which the Court quotes from one or two legislative sources to buttress its interpretation. On other occasions, however, the Court actually does a serious documentary history of a statute, what Judges Learned Hand and Richard Posner have called "imaginative reconstruction."³³ In this mode, the Court will trace the evolution of the statute and its debating history, from early legislative proposals to enactment, obviously with a focus on the interpretive issue in the case.³⁴ The goal of the inquiry is not only to retrieve specific legislative consideration of the issue (if such occurred), but also to recreate the general assumptions, goals, and limitations of the enacting Congress. Through this imaginative process, the Court seeks to "reconstruct" the answer the enacting Congress would have given if the interpretive issue had been posed directly.

This "imaginative reconstruction" approach is the one followed in *Cardoza-Fonseca*. "The 1980 Act was the culmination of a decade of legislative proposals for reform in the refugee laws,"³⁵ which the Court explored in some detail. Based upon the historical context of the recently enacted statute, the Court concluded that section 208(a)'s "well-founded fear" standard did not entail a probability burden of proof. Before 1980, no provision provided

32. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 195 (1983) (emphasis in original). "When the plain meaning rhetoric is invoked it becomes a device not for ignoring legislative history, but for shifting onto legislative history the burden of proving that the words do not mean what they appear to say." *Id.*

33. R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 286-87 (1985); *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 553 (2d Cir. 1914) (L. Hand, J.), *cert. denied*, 235 U.S. 705 (1915).

34. See, e.g., *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237 (1985); *Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys.*, 468 U.S. 137 (1984); *Bowsher v. Merck & Co.*, 460 U.S. 824 (1983); *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982); *United Steelworkers v. Sadlowski*, 457 U.S. 102 (1982); *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979).

35. *Cardoza-Fonseca*, 480 U.S. at 442 n.27 (citing Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 20-64 (1981)).

asylum to aliens who applied from within the United States, but one provision did permit the Attorney General to grant asylum to certain aliens seeking to enter the United States.³⁶ The Court found this provision similar to the one adopted in section 208(a) and relied on the pre-1980 administrative practice, which was “unquestionably” more lenient than the probability standard in section 243(h).³⁷ Additionally, the Court found that the 1980 Act was meant to bring the United States into conformity with an international protocol it had joined in 1968.³⁸ The international practice under the protocol required nothing like a probability standard of proof.³⁹ Finally, the Court found persuasive the conference committee’s rejection of the Senate bill’s proposal to tie section 208(a)’s well-founded fear standard to the probability standard of section 243(h).⁴⁰

What is quite striking about *Cardoza-Fonseca*’s legislative history arguments is the great variety of sources consulted by the Court—including committee reports in both the House and Senate, the report of the conference committee, a United Nations protocol and its handbook (the latter explicitly disclaiming any legal significance), prior administrative practice, testimony at hearings by an assistant Attorney General and a law professor, and academic commentary. *TVA v. Hill* followed a similarly wide-ranging method of imaginative reconstruction, in which the Court examined an array of committee reports, including reports of appropriations committees after the statute was enacted; a wide variety of hearing testimony, including that of Members of Congress, an Assistant Secretary of the Interior, the Director of the Michigan Department of Natural Resources, and Defenders of Wildlife; statements by the House and Senate sponsors of the legislation; the drafting evolution of the bill that was adopted, including language of bills that were not adopted and drafting changes made in the conference committee.

36. Immigration & Nationality Act § 203(a)(7), 8 U.S.C. § 1153(a)(7) (1976). Sections 207 and 208, added by the 1980 amendments, replaced § 203(a)(7): § 207 applies to admission of refugees from abroad, and § 208 applies to admission of refugees at or inside our borders.

37. *Cardoza-Fonseca*, 480 U.S. at 433–34. See also the more detailed treatment in Respondent’s Brief at 18–21, *Cardoza-Fonseca* (No. 85-782). But see Petitioner’s Brief at 12–13, *id.*

38. United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577.

39. *Cardoza-Fonseca*, 480 U.S. at 436–41; see Respondent’s Brief at 21–28, *Cardoza-Fonseca* (No. 85-782); Amicus Brief of the Office of the United Nations High Comm’r, *id.*

40. *Cardoza-Fonseca*, 480 U.S. at 441–43.

Although both decisions engaged in a somewhat more thorough examination of legislative background than is typical, *Cardoza-Fonseca* and *TVA v. Hill* are representative of the Court's willingness to consider *almost anything* that was said about or happened to a legislative proposal that becomes a statute, so long as it has some bearing on the interpretive issue. In an inquiry to reconstruct Congress' original intent or purpose, much of what passes for legislative history is obviously relevant, including the text of proposed bills, changes made in the bills by committee, the committee's report on the bill, discussion of the bill by Members of Congress at the committee hearings and on the floor of the House and Senate, votes rejecting amendments or amending the bill, and the conference report reconciling differences between the Senate and House versions (if necessary). Other materials have been found relevant by the Court sometimes, based upon conventions or inferences it has made about probable legislative intent.

1. Statements of Nonlegislators

Initially, it might seem anomalous for an inquiry about probable legislative intent or purpose to consider statements by nonlegislators. Yet much legislation is actually drafted by people outside the Congress, which is then persuaded to enact it, often without much discussion or alteration. Hence, what these nonlegislative drafters have to say about legislation is often of interest to the statutory interpreter, and indeed much of this evidence is preserved in hearings and letters where the drafters explain the statute to the legislators who are called to vote on it. To take an obvious example, the President often proposes legislation, and presidential transmittal letters and addresses may be useful in discerning the original point of a statute.⁴¹ Presidential veto messages may sometimes be useful, especially when Congress passes legislation over the President's veto, implicitly rejecting the President's policy preferences.⁴² The

41. See, e.g., *NLRB v. Local 103, Int'l Ass'n of Bridge Workers*, 434 U.S. 335, 347 n.9 (1978) (presidential transmittal letter); *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 566-67 (1976) (letter from presidential counsel to committee); *Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 629 n.8 (1975) (presidential message calling for legislation); *Western Union Tel. Co. v. Lenroot*, 323 U.S. 490, 492 (1945) (presidential message to Congress as genesis of federal child labor law).

42. See, e.g., *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295 & n.26 (1976); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 178 & n.33 (1963); *United States v. CIO*, 335 U.S. 106, 138-39 (1948) (Rutledge, J., concurring in the result). See generally A. Magazine, *Presidential Veto Messages as Legislative History* (Nov. 1989) (unpublished manuscript on file with UCLA Law Review).

Administration of President Reagan believed that presidential signing statements should be given weight in statutory interpretation.⁴³

The President is not often personally involved in advising Congress about drafting legislation, but executive departments and the independent agencies often are, and their opinions about bills they have drafted or supported are often noted in the Supreme Court's discussion of legislative history.⁴⁴ The Department of Justice, as the main legal arm of the executive branch, often has a strong voice in drafting and pressing for legislation, especially civil rights and criminal statutes. Consequently, in these areas especially, the Court often stresses the views of Attorneys General or other Department of Justice officials.⁴⁵

Finally, the Court will consider the views of private persons and groups that draft or lobby for legislation. Occasionally, law professors' testimony is important evidence, especially if they originated or drafted the legislation,⁴⁶ and the Court has also considered the views of private interest groups that advocated particular legislation.⁴⁷ Most commonly, however, the Court will rely on shared understandings of competing interest groups. Many statutes

43. See generally W. Popkin, Legislative History 67-76 (Jan. 1990 draft) (unpublished manuscript on file with UCLA Law Review).

44. See, e.g., *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 425 n.7 (1987) (HUD testimony); *BankAmerica Corp. v. United States*, 462 U.S. 122, 134-35 (1983) (testimony of Louis Brandeis, adviser to President Wilson and drafter of proposed legislation); *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 31-32 (1982) (giving "great weight" to Treasury Department views because of its role in drafting and explaining statute); *United States v. Sotelo*, 436 U.S. 268, 276-77 & 287 (1978) (both majority and dissenting opinions relying on letters from Assistant Treasury Secretary Stanley Surrey); *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 27-28, 33-35 (1977) (testimony of SEC Chair given substantial emphasis); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 202-03 (1976) (refusing to consider views of legislative opponents of securities laws but giving extensive consideration to the views of executive branch drafter, Tommy Corcoran); *Leary v. United States*, 395 U.S. 6, 21-23 (1969) (emphasis on testimony by officials of Treasury Department, which drafted and pushed for legislation); *Shapiro v. United States*, 335 U.S. 1, 12-15 (1948) (relying on view of OPA General Counsel in lengthy statement). See generally A. Giles, *Whether and When the Courts Should Rely on Nonlegislators' Contributions to Statutory History* (Nov. 1989) (unpublished manuscript on file with UCLA Law Review).

45. See, e.g., *United States v. Board of Comm'rs*, 435 U.S. 110, 131-32 (1978); *United States v. Feola*, 420 U.S. 671, 679-84 (1975); *Gaston County v. United States*, 395 U.S. 285, 289-90 (1969).

46. See, e.g., *Piper*, 430 U.S. at 29; *United States v. Giordano*, 416 U.S. 505, 517-19 (1974); *Trbovich v. United Mine Workers*, 404 U.S. 528, 535 (1972).

47. See, e.g., *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 460 U.S. 150, 159-62 (1983) (private lobbyist drafter); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 221-23 (1979) (report of private lobbying group that originated bill ultimately enacted).

reflect carefully crafted compromises among the various groups, and the Court sometimes finds documentary records of such compromises useful when interpreting the statutory result.⁴⁸

2. Legislative Silence

The silence of legislators can be as significant as their utterances. Sherlock Holmes once solved a case by making inferences from the fact that a dog did not bark.⁴⁹ A dog's barking may be significant, suggesting that something (or a strange someone) has disturbed the household's status quo. A dog's failure to bark may be evidence that the status quo has not been disrupted. Using similar logic, the Court has created a principle of continuity: Every time Congress enacts or amends a statute, it is acting against an established background of legal rules and interpretations, which Congress is presumed to know. When Congress wants to change one of these rules, it usually says something directed at the change in the statutory text or legislative history (it barks). Often Congress talks about changing one of these rules, but ultimately decides not to. More often still, no one says anything, lending an equally strong inference that the pre-existing rules are left in place: The dog fails to bark in a situation where one would expect it if there were a change in the status quo.⁵⁰

Based upon this type of reasoning, *Cardoza-Fonseca* found significance in Congress' utilization of the well-founded fear standard, which had a pre-existing term-of-art connotation, and presumed from Congress' silence that Congress meant the term in the same way the United Nations protocol and its accompanying handbook had developed it before 1980.⁵¹ In many other cases, the Court presumes from Congress' silence over time that Congress "acqui-

48. See, e.g., *Community for Creative Non-Violence v. Reid*, 109 S. Ct. 2166, 2176 & n.12 (1989) (relying on joint memorandum of publishers' and artists' groups to interpret Copyright Act); *Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. 570, 576, 580 n.13 (1971) (relying on labor and management testimony, because "the Railway Labor Act of 1926 was . . . an agreement worked out between management and labor, and ratified by the Congress and the President"); *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 217 & n.12 (1969) (relying on shared understanding in testimony by representatives of both shipping industry and unions to interpret LHWCA).

49. A.C. Doyle's *The Adventure of Silver Blaze* turns on Holmes' grasping "the significance of the silence of the dog."

50. "A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change." *Green v. Bock Laundry Mach. Co.*, 109 S. Ct. 1981, 1991 (1989).

51. *Cardoza-Fonseca*, 480 U.S. at 436-41.

escas" in judicial or agency interpretations of a statute,⁵² or presumes from Congress' silence when reenacting or amending a statute that Congress wants to carry forth previous interpretations into the new statute.⁵³

3. Subsequent Legislative History

Perhaps most peculiar of all is the Court's occasional willingness to consider "subsequent legislative history" (something of an oxymoron), that is, the interpretation of a statute expressed by Members of Congress after the statute has been enacted. Such statements are sometimes found in floor debates, committee reports, and even affidavits or amicus briefs in statutory cases. Given the Court's focus on the original legislative intent or purpose and the possibility of manipulation, it has often iterated that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."⁵⁴ In *TVA v. Hill*, for example, the Court rejected TVA's effort to invoke appropriations committee reports interpreting the Endangered Species Act to permit the Tellico Dam to go forward. The Court found that the subsequent statements "'represent only the personal views of these legislators,' and 'however explicit, [they] cannot suffice to change the legislative intent of Congress expressed before the Act's passage.'"⁵⁵

Nonetheless, the Court sometimes has considered subsequent legislative history when interpreting statutes.⁵⁶ The Court's stated reason is usually the dearth of other interpretive guides. Also, subsequent Congresses often rely on certain assumed interpretations of previous statutes. When it is apparent that the legislature has relied on an interpretation that is not clearly incorrect, it makes a good deal of sense for an intentionalist to credit subsequent legislative interpretation. Indeed, the Court will give some weight to statutory interpretations accepted and relied on by regulators and the regu-

52. See Eskridge, *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 125-28 (1988) (appendix 1, listing cases).

53. *Id.* at 129-31 (appendix 2, listing cases).

54. *United States v. Price*, 361 U.S. 304, 313 (1960) (quoted in cases such as *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 840 (1988); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 (1980); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348-49 (1963)).

55. 437 U.S. at 193 (1978) (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974)).

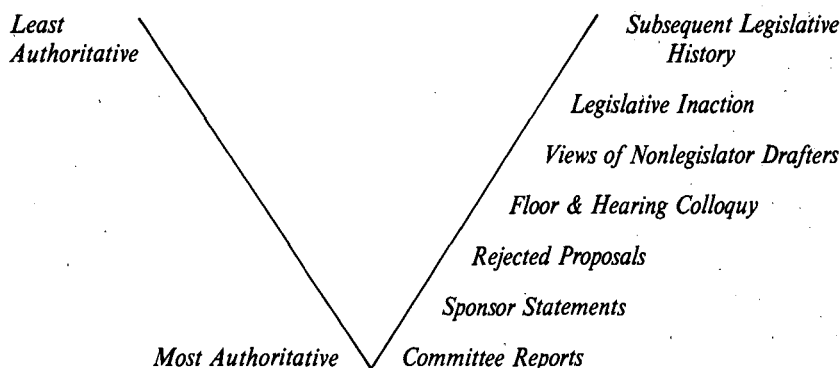
56. See, e.g., *Jett v. Dallas Indep. School Dist.*, 109 S. Ct. 2702, 2715-17 (1989); *Bowen v. Yuckert*, 482 U.S. 137, 148-52 (1987); *Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980); *Cannon v. University of Chicago*, 441 U.S. 677, 686 n.7 (1979); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969).

lated community.⁵⁷ Should it not give at least as much weight to legislative reliance on its interpretations of prior statutes, as on private or agency reliance?

C. *Hierarchy of Sources in the Court's Use of Legislative History*

Given the foregoing discussion, the Court is not at a loss in having much material from which imaginatively to reconstruct a legislative history. Sometimes all the sources point to the same interpretive answer, which makes the Court highly confident of its resolution. Other times the different sources will point in different directions. As a result, the Court has worked out a rough hierarchy of evidence to resolve conflicts. The hierarchy is based upon the comparative reliability of each source: How likely does this source reflect the views or assumptions of the enacting Congress? Is there a danger of strategic manipulation by individual Members or biased groups seeking to "pack" the legislative history? How well-informed is the source? The figure below, which Professor Frickey and I have developed in teaching Legislation at the University of Minnesota School of Law and at the Georgetown University Law Center (respectively),⁵⁸ reflects this hierarchy.

HIERARCHY OF LEGISLATIVE HISTORY SOURCES (THE FRICKEY & ESKRIDGE MINI-FUNNEL)



57. See, e.g., *BankAmerica Corp. v. United States*, 462 U.S. 122, 130–33 (1983).

58. See Eskridge & Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 319, 353 (1990), which uses a similar funnel-shaped diagram to discuss the pull of text, legislative history, purpose, and evolutive considerations in statutory interpretation. The figure in the text is an adaptation of this diagram to a theory of legislative history.

1. Committee Reports

The Court's opinions in *Cardoza-Fonseca* and *TVA v. Hill* repeatedly quote from committee reports (albeit for rather innocuous propositions). The prominence of committee reports is fairly typical. Committee reports are the most frequently cited and relied-upon sources of legislative history,⁵⁹ and in the Court's traditional view the most authoritative source. "A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation. Floor debates reflect at best the understanding of individual Congressmen. It would take extensive and thoughtful debate to detract from the plain thrust of a committee report"⁶⁰ Committee reports are often the best evidence of bicameral agreement, either because the House and Senate reports are identical, or because a conference report explicates the chambers' resolution of differences.⁶¹

2. Sponsor Statements

In *TVA v. Hill*, the Court cited committee reports, but the most specific evidence supporting its interpretation was a statement by the House sponsor and floor manager.⁶² Next only to committee reports in reliability are statements by sponsors and/or floor managers, and the Court relies on their statements routinely.⁶³

59. See Carro & Brann, *The U.S. Supreme Court & the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294, 304 (1982) (over 40-year period, approximately 60% of the Court's legislative history citations were to committee reports).

60. *Zuber v. Allen*, 396 U.S. 168, 186 (1969); see *Thornburg v. Gingles*, 478 U.S. 30, 43-44 nn.7-8 (1986) (committee reports are the "authoritative source for legislative intent"); *Garcia v. United States*, 469 U.S. 70, 76 (1984) (the most "authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill . . ."). See also *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395-96 (1951) (Jackson, J., concurring).

61. See, e.g., *Tanner v. United States*, 483 U.S. 107, 122-25 (1987); *Gulf Oil Co. v. Copp Paving Co.*, 419 U.S. 186, 199-200 (1974); *S & E Contractors, Inc. v. United States*, 406 U.S. 1, 11-12 (1972).

62. 437 U.S. at 183-84 (quoting Rep. Dingell).

63. See, e.g., *Public Employees Retirement Sys. of Ohio v. Betts*, 109 S. Ct. 2854, 2867 (1989) (Age Discrimination in Employment Act, Sen. Javits); *Jett v. Dallas Indep. School Dist.*, 109 S. Ct. 2702, 2711-14 (1989) (Civil Rights Act of 1866, Sen. Trumbull and Rep. Wilson); *United States v. Taylor*, 108 S. Ct. 2413, 2418 & n.7 (1988) (Speedy Trial Act, Rep. Cohen); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 584-88 (1988) (Labor Management Reporting and Disclosure Act, conflicting views among sponsoring Rep. Griffin and Sen. Goldwater versus Sen. Kennedy); *Bowen v. Yuckert*, 482 U.S. 137, 152 n.10 (1987) (Social Security Act and amendments, Sen. Long); *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 26-27, 28-29, 31, 34 (1977) (Williams Act, Sens. Williams and Kuchel); *Huddleston v. United States*, 415 U.S. 814, 828 (1974) (Crime Control and Safe Streets Act, Reps.

"[R]emarks . . . of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction,"⁶⁴ because the sponsors are the Members of Congress most likely to know what the proposed legislation is all about, and other Members can be expected to pay special heed to their characterizations of the legislation. "While the views of a sponsor of legislation are by no means conclusive, they are entitled to considerable weight, particularly in the absence of a committee report."⁶⁵

3. Rejected Proposals

Cardoza-Fonseca relied heavily on the conference committee's rejection of the Senate bill's effort to link new section 208(a)'s well-founded fear standard to old section 243(h)'s probability standard. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language," the Court remarked.⁶⁶ This is a slight overstatement of the Court's practice. Oftentimes, the rejection of proposed language by the committee, on the floor of the House or Senate, or in conference is quite probative, since it is direct evidence that Congress considered an issue and agreed not to adopt a specified policy.⁶⁷ But other times it is unclear that the rejection was truly a referendum on the issue later before the Court. The Court usually

Celler and McCulloch); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 164 (1970) (Civil Rights Act of 1871, Rep. Shellabarger and Sen. Edmunds); *Rodrigue v. Aetna Casualty & Sur. Co.*, 395 U.S. 352, 358, 361-62 (1969) (Outer Continental Shelf Lands Act, Sen. Cordon); *Waterman S.S. Corp. v. United States*, 381 U.S. 252, 264-66 (1965) (Merchant Ship Sales Act, Rep. Jackson); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951) (Miller-Tydings Act, Sen. Tydings).

64. *Northhaven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982); see also *Weinberger v. Rossi*, 456 U.S. 25, 35 (1982); *Lewis v. United States*, 445 U.S. 55, 63 (1980); *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 640 (1967) ("[i]t is the sponsors that we look to when the meaning of the statutory words is in doubt") (citing *Schwegmann Bros.*, 341 U.S. at 394-95).

65. *Carlin Communications, Inc. v. FCC*, 749 F.2d 113, 116 n.7 (2d Cir. 1984), cert. denied, 109 S. Ct. 305 (1988). The classic example is the Civil Rights Act of 1964, which had no Senate report (for strategic reasons). For Title VII issues, the Court often cites to the interpretive memorandum inserted into the Congressional Record by the floor managers, Senators Clark and Case. See, e.g., *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1787 (1989) (plurality opinion); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 350-51 (1977); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976); *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 n.11 (1971).

66. 480 U.S. at 442-43 (1987) (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting)).

67. See *Eskridge*, *supra* note 52, at 132-33, 134, 135-36 (appendix 3).

does not rely on evidence concerning rejected proposals as its primary legislative history.

4. Floor and Hearing Colloquy

"In construing laws [the Court has] been extremely wary of testimony before committee hearings and of debates on the floor of Congress save for precise analyses of statutory phrases by the sponsors of the proposed laws."⁶⁸ Thus, statements by legislators at hearings or on the floor are not as authoritative as those of sponsors and floor managers, unless the speakers can be identified as "players" on that particular bill.⁶⁹ According to the conventional wisdom, nonplayers are less likely to know what the consensus view is on the bill, and are more likely to behave strategically (engaging in the famed "planned colloquy"). Further, the views of those unsupportive of the proposed legislation "are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt."⁷⁰ This conventional wisdom has been relaxed somewhat in the last twenty years, for the Court frequently looks to legislative colloquy, especially to discern the general assumptions made at the time a law was enacted. Moreover, where the sponsor's statements are either too general or suspicious, the Court will rely on more specific colloquy instead.⁷¹ Even the views of opponents have sometimes been considered.⁷²

5. Nonlegislative Drafters and Sponsors

In both *Cardoza-Fonseca* and *TVA v. Hill*, the testimony of nonlegislative supporters of the legislation (executive officials, law

68. *S & E Contractors, Inc. v. United States*, 406 U.S. 1, 13 n.9 (1972).

69. See, e.g., *Kelly v. Robinson*, 479 U.S. 36, 51 n.13 (1986); *McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 493-94 (1931).

70. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951), quoted with approval in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 585 (1988); *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 66 (1964).

71. See, e.g., *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 553-54 (1987) (refusing to rely on imprecise sponsor statement contradicted by statutory definitions and statements of other legislators); *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 406-07 (1987) (refusing to rely on sponsor statement uttered after statute was enacted but relying on colloquy during legislative consideration).

72. "We recognize, of course, that statements of opponents of a bill may not be authoritative, but they are nevertheless relevant and useful, especially where, as here, the proponents of the bill made no response to the opponents' criticisms." *Arizona v. California*, 373 U.S. 546, 583 n.85 (1963) (citation omitted); see also *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 498 (1985).

professors, environmental groups) was counted as relevant but not critical. Such use is typical of this evidence. The Court will usually invoke these statements as further evidence in support of conclusions gleaned from the statutory text, committee reports, and sponsors' statements. Nonlegislator evidence will be most important in cases where it is clear that the statute was a careful compromise reached outside the legislative process and merely ratified by the legislature, and sometimes in cases where there is virtually no other evidence.⁷³

6. Legislative Silence and Subsequent History

For the reasons developed above, evidence of legislative silence and subsequent history is usually too ambiguous to count as legislative history, but in some contexts the sources are considered by the Court. "[W]hile the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, such views are entitled to significant weight, and particularly so when the precise intent of the enacting Congress is obscure."⁷⁴ Much the same can be said of the dog that doesn't bark argument: Legislative silence will usually be supporting evidence of legislative intent and will be the main evidence only when there is virtually no other evidence of legislative intent.⁷⁵

II. THE NEW TEXTUALISM: JUSTICE SCALIA'S CRITIQUE OF THE TRADITIONAL APPROACH AND THE COURT'S NEW DIRECTION

The traditional approach, as described in Part I, has been well received by judges, lawyers, and even law professors in the generation weaned on the legal process philosophy of the 1950s.⁷⁶ The

73. In *Kosak v. United States*, 465 U.S. 848, 855-57 (1984), the Court's main evidence of "legislative" intent was a secret Department of Justice memorandum written by Judge Holtzoff, the drafter of the Act. The Court sheepishly conceded that the memorandum "should not be given great weight in determining the intent of the Legislature. But, in the absence of any direct evidence regarding how Members of Congress understood the provision . . . it seems to us senseless to ignore entirely the views of its draftsman." *Id.* at 857 n.13 (citation omitted). Interestingly, when Judge Holtzoff actually has testified before Congress, the Court has ignored his views. See *Sheridan v. United States*, 108 S. Ct. 2449, 2460 (1988) (O'Connor, J., dissenting) (relying on Judge Holtzoff's testimony).

74. *Seatrains Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980) (citations omitted).

75. See, e.g., *Green v. Bock Laundry Mach. Co.*, 109 S. Ct. 1981, 1985-92 (1989).

76. For the jurisprudential background of this period, see Eskridge, *supra* note 12; Eskridge & Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*,

legal process philosophy emphasizes the importance of context in determining statutory meaning, and is skeptical of claims that words are self-defining. Given our society's commitment to representative democracy, the legislative background of statutes seems like an acceptable source of context. Decisions in cases like *Cardoza-Fonseca* and *TVA v. Hill* are useful contextualized stories about interesting statutory issues. The Court's ability to establish its case through historical as well as textual evidence makes its opinions seem more authoritative and reliable.

The traditional approach is in trouble. Because of several theoretical developments in the 1980s, an increasing number of scholars and judges are questioning the traditional approach. Justice Scalia's critique grows out of at least two of these developments and, not surprisingly, has found a receptive audience, including an audience on the Supreme Court. Although the Court has hardly abandoned the traditional approach, its practice in statutory cases of the last two Terms has been influenced by the new textualism. There is little reason to believe that the new textualism is a fad limited to these Terms, and its influence may expand.

A. *Theoretical Problems with the Traditional Approach*

The traditional approach has never been without its critics from within the legal process tradition. Professor Reed Dickerson, for example, has long objected that Congressional hearing testimony and floor debate are too unreliable to qualify as "external context" for interpreting statutes.⁷⁷ But his and similar criticisms have generally been from within the legal process framework and within the overall assumptions of the traditional approach. Academic dissatisfaction with the traditional approach has been more radical in the 1980s. Three different types of criticisms render the traditional approach vulnerable: (1) the realist criticism that legislative intent is an incoherent and indeterminate concept; (2) the historicist criticism that present interpreters can never completely reconstruct a hypothetical historical intent; and (3) the formalist

48 U. PITT. L. REV. 691 (1987); Peller, "Neutral Principles" in the 1950's, 21 U. MICH. J.L. REF. 561 (1988).

77. See R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 155-56, 174-75 (1975); Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 HOFSTRA L. REV. 1125, 1131-33 (1983). But see Wald, *supra* note 32, at 202 (defending the Court's use of such external context).

criticism that the traditional approach is inconsistent with the structures of our constitutional democracy.⁷⁸

1. Realist Criticisms

The legal realists, such as Max Radin, argued that the collective intent of a legislature is only a construction of the interpreter, because legislatures usually have no determinate collective expectations about many (if any) of the concrete issues posed by their statutes.⁷⁹ Even talking about the intent of an individual involves a complex series of inferences and, necessarily, conventions and legal fictions. To talk about the collective intent of a legislature is fiction compounded, not just by the greater number of people whose intent must be discovered, but also by the muteness of most of these people and the special conventions of the legislative process, such as the requirements that a bill must be passed in the same form by both chambers (bicameralism) and that it must then be presented to the President (presentment).⁸⁰ Radin showed that one can deconstruct almost any legislative intent argument through predictable analytical moves. This insight has been revived by several newer legal process theorists in the 1980s.⁸¹

Radin's skepticism about the meaningfulness of "legislative intent" has taken on fresh power through the insights of public choice theory, the application of economic or game-theory analysis to politics.⁸² Although controversial as a "pure" theory of the political

78. My view is that the formalist criticisms are overstated and that historicist criticisms are the most persuasive. See Part III, *infra*.

79. Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930); see also Bishin, *The Law Finders: An Essay in Statutory Interpretation*, 38 S. CAL. L. REV. 1, 14 (1965); Corry, *The Use of Legislative History in the Interpretation of Statutes*, 32 CAN. B. REV. 624, 626 (1954); Comment, *Admissibility of Congressional Debates in Statutory Construction by the United States Supreme Court*, 25 CALIF. L. REV. 326, 335-36 (1937). But see Dickerson, *A Statutory Interpretation: Mind and Will of a Legislature*, 50 IND. L.J. 206 (1975); Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886 (1930).

80. U.S. CONST. art. I, § 7, cl. 2.

81. See, e.g., Dworkin, *How to Read the Civil Rights Act*, in R. DWORKIN, *A MATTER OF PRINCIPLE* 316 (1985); Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 27 (1985).

82. See generally *Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167 (1988); Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987). Note especially that Judge Abner Mikva, a moderate defender of intentionalism and the use of legislative history in statutory interpretation, see Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, wrote a Foreword to the Symposium that seems hostile to public choice theory. 74 VA. L. REV. at 167 ("After studying the articles in this symposium, I realize why I have found it hard to read or to profit from the 'public choice' literature.").

process, public choice has generated, or elaborated on, several ideas that undermine legislative intent in statutory interpretation. Judge Frank Easterbrook has relied on public choice theory to assert that judges' reliance on legislative history to discern legislative intent amounts to nothing more than "wild guesses."⁸³

To begin with, game theory makes one skeptical that it is usually possible to figure out how most legislators "would have voted" on issues they never actually considered. That is, collective decisionmaking often depends critically on who controls the agenda and how the person orders the choices; it is not uncommon for several different choices to be possible under majority voting.⁸⁴ Hence, it is very hard for a court to figure out how a legislature "would have decided" issues on which it never formally voted—it would depend very much on the order in which proposals are considered, which in turn depends on who controls the agenda. Hence, we have no way of knowing how Congress would have decided the snail darter issue in *TVA v. Hill*, notwithstanding a great deal of legislative history. The best one can say is that if the House Merchant Marine & Fisheries Committee and Representative Dingell had set the agenda on the issue, it is more likely that the snail darter would have been protected than if the House or Senate Appropriations Committees or Senator Tunney had set the agenda. Ironically, the evidence from legislative voting records in the 1970s suggests that Congress would have accepted a Merchant Marine Committee provision in the Endangered Species Act requiring absolute protection of endangered species *and* would have accepted an Appropriations Committee provision in the budget exempting almost-completed dams (e.g., Tellico) from the requirement. We cannot know how Congress would have chosen between either of these acceptable provisions if it had been confronted with the Tellico issue directly.

Public choice theory also makes one more skeptical of the reliability of traditional linchpins of statutory interpretation, such as committee reports and sponsor's statements, by suggesting that specific explanations in those sources may well be strategic, rather than

83. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 548 (1983). This article is a particularly useful synthesis of some lessons of public choice theory for statutory interpretation.

84. See W. RIKER, *LIBERALISM AGAINST POPULISM* (1982); Riker, *The Paradox of Voting and Congressional Rules for Voting on Amendments*, 52 AM. POL. SCI. REV. 349, 352-62 (1958). But see Farber & Frickey, *supra* note 82 (limitations on public choice explanation).

sincere, expressions of the statute's meaning.⁸⁵ The Court in *TVA v. Hill* relied heavily on Representative Dingell's statement that the bill would force the Air Force to stop bombing whooping cranes in Texas and the Department of Agriculture to protect grizzlies in the West, notwithstanding heavy costs. The Court assumed that this was a sincere statement by someone who represented the consensus view on the issue. But, because the sponsor may have a hidden agenda or may be acting pursuant to a secret logroll, the sponsor is often the least likely person to represent the consensus view. Representative Dingell may have uttered the broad language, not because it represented the views of most of his colleagues, but precisely because he realized he did not have the votes to put it in the statute itself. Alternatively, he might have been making legislative history to pull in the votes of a few Members who wanted to protect whooping cranes and grizzlies. Either of these explanations is as plausible as the Court's explanation, but neither supports the Court's inference that Congress "would have" wanted to kill the Tellico Dam project to save the snail darter.

2. Historicist Criticisms

A second source of doubt about the usefulness of legislative history or the determinacy of legislative intent is the law and interpretation movement. Like public choice theory, this movement has galvanized law debates in the 1980s, though it has not had a discernible effect on judges yet.⁸⁶ According to historicist criticism, even if collective intent were a coherent concept (*contra* the realists and public choice theorists), an historically situated collective intent cannot be completely "reconstructed" by even the most "imaginative" jurist. The latter's interpretation of the former's statements will inevitably be influenced by current context, including the interpreter's own views and predispositions. To "reconstruct" a past event (especially something as difficult as a collective state of mind), involves selection of evidence, arrangement of the evidence, and interpretation of the evidence. The treatment of the evidence is all accomplished by humans whose choices will be influenced by their overall reaction to the facts of the case, their views of the judicial

85. See Fiorina, *Legislator Uncertainty, Legislative Control, and the Delegation of Legislative Power*, 2 J.L. ECON. & ORG. 33, 49 n.22 (1986) (committee reports may be biased because committees are not necessarily representative of the whole legislative chamber).

86. See INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER (S. Levinson & S. Mailloux eds. 1988); *Interpretation Symposium*, 58 S. CAL. L. REV. 1 (1985); *Law and Literature: Symposium*, 60 TEX. L. REV. 373 (1982).

role, and their assumptions (informed or not) about the historical period. This analysis, which owes much to philosophical hermeneutics⁸⁷ and modern historiography,⁸⁸ is somewhat less applicable to cases like *Cardoza-Fonseca* and *TVA v. Hill*, where the Court interprets recently enacted statutes, than it is to cases interpreting older statutes.⁸⁹

For an example of this difficulty, consider *Jett v. Dallas Independent School District*.⁹⁰ Norman Jett, formerly the head football coach and athletic director at the South Oak Cliff High School in Dallas, brought suit under the Civil Rights Act of 1866 alleging that the school's principal harassed him and ultimately discharged him because of race. A Dallas jury found racial harassment and awarded Jett damages against both the school district and the principal. The Supreme Court held that the statute does not hold municipal governments liable for the constitutional torts of their employees, even if *respondeat superior* precepts would normally impute liability to the employer. The plurality opinion examined the extensive legislative history of the 1866 Act and found no evidence that the legislation's sponsors expected it to apply to municipalities.⁹¹ The plurality also relied on the subsequent enactment of the Civil Rights Act of 1871: Since the later Congress subjected municipalities to liability for a broad range of constitutional deprivations but did not "intend" to subject municipalities to vicarious liability, the plurality reasoned that the earlier statute did not either.⁹²

There are important realist problems with the plurality's approach. Even its thorough analysis of the legislative history canvasses only a handful of legislators, and there is no evidence as to the views of the majority of legislators. Moreover, the failure of the sponsors to talk about the statute's application to municipalities is consistent with several different inferences about what they thought, to wit: No one would have imagined that the bill would have subjected municipalities to vicarious liability (the plurality's inference), or everyone recognized that state and local governments were covered by the statute, and so the interlocutors didn't even bother to

87. See Eskridge, *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. __ (1990) (forthcoming).

88. See Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237 (1986).

89. See Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1506-11 (1987).

90. 109 S. Ct. 2702 (1989).

91. *Id.* at 2711-15 (plurality opinion).

92. *Id.* at 2715-19.

mention the issue (the dissent's inference). The most likely reason, however, is an historical one not mentioned by either opinion: There were in 1866 some questions about Congress' power to impose liability on municipalities for racial discrimination, and so the sponsors consciously or unconsciously kept the issue submerged.

The realist problems are compounded by historicist problems with *Jett*. The current judicial interpreter cannot ignore important legal developments after 1866 (such as the adoption of the fourteenth amendment in 1868 and the enactment of the 1871 Act) and, more subtly, cannot expunge personal feelings about the variety of remedies that should be available to enforce our nation's civil rights laws *today*. The four dissenting Justices in *Jett* have consistently advocated a multiplicity of judicial remedies for civil rights violations, based upon their substantive view that antidiscrimination laws are privileged and important in our legal system. The four plurality Justices have shown reluctance to expand antidiscrimination remedies beyond the ambit clearly defined by Congress. It is no surprise that the eight Justices read the same historical evidence and came up with such vastly different stories about what the 1866 Act means. All the Justices were acting in good faith as amateur historians. But the evidence each selected, the questions he or she asked of the evidence, and the significance accorded the evidence were decisively influenced by the different preconceptions and values held by each Justice.

3. Formalist Criticisms

The 1980s witnessed an important revival of formalism, especially in connection with statutory interpretation. Formalism posits that judicial interpreters can and should be tightly constrained by the objectively determinable meaning of a statute; if unelected judges exercise much discretion in these cases, democratic governance is threatened. Some versions of formalism argue that original intent and legislative history are essential constraints on judicial lawmaking in statutory interpretation.⁹³ The more recent tendency among formalists is to argue that legislative intent and legislative history are to be avoided, or at least invoked much more cautiously. Several circuit court judges voiced this new formalist concern in the

93. E.g., Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1 (1988); Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985).

1980s—including Judge Easterbrook of the Seventh Circuit;⁹⁴ Judges Kenneth Starr (now Solicitor Counsel),⁹⁵ Scalia (now Justice),⁹⁶ and James Buckley⁹⁷ of the District of Columbia Circuit; and Judge Alex Kozinski⁹⁸ of the Ninth Circuit. The Department of Justice has recently relied on their criticisms to rethink its approach in statutory cases.⁹⁹

There are several formalist-sounding arguments made by these judges and the Department of Justice (often in combination with realist arguments). These critics often start their argument with a classic Holmesianism: "We do not inquire what the legislature meant; we ask only what the statute means."¹⁰⁰ From this start, formalist critics proceed in several different constitutional directions. One argument is that courts must never lose sight of the text,

94. See Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988) [hereinafter Easterbrook, *Original Intent*]; Easterbrook, *supra* note 83; Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87 (1984); see also *In re Sinclair*, 870 F.2d 1340 (7th Cir. 1989) (Easterbrook, J.); *Marozsan v. United States*, 852 F.2d 1469, 1498–1501 (7th Cir. 1988) (Easterbrook, J., dissenting); *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280, 1291 (7th Cir. 1986) (Easterbrook, J., dissenting).

95. See Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371; see also *United States v. McGoff*, 831 F.2d 1071, 1080 n.19 (D.C. Cir. 1987) (Starr, J.); *American Mining Congress v. EPA*, 824 F.2d 1177, 1190 (D.C. Cir. 1987) (Starr, J.); *Natural Resources Defense Council, Inc. v. EPA*, 822 F.2d 104, 113 (D.C. Cir. 1987) (Starr, J.); *Federal Election Comm'n v. Rose*, 806 F.2d 1081, 1089–90 (D.C. Cir. 1986) (Starr, J.).

96. See *infra* note 114 for Judge Scalia's District of Columbia Circuit opinions.

97. See *United States v. Nofziger*, 878 F.2d 442, 447–49 (D.C. Cir.) (Buckley, J.), *cert. denied*, 110 S. Ct. 564 (1989); *Overseas Educ. Ass'n, Inc. v. Federal Labor Relations Auth.*, 876 F.2d 960, 974–75 (D.C. Cir. 1989) (Buckley, J., joined by Starr, J., concurring in part); *IBEW Local 474 v. NLRB*, 814 F.2d 697, 715–17 (D.C. Cir. 1987) (Buckley, J., concurring).

98. See *Wallace v. Christensen*, 802 F.2d 1539, 1559–60 (9th Cir. 1986) (Kozinski, J., concurring in the judgment).

99. UNITED STATES DEP'T OF JUSTICE OFFICE OF LEGAL POLICY, USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION (1989) [hereinafter DOJ RE-EVALUATION].

100. Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899). This language is quoted and relied upon in Easterbrook, *Original Intent*, *supra* note 94, at 61; Starr, *supra* note 95, at 378; *American Mining Congress v. EPA*, 824 F.2d 1177, 1190 n.19 (D.C. Cir. 1987) (Starr, J.); DOJ RE-EVALUATION, *supra* note 99, at 20. The new formalists uniformly fail to mention that Justice Holmes often relied heavily on legislative history to figure out "what the statute means." His opinion for the Court in *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41 (1928), relied on legislative history to interpret a statute the dissenting Justices found clear on its face. "It is said that when the meaning of language is plain we are not to resort to [extrinsic] evidence in order to raise doubts. This is rather an axiom of experience than a rule of law," Holmes responded, "and does not preclude consideration of persuasive evidence if it exists." *Id.* at 48.

which is formally all that Congress enacts into "law" and is all that is before the court. Any effort by Congress or its Members to control the interpretation of its statutes after their enactment is, according to some of the formalist critics, an invalid legislative usurpation of duties left by the Constitution exclusively with the courts. "Intended meaning is a form of extra-statutory legislative interpretation of a statute, and judicial reliance upon it allows the legislature to exercise essentially judicial powers," in violation of the separation of the legislative and the judicial powers in articles I and III of the Constitution.¹⁰¹

Some critics also argue that a restrained use of legislative history and focus on text is necessary to prevent judicial usurpation of legislative power.¹⁰² In a representative democracy, the argument goes, major policy decisions should be made by the popularly elected branches of government, mainly Congress. Unelected judges should make as few policy choices as possible, especially when interpreting statutes. The judges' use of legislative history (especially when it alters the apparent textual meaning) increases their discretion to make illegitimate policy choices.¹⁰³ By broadening the inquiry beyond the relatively concrete one of what the actual words of the statute mean, use of legislative history permits the Court to justify a broader range of answers and makes it easier for the Justices to write their own preferences into the statute.¹⁰⁴ As Judge Leventhal once said, citing legislative history is like "looking over a crowd and picking out your friends."¹⁰⁵ *TVA v. Hill*, for example, offered the Court a plethora of legislative history that could be used to support either the dissenting or the majority view. The Court's opinion emphasized the House sponsor's view, and the dissenting opinion emphasized the views of appropriations committees.

Jett offers a variation on this problem. The plurality and dissenting opinions in that case relied on much the same evidence (they "picked out the same friends") but asked different questions of the evidence. The plurality asked: What specific discussion of

101. DOJ RE-EVALUATION, *supra* note 99, at 34; see *Wallace*, 802 F.2d at 1560 (Kozinski, J., concurring in the judgment) (emphasizing the "uniquely judicial function of statutory interpretation").

102. *American Mining Congress*, 824 F.2d at 1190 n.19 (Starr, J.).

103. See Easterbrook, *Original Intent*, *supra* note 94, at 62-63.

104. "It is often said that one generally finds in the legislative history only that for which one is looking." Starr, *supra* note 95, at 376; see *Wallace*, 802 F.2d at 1559 (Kozinski, J., concurring in the judgment) ("The fact of the matter is that legislative history can be cited to support almost any proposition, and frequently is.").

105. Wald, *supra* note 32, at 214.

municipal liability can be found in the 1866 debates? [None.] Why, then, was municipal liability only mentioned in the 1871 debates, and not the 1866 debates? For historicist reasons, the latter question is not answerable, but that allowed the plurality to fall back upon the assumption that Congress "must" have been unconcerned about municipal liability in 1866. The dissent asked very different questions: What was the general purpose of the 1866 Act? [To root out and penalize racial discrimination in contracting.] Would that general purpose be subserved by interpreting the statute to apply to municipalities? [The question suggests its own answer.] Which set of questions is "truer" to original legislative intent? It is quite unclear, even as it is very clear that each set of questions is motivated by different judicial attitudes about the statute.

Finally, the formalist critics argue that judicial reliance on legislative history is inconsistent with the specific structures for legislation in the Constitution.¹⁰⁶ "The Constitution and the structure of the legislative process it establishes *assume* an approach to statutory interpretation that focuses on the actual rather than the intended meaning of the statutory text. This approach is implicit in the establishment of a bicameral legislature and in the requirement that bills be presented to the President and be subject to a qualified veto," in article I, section 7.¹⁰⁷ In *INS v. Chadha*,¹⁰⁸ the Court broadly invalidated legislative vetoes because they sought to create legislation without obtaining the approval of both houses of Congress (the bicameralism requirement) and of the President (the presentment requirement). "Legislative history, however, has the potential to mute (or indeed override) the voice of the statute itself," Judge Starr has argued. "In terms of democratic theory, the use of legislative history can distort the proper voice of each branch of our constitutional government."¹⁰⁹

According to these formalists, reliance on legislative history to rewrite an otherwise clear statute distorts the voice of the legislative branch, and violates the bicameralism requirement, because it elevates the views of a legislative subgroup—committees in one chamber, individual legislators—over that of Congress as a whole.¹¹⁰ It

106. Easterbrook, *Original Intent*, *supra* note 94, at 64–65.

107. DOJ RE-EVALUATION, *supra* note 99, at 26 (emphasis in original).

108. 462 U.S. 919 (1983).

109. Starr, *supra* note 95, at 375.

110. *Id.* (committee reports "lack the holistic 'intent' found in the statute itself"); see *Overseas Educ. Ass'n, Inc. v. Federal Labor Relations Auth.*, 876 F.2d 960, 975 (D.C. Cir. 1989) (Buckley, J., joined by Starr, J., concurring) ("While a sponsor's statements may reveal *his* understanding and intentions, they hardly provide definitive in-

also distorts the legislative process generally by creating "strong incentives for manipulating legislative history to achieve through the courts results not achievable during the enactment process."¹¹¹ Excessive reliance on legislative history distorts the voice of the President, whose participation in statute-formation is essential under the presentment clause, because it imposes on a statute a meaning the President might not have considered in signing the bill.¹¹²

B. *Justice Scalia's Critique of the Traditional Approach and His Proposed Alternative*

For realist, historicist, and formalist reasons, the traditional approach was ripe for rethinking in the 1980s. Inspired by realist and historicist problems with the concept of legislative intent, "new legal process" scholars have emphasized the "dynamic" rather than "archaeological" nature of statutory interpretation.¹¹³ Inspired by the realist and formalist problems with the Court's traditional approach and following the intellectual structure also suggested by Judge Easterbrook (among others), Justice Scalia has aggressively criticized the traditional approach and has argued for disregard of legislative history in the great majority of cases. Although somewhat more scornful of legislative history than other judicial critics, Justice Scalia and Judge Easterbrook have essentially founded a new school of thought about legislative history. Because of its focus on Supreme Court opinions, the remainder of this Article will develop Justice Scalia's contribution to the new textualism.

The public chronology of Justice Scalia's critique and new textualism is as follows: While still sitting on the District of Columbia Circuit, Judge Scalia penned a concurring opinion that attacked the use of committee reports as evidence of legislative intent¹¹⁴ and de-

sights into *Congress'* understanding of the meaning of a particular provision." (emphasis in original)).

111. *Wallace v. Christensen*, 802 F.2d 1539, 1559 (9th Cir. 1986) (Kozinski, J., concurring in the judgment).

112. *Id.* at 1559-60; Starr, *supra* note 95, at 376 ("the President passes upon legislation, and as a practical matter does so without the benefit of legislative history").

113. See Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988), and Eskridge, *supra* note 89, for the terminology used in the text. For other works, see Eskridge, *Spinning Legislative Supremacy*, 79 GEO. L.J. 319 (1989); Eskridge & Frickey, *supra* note 58; Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

114. *Hirschey v. FERC*, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring in the judgment). In *Hirschey*, Judge Scalia attacked the majority's reliance on committee report language to illuminate an admittedly unclear statute. See also the earlier panel opinion in *Hirschey*, 760 F.2d 305 (D.C. Cir. 1985). Lower court judges influenced by

livered a series of speeches at various law schools attacking the use of committee reports.¹¹⁵ After his elevation to the Supreme Court, Justice Scalia has authored a number of specially concurring or dissenting opinions arguing that the Court should ignore legislative history except in the rare case where the statutory text is absurd on its face.¹¹⁶ His concurring opinion in *Cardoza-Fonseca* was Justice Scalia's first effort while on the Court to articulate reasons for his approach.

There has been some evolution over time in Justice Scalia's critique of the traditional approach. His initial attack (while a court of appeals judge) focused mainly on the extensive judicial use of committee reports as authoritative evidence of statutory meaning, and seemed to accept other legislative history as authoritative in some cases.¹¹⁷ Also, his attack was primarily a realist one. Thus, Judge

or sympathetic to the nascent new textualism seized upon this opinion as a standard citation. *E.g.*, *American Mining Congress v. EPA*, 824 F.2d 1177, 1192 n.22 (D.C. Cir. 1987) (Starr, J.); *ACLU v. FCC*, 823 F.2d 1554, 1583 (D.C. Cir. 1987) (Starr, J., dissenting in part); *Wallace*, 802 F.2d at 1559-60 (Kozinski, J., concurring in the judgment); Easterbrook, *Original Intent*, *supra* note 94, at 60; Starr, *supra* note 95, at 374. For other, less celebrated, Scalia opinions while on the D.C. Circuit, see, *e.g.*, *Beattie v. United States*, 756 F.2d 91 (D.C. Cir. 1984) (Scalia, J., dissenting); *Illinois Commerce Comm'n v. ICC*, 749 F.2d 875 (D.C. Cir. 1984) (Scalia, J., dissenting), *cert. denied*, 474 U.S. 820 (1985); *Community Nutrition Inst. v. Block*, 698 F.2d 1239, 1255 (D.C. Cir. 1983) (Scalia, J., concurring in part and dissenting in part), *rev'd*, 467 U.S. 340 (1984).

115. A. Scalia, *Speech on Use of Legislative History*, delivered between fall 1985 and spring 1986 at various law schools (copy on file with UCLA Law Review) [hereinafter *Legislative History Speech*].

116. *See H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893, 2907 (1989) (Scalia, J., concurring in the judgment); *Jett*, 109 S. Ct. at 2724 (Scalia, J., concurring in part and concurring in the judgment); *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2295-96 (1989) (Scalia, J., concurring in part and dissenting in part); *Green v. Bock Laundry Mach. Co.*, 109 S. Ct. 1981, 1994-95 (1989) (Scalia, J., concurring in the judgment); *United States v. Stuart*, 109 S. Ct. 1183, 1193-95 (1989) (Scalia, J., concurring in the judgment); *Blanchard v. Bergeron*, 109 S. Ct. 939, 946-47 (1989) (Scalia, J., concurring in part and concurring in the judgment); *United States v. Taylor*, 108 S. Ct. 2413, 2423-24 (1988) (Scalia, J., concurring in part); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 318-29 (1988) (Scalia, J., concurring in part and dissenting in part); *Thompson v. Thompson*, 484 U.S. 174, 188 (1988) (Scalia, J., concurring in the judgment); *Edwards v. Aguillard*, 482 U.S. 510, 636-39 (1987) (Scalia, J., dissenting); *Rose v. Rose*, 481 U.S. 619, 640-44 (1987) (Scalia, J., concurring in the judgment); *Citicorp Indus. Credit, Inc. v. Brock*, 483 U.S. 27, 40 (1987) (Scalia, J., concurring); *Johnson v. Transportation Agency*, 480 U.S. 616, 670-72 (1987) (Scalia, J., dissenting); *Cardoza-Fonseca*, 480 U.S. at 452-54 (Scalia, J., concurring in the judgment); *California Fed. Savs. & Loan Ass'n v. Guerra*, 479 U.S. 272, 295-96 (1987) (Scalia, J., concurring in the judgment).

117. As an intermediate federal judge, I can hardly ignore legislative history when I know it will be used by the Supreme Court. But it seems to me we can at least be more selective in the sorts of legislative history we employ—requiring some indication that it at least genuinely reflects the in-

Scalia followed the Radin critique of the concept of collective legislative intent.¹¹⁸ According to Judge Scalia, moreover, committee reports are scant evidence of even a probable or made-up legislative intent, because they are crafted by staff, are not necessarily even read by the legislators themselves, and are subject to packing at the behest of interest groups and other legislative insiders.¹¹⁹ This line of attack, including the specific evidence adduced by Judge Scalia, has been persuasively criticized by Professors Farber and Frickey.¹²⁰

Since his elevation to the Supreme Court, Justice Scalia's critique has been both more radical and more formalist. His earlier focus on committee reports, and not legislative history in general, was inspired partly by his role as a circuit court judge bound by Supreme Court practice.¹²¹ Once he became a Supreme Court Justice, he may have felt less constrained by the Court's traditional practice. Within months of joining the Court, Justice Scalia attacked the soft plain meaning rule in his *Cardoza-Fonseca* concurrence. "Where the language of . . . laws is clear, we are not free to

tent of one of the houses of Congress. For that purpose, I suppose I would rank most highly legislative history consisting of amendments defeated on the floor—where it seems clear that the reason for the defeat was rejection of a particular course now said to be contained in the unamended text. I suppose next to that would be extended floor debate—at least in circumstances, which occasionally occur, where the final text is actually being crafted on the floor. At the bottom of my list I would place—what hitherto seems to have been placed at the top: the committee report.

Legislative History Speech, *supra* note 115, at 18.

118. Similar to Radin's realist arguments, Judge Scalia said:

That a majority of both houses of Congress (never mind the President, if he signed rather than vetoed the bill) entertained *any* view with regard to [interpretive] issues is utterly beyond belief. For a virtual certainty, the majority of Members were blissfully unaware of the *existence* of the issue, much less had any preference as to how it should be resolved.

Id. at 5 (emphasis in original).

119. *Id.* at 5-8; *Hirschey v. FERC*, 777 F.2d 1, 7-8 & n.1 (D.C. Cir. 1985) (Scalia, J., concurring in the judgment). Both of these sources relied mainly on a recent colloquy in which the committee chair admitted that even he had not read the committee report.

120. Farber & Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988), criticize Judge Scalia's specific evidence, *see supra* note 119, that committee staff control the content of committee reports without much supervision from members of Congress, Farber & Frickey, *supra*, at 438-43, as well as "doubtful factual assumptions" underlying his realist attack on committee reports. *Id.* at 445-46. Farber and Frickey then demonstrate that actual political science scholarship, including much public choice scholarship, supports a cautious use of committee reports. *Id.* at 448-50.

121. *See supra* note 117.

replace it with an unenacted legislative intent."¹²² Also in his first year, Justice Scalia distinguished himself for a reluctance to rely on legislative history in his opinions, concurrences, and dissents. In his second year, he generally questioned the use of any kind of legislative history. "Committee reports, floor speeches, and even colloquies between Congressmen, are frail substitutes for bicameral vote upon the text of a law and its presentment to the President."¹²³ For similar reasons, Justice Scalia has also attacked the Court's willingness to look at legislative purpose.¹²⁴

More important, the basis on which Justice Scalia indicts the Court's use of legislative history has shifted, at least in emphasis, from realist attacks to formalist attacks. There is every reason to believe that Justice Scalia still considers legislative intent to be a spongy concept and finds committee reports scant evidence of any conceivable legislative intent.¹²⁵ The arguments he now emphasizes, however, are derived from his formalist view of the roles of Congress and the Court in our constitutional system.¹²⁶

In *Cardoza-Fonseca*, Justice Scalia posited that the constitutionally mandated role of the Court is to "interpret laws," the actual statutory language, "rather than [to] reconstruct legislators' intentions."¹²⁷ This view is similar to the position Judge Scalia said, in speeches delivered in 1985-86, he would have taken if he were "writing on a blank slate."¹²⁸ In those speeches, and in subsequent opinions while on the Supreme Court, Justice Scalia has suggested several constitutional arguments for this refusal to rely on legislative history. To begin with, Judge Scalia in 1985-86 argued that judicial inquiry into legislative intentions is inconsistent with our constitutional separation of powers. "Surely it is more consonant

122. *Cardoza-Fonseca*, 480 U.S. at 453 (Scalia, J., concurring in the judgment).

123. *Thompson v. Thompson*, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring in the judgment).

124. See *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 318-29 (1988) (Scalia, J., concurring in part and dissenting in part).

125. See *Blanchard v. Bergeron*, 109 S. Ct. 939, 946-47 (1989) (Scalia, J., concurring).

126. For Justice Scalia's views on the formal separation of powers, see *Mistretta v. United States*, 109 S. Ct. 647, 675-82 (1988) (Scalia, J., dissenting); *Morrison v. Olson*, 108 S. Ct. 2597, 2622-41 (1988) (Scalia, J., dissenting); *Synar v. United States*, 626 F. Supp. 1374 (D.D.C.) (per curiam three-judge court opinion, including Scalia, J.), *aff'd sub nom.* *Bowsher v. Synar*, 478 U.S. 714 (1986).

127. *Cardoza-Fonseca*, 480 U.S. at 452-53 (Scalia, J., concurring in the judgment).

128. Legislative History Speech, *supra* note 115, at 15 ("interpretive doubts are to be resolved by assessing the meaning that would reasonably have been conveyed to a citizen at the time the law was enacted, as modified by the relationship of the statute to later enactments similarly interpreted").

with that doctrine that—once a statute is enacted—its meaning is to be determined on the basis of its text by the Executive officers charged with its enforcement and the Judicial officers charged with its application.”¹²⁹ Like other formalist critics, Judge Scalia was apparently concerned that Congress not try to control the judicial function through directive legislative history. At the same time, he argued that a textual focus also reduces the possibility of judicial usurpation of Congress’ lawmaking responsibilities, by curtailing judges’ discretion to impose their own values onto the statute itself.¹³⁰

Since his elevation to the Supreme Court, Justice Scalia has emphasized that any search for legislative intent through examination of legislative history is in tension with article I’s structure, as interpreted in *Chadha*. The only legitimate statutory law is that which has been approved by both chambers of Congress and by the President (or passed over a veto). We only know what the House, the Senate, and the President agreed to by what the statutory language tells us. If the Court credits committee reports, floor colloquy, or hearing testimony, it essentially elevates the views of a legislative subgroup over the enactments of Congress, which was the basis for *Chadha*’s invalidation of legislative vetoes. Legislative history is therefore “[a] frail substitute[] for bicameral vote upon the text of a law and its presentment to the President. It is at best dangerous to assume that all the necessary participants in the law-enactment process are acting upon the same unexpressed assumptions.”¹³¹

Nowhere does Justice Scalia demonstrate that one can never show that the President and virtually everyone in Congress “very probably” shared a collective understanding not clearly revealed on the face of the statute.¹³² Nonetheless, he seems to lean toward the view that legislative history should not be consulted (except in cases of absurd results and, possibly, of ambiguity), as something of a prophylactic rule to cabin the discretion of judges *and* to encourage Congress to enact clearer statutes. A corollary of *Chadha*, for Justice Scalia, is that the Court not only has a negative duty to police against lawmaking by legislative subgroups, but also has a positive

129. *Id.* at 16.

130. *Id.* at 13 (“since none of it can possibly be 100 percent dispositive—[legislative history] substantially increases, rather than reduces, the scope of judicial discretion”).

131. *Thompson v. Thompson*, 484 U.S. 174, 192 (1988) (Scalia, J., concurring in the judgment) (citing and relying on *Chadha*).

132. See Farber & Frickey, *supra* note 120.

duty to encourage Congress to legislate more carefully, so as to obtain the benefits of the bicameralism and presentment requirements. "It should not be possible, or at least should not be easy, to be sure of obtaining a particular result in this Court without making that result apparent on the face of the bill which both Houses consider and vote upon, which the President approves, and which, if it becomes law, the people must obey," argues Justice Scalia. "*I think we have an obligation to conduct our exegesis in a fashion which fosters that democratic process.*"¹³³

Justice Scalia is aware of the familiar precepts that words do not interpret themselves and that their meaning depends upon their context. He probably would agree that a dictionary definition will not always answer the difficult interpretive issues and would admit that context is necessary. Like the defenders of legislative history, therefore, Justice Scalia admits "coherence" arguments, that is, arguments that an ambiguous term is rendered clear if one possible definition is more coherent with the relevant legal authorities than other possible definitions. But, unlike defenders of legislative history, Justice Scalia admits only arguments based upon textual, or horizontal, coherence (this meaning is consistent with other parts of the statute or other terms in similar statutes), and not based upon historical, or vertical, coherence (this meaning is consistent with the historical expectations of the authors of the statute). Consider the clearest statement to date of his approach:

The meaning of terms on the statute-books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind.¹³⁴

Although the primary basis for his new textualism is the formalist arguments set forth above, Justice Scalia also has claimed

133. *United States v. Taylor*, 108 S. Ct. 2413, 2424 (1988) (Scalia, J., concurring in part) (emphasis added).

134. *Green v. Bock Laundry Mach. Co.*, 109 S. Ct. 1981, 1994 (1989) (Scalia, J., concurring in the judgment) (emphasis in original). See also *Legislative History Speech*, *supra* note 115, at 9 (statutory interpretation is a process of rationalizing the law—making those adjustments that coexisting texts require in order that the corpus of the law be coherent).

functionalist advantages for his approach.¹³⁵ Textualism will curtail opportunities for judicial lawmaking by limiting the tools available to judges seeking to escape plain statutory meaning. It will prevent the Court from being misled by manipulative legislative history and will remove incentives for legislative actors to create such history. And it will obviate the need for practitioners and judges to engage in the needless, and often very expensive, search through legislative histories before they can be sure of statutory meaning.

C. *The New Textualism's Impact on the Court's Approach to Statutory Interpretation, 1987-89*

The Supreme Court has not thrown over its traditional approach to legislative history in favor of the new textualism, yet. In each year that Justice Scalia has sat on the Court, however, his theory has exerted greater influence on the Court's practice. This influence has been manifest in three respects. First, the Court is now somewhat less willing to refer to legislative history when the statutory text has a plain meaning. Second, the Court more often determines that a statutory text has a plain meaning by reference to structural textual arguments. Third, the Court has been increasingly influenced by textual and procedural canons of statutory interpretation.

1. A Harder Plain Meaning Rule

In the last two Terms, the Court has been somewhat more willing to find a statutory "plain meaning" and less willing to consult legislative history, either to confirm or to rebut that plain meaning. Consider Table 1 on the adjoining page.¹³⁶ By my count, the Supreme Court has decided almost half of its statutory interpretation cases by reference to a statute's plain meaning in each of the last three Terms. (This itself is a slight increase from prior Terms.)

135. See Legislative History Speech, *supra* note 115 (existing legislative history practice is highly wasteful, with little payoff); see also Starr, *supra* note 95 (wastefulness of legislative history research is felt by private practitioners, especially small firms, rendering predictive advice to clients).

136. Table 1 is simply a compilation of my reading of the Court's cases in the 1986 to 1988 Terms. I included any opinion with a substantial (*i.e.*, more than a paragraph or two) discussion of a statutory issue; hence, I included some cases whose primary issues were constitutional. I considered the Court to have found a statutory plain meaning when the Court analyzed the statutory language and did not find ambiguity; the Court did not have to say "plain meaning" for me to count the case. The last category, cases where legislative history is used to avoid the statute's apparent textual meaning, is the most subjective, but I believe I have applied consistent standards for this over the three Terms.

During Justice Scalia's tenure, the Court has become somewhat more reluctant to use legislative history, either to confirm the statute's plain meaning *or* to displace the apparently plain meaning of a statute. The numerical shift in the 1987 and 1988 Terms is attributable not only to Justice Scalia's own refusal to rely on legislative history, but also to the practice of some of his colleagues (especially recently appointed Justice Kennedy).¹³⁷

TABLE 1

Supreme Court's Legislative History Cases, 1987-1989

	1988 Term	1987 Term	1986 Term
Number of Substantial Statutory Interpretation Opinions	83	81	82
Court Finds Statutory Plain Meaning	32	37	28
Legislative History Used to Confirm Plain Meaning	11	15	18
Legislative History Used to Get Around Apparent Meaning	4	3	7

In short, the old soft plain meaning rule has become "harder." A notable example of the new textualism is *Pierce v. Underwood*.¹³⁸ The Equal Access to Justice Act (EAJA) provides that a party prevailing in a lawsuit against the United States should be awarded counsel fees, "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."¹³⁹ The Ninth Circuit had interpreted "substantially justified" to mean that the government's position "had a reasonable basis both in law and in fact."¹⁴⁰ The prevailing party seeking counsel fees argued that the EAJA requires a stronger position than simply a "reasonable" one, and relied upon the House

137. In the 1987 Term, Justice Scalia gained an important ally, Justice Anthony Kennedy, whose opinions have been influenced by the new textualism. See *Public Citizen v. United States Dep't of Justice*, 109 S. Ct. 2558, 2573 (1989) (Kennedy, J., concurring in the judgment). In the 1988 Term, Chief Justice Rehnquist and Justices White and O'Connor sometimes joined the new textualist opinions of Justices Scalia and Kennedy and have reflected its influence in their own opinions. Even some of the relatively "liberal" Justices have written opinions that reflect the new textualism. E.g., *Mansell v. Mansell*, 109 S. Ct. 2023 (1989) (Marshall, J.); *Mallard v. United States Dist. Court*, 109 S. Ct. 1814 (1989) (Brennan, J.).

138. 108 S. Ct. 2541 (1988).

139. 28 U.S.C. § 2412(d)(1)(A) (1982).

140. *Underwood v. Pierce*, 761 F.2d 1342, 1346 (9th Cir. 1985), *aff'd in part and vacated in part*, 108 S. Ct. 2541 (1988).

committee report accompanying the 1985 reenactment of the EAJA.¹⁴¹ The Supreme Court, in an opinion by Justice Scalia, adopted the Ninth Circuit's position, based upon the plain meaning of "substantially justified." Justice Scalia found the committee report unpersuasive in his interpretive inquiry, for essentially realist and practical reasons.¹⁴²

Because *Underwood* actually discussed the legislative history, it is in fact a mild version of the approach urged by the new textualism. More recent opinions of the Court by Justices sympathetic to the new textualism are more rigid: Not only does the Court not begrudge legislative history any legitimate role, but the Court does not even stoop to analyze legislative history arguments. This dismissive attitude toward legislative history recurred often in the last two Terms.¹⁴³ Justice Scalia's concurring views in *Cardoza-Fonseca* are now often found in opinions for the Court.

But the Court has not completely abandoned legislative history as a tool of statutory construction. The Court still uses legislative history to confirm the plain meaning of the statute in at least some cases (though this practice is decreasing). Probably all of the Justices are willing to consult relevant legislative history if the statutory text is genuinely ambiguous or open-textured.¹⁴⁴ All of the

141. H.R. REP. NO. 99-120, 99th Cong., 1st Sess. 9, reprinted in 1985 U.S. CODE CONG. & ADMIN. NEWS 132, 138. "Several courts have held correctly that 'substantial justification' means more than merely reasonable. Because in 1980 Congress rejected a standard of 'reasonably justified' in favor of 'substantially justified,' the test must be more than mere reasonableness." *Id.* (footnote omitted).

142. *Underwood*, 108 S. Ct. at 2550-51 (1985 report cannot state intent of 1980 Congress, cannot overcome presumption of continuity in judicial interpretation, and cannot force upon the Court an unadministerable test unsupported by statutory language).

143. See, e.g., *Public Employees Retirement Sys. of Ohio v. Betts*, 109 S. Ct. 2854, 2863-64 (1989) (Kennedy, J.) (*compare id.* at 2870 (Marshall, J., dissenting)); *Hoffman v. Connecticut Dep't of Income Maintenance*, 109 S. Ct. 2818, 2823-24 (1989) (plurality opinion) (*compare id.* at 2827-28 (Stevens, J., dissenting)); *United States v. Monsanto*, 109 S. Ct. 2657, 2662-64 (1989) (White, J.); *Dellmuth v. Muth*, 109 S. Ct. 2397, 2401 (1989) (Kennedy, J.) (*compare id.* at 2403-05 (Brennan, J., dissenting)); *Chan v. Korean Air Lines, Ltd.*, 109 S. Ct. 1676, 1683-84 (1989) (Scalia, J.) (*compare id.* at 1684-93 (Brennan, J., concurring in judgment)); *Davis v. Michigan Dep't of Treasury*, 109 S. Ct. 1500, 1504 n.3 (1989) (Kennedy, J.); *Pittston Coal Group v. Sebben*, 109 S. Ct. 414 (1988) (Scalia, J.) (*compare id.* at 425-38 (Stevens, J., dissenting)); *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 840 (1988) (White, J.); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988) (Kennedy, J.) (*compare id.* at 295-318 (Brennan, J., concurring in part and dissenting in part)); *United Savs. Ass'n of Texas v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365 (1988) (Scalia, J.).

144. Even Justice Scalia said in *Chan*, 109 S. Ct. at 1683, that he might consult legislative history "to elucidate a text that is ambiguous," but there appear to be relatively few texts that he finds "ambiguous."

Justices are willing to consult legislative history if a statutory text is on its face absurd.¹⁴⁵ And there are still cases every Term in which the Court uses legislative history to massage a better result out of a statute whose plain meaning seems unreasonable. These cases have sometimes provoked sharp exchanges on the Court, however.

The sharpest exchange from last Term was in *Public Citizen v. United States Department of Justice*.¹⁴⁶ The Department of Justice regularly seeks advice from an ABA committee regarding potential nominees for federal judgeships. The Federal Advisory Committee Act (FACA) regulates "advisory committees," defined by the Act to include groups "established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government"¹⁴⁷ The parties agreed that the ABA committee "furnishes advice or recommendations" to the President but is not "established" by the Executive, and the only question therefore was whether it is "utilized" by the Executive.¹⁴⁸ Although even the Court admitted that the Executive does "utilize" the committee "in one common sense of the term," the Court held that the statutory purpose, derived from its legislative history, "reveals that it cannot have been Congress' intention" to read the statute so broadly.¹⁴⁹ Invoking *Holy Trinity Church* and its progeny, the Court held it proper to look beyond the text "when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention, since the plain-meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.'"¹⁵⁰ The Court then examined the drafting history of the FACA, which sought to target groups actually organized or brought together by the Executive, not pre-existing groups informally consulted by the Executive.

Justice Scalia did not participate in the case, but Justice Kennedy, joined by Chief Justice Rehnquist and Justice O'Connor, at-

145. See *Green v. Bock Laundry Mach. Co.*, 109 S. Ct. 1981 (1989) (Stevens, J.) (extensive legislative history analysis for statute with probable drafting error); *id.* at 1994 (Scalia, J., concurring in the judgment) (absurd statute permits inquiry into legislative background); *id.* at 1995 (Blackmun, J., dissenting) (different inferences from legislative history).

146. 109 S. Ct. 2558 (1989).

147. 5 U.S.C. app. § 3(2)(C) (1982 & Supp. V 1987).

148. *Public Citizen*, 109 S. Ct. at 2565.

149. *Id.*

150. *Id.* at 2566 (quoting *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928) (Holmes, J.)).

tacked the Court's approach to statutory interpretation, arguing that it "does not accord proper respect to the finality and binding effect of legislative enactments."¹⁵¹ Justice Kennedy conceded that completely absurd interpretations—those that no rational Congress could conceivably have intended—might be written out of the statute. But, merely "unreasonable" interpretations must be left alone. According to Justice Kennedy, the Court's willingness to massage the statute to make it more reasonable violates separation of powers precepts.¹⁵² He then lampooned the Court for its reliance on *Holy Trinity Church*, arguing that "it does not foster a democratic exegesis for this Court to rummage through unauthoritative materials to consult the spirit of the legislation in order to discover an alternative interpretation of the statute with which the Court is more comfortable."¹⁵³

In several other cases last Term a less bitterly divided Court used legislative history to cadge a more reasonable interpretation out of a broadly phrased statute.¹⁵⁴ One lesson from last Term, however, is that this traditional strategy is substantially more controversial now. If the new textualists on the Court gain one more ally at the expense of the four-person "liberal" wing of the Court, cases like *Public Citizen* will be decided the other way.

2. The Rise of Structural Arguments

A particularly interesting development in the last two Terms is the Court's rethinking of what it means for a statute to have a "plain meaning." Traditionally, plain meaning signified that under ordinary principles of grammar and dictionary definitions of its words, the statutory provision has only one meaning. Although this is still the starting point, Justice Scalia urges a "structural" view of what a statute's plain meaning is: "Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory

151. *Id.* at 2573–74 (Kennedy, J., concurring in the judgment).

152. *Id.* at 2573–75.

153. *Id.* at 2576. Justice Kennedy further recalled the "unhappy" analysis actually applied in *Holy Trinity Church*, which read a "Christian nation" requirement into an immigration statute—a view that has not been robust over time. *Id.* Justice Kennedy finally took sharp issue with the Court's reading of the legislative history upon which it relied. *Id.* at 2576–80.

154. See *Gomez v. United States*, 109 S. Ct. 2237 (1989) (unanimous Court); *Massachusetts v. Morash*, 109 S. Ct. 1668 (1989) (unanimous Court); *Shell Oil Co. v. Iowa Dep't of Revenue*, 109 S. Ct. 278 (1988) (unanimous Court). But see *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989) (plurality opinion; O'Connor, J., concurring; Kennedy, J., dissenting).

scheme," argues Justice Scalia, "because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."¹⁵⁵ Justice Scalia considers at least three types of structural arguments useful in determining "plain meaning."

First, Justice Scalia will consider how the word or phrase is used elsewhere in the same statute, or how it is used in other statutes.¹⁵⁶ This was his approach in *Underwood*. His opinion conceded that "substantially justified" could mean "justified to a high degree" (the view of the prevailing private party) or "justified . . . in the main" (the government's view).¹⁵⁷ Yet he still found a statutory plain meaning by reference to the U.S. Code's use of "substantial evidence" elsewhere.¹⁵⁸ He also relied on the Federal Rules of Civil Procedure's imposition of counsel fees for resisting discovery only when the loser's position is not "substantially justified." Justice Scalia noted that no court has ever found this standard to require that the loser's position must be "justified to a high degree."¹⁵⁹

Second, Justice Scalia will consider how the possible meanings fit with the statute as a whole.¹⁶⁰ Does one meaning render other provisions duplicative or superfluous? Is there a structure in the statute, or a pattern of assumptions, that supports one of the plausible meanings? In *Chan v. Korean Air Lines, Ltd.*¹⁶¹ the issue was whether international air carriers lose their Warsaw Convention benefit of the limitation on damages for passenger injury or death, if they fail to provide the passenger with the requisite notice of limitation on her ticket. Article 3(1) of the Convention requires the notice, and article 3(2) provides that if the carrier fails to deliver a ticket to the passenger it cannot avail itself of the liability limits of the Convention. Although many courts had interpreted article 3(2) to include situations where the passenger received a ticket but without the requisite notice, Justice Scalia's opinion for the Court found

155. *United Savs. Ass'n of Texas v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (citations omitted).

156. "'Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'" *Kungys v. United States*, 485 U.S. 759, 770 (1988) (Scalia, J.) (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981)).

157. *Underwood*, 108 S. Ct. at 2549.

158. *Id.* at 2549-50.

159. *Id.* at 2550.

160. *See United States v. Fausto*, 484 U.S. 439, 449-51 (1988) (Scalia, J.).

161. 109 S. Ct. 1676 (1989).

this view completely "implausible," because it is inconsistent with the first sentence of article 3(2)¹⁶² and would produce absurd results if adopted.¹⁶³ "The conclusion that defective compliance with the notice provision does not eliminate the liability limitation is confirmed by comparing Article 3(2) with other provisions of the Convention," he continued.¹⁶⁴ Other sections of the Convention provide parallel rules (including liability limitation and a notice requirement) for baggage checks and cargo waybills. The sections are identical in their requirements, but not in their remedies. Section 1 provides no explicit remedy, yet sections 2 and 3 specifically waive liability limits for the airline's failure to include the notice requirements in the documents.¹⁶⁵ Having established the statute's plain meaning to his satisfaction, Justice Scalia brusquely dismissed any effort to examine the legislative history.¹⁶⁶

Third, Justice Scalia will rely on the interaction of different statutory schemes to determine statutory plain meaning. In *Jett*, for example, Justice Scalia refused to join the Court's legislative history discussion.¹⁶⁷ But he concurred in the Court's judgment, reasoning that the 1866 Act should follow the specific policy later adopted in the 1871 Act. He cited the "principles of construction that the specific governs the general, and that, where text permits, statutes dealing with similar subjects should be interpreted harmoniously."¹⁶⁸

All of these structural arguments have been used by the Court in the past and so are hardly unique to the "new" textualism. The increasing incidence of these arguments is somewhat novel, and quite striking is the new textualists' willingness (as in *Underwood*) to use structural arguments to establish a statutory plain meaning.

162. Article 3(2)'s first sentence reads: "The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention." Warsaw Convention, art. 3(2), *quoted in* 109 S. Ct. at 1680. Justice Scalia contended that the first sentence clearly covers lack of notice on the ticket, as that is plainly an "irregularity." 109 S. Ct. at 1680.

163. 109 S. Ct. at 1681-82.

164. *Id.* at 1682.

165. Warsaw Convention, art. 4(2) (if baggage check does not contain notice of liability limitation, carrier shall not avail itself of the Convention's liability limitations); *id.* art. 9 (similar rule for air waybill). The Warsaw Convention is reprinted in its entirety in the note following 49 U.S.C. § 1502 (1982).

166. 109 S. Ct. at 1683-84. Note here that the case involved treaty interpretation, where the relevant "intent" would be that of several nations, not just the intent of the United States.

167. *Jett*, 109 S. Ct. at 2724 (Scalia, J., concurring in part and concurring in the judgment).

168. *Id.*

This technique has had a decided impact within the Court in the last two Terms. An unprecedented number of opinions, by a variety of Justices, used structural arguments to establish the plain meaning of arguably ambiguous statutory language.¹⁶⁹

3. Revival of [Some] Canons of Statutory Interpretation

The "canons of statutory construction," a homely collection of rules of thumb for interpreting statutes, have long been used by judges in writing statutory interpretation opinions. For most of this century, the canons have been derided by scholars as arbitrary guides to statutory interpretation.¹⁷⁰ Recently, some scholars have defended, at least in theory, the usefulness of substantive policy canons as ways for the Court to develop the nation's public values in statutory interpretation.¹⁷¹ The new textualists are somewhat reluctant to emphasize those canons and, instead, seek a revival of canons that rest upon precepts of grammar and logic, proceduralism, and federalism. The Court's opinions in the last two Terms reflect this revival urged by the new textualists.

169. For cases in the 1988 Term, see *Public Employees Retirement Sys. of Ohio v. Betts*, 109 S. Ct. 2854, 2868 (1989) (Kennedy, J.) (statutes *in pari materia* interpreted similarly); *United States v. Monsanto*, 109 S. Ct. 2657, 2664 (1989) (White, J.) (contemporaneous statute sheds light on RICO); *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2374-75 (1989) (Kennedy, J.) (refusing to read § 1981 broadly, so as not to interfere with Title VII's carefully crafted statutory scheme); *Sullivan v. Hudson*, 109 S. Ct. 2248 (1989) (O'Connor, J.) (massaging plain meaning of EAJA by reference to precedents for other fee-shifting provisions and to structure of statute); *Gomez v. United States*, 109 S. Ct. 2237, 2246-47 (1989) (Stevens, J.) (literal reading of one provision would render other provisions "incongruous" and unworkable); *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2122 (1989) (White, J.) (rejecting interpretation that would compel employers to violate another provision of statute); *Asarco Inc. v. Kadish*, 109 S. Ct. 2037, 2052 (1989) (Kennedy, J.) (interpreting provision by reference to whole act); *Mallard v. United States Dist. Court*, 109 S. Ct. 1814, 1820-21 (1989) (Brennan, J.) (interpreting statute so that subsequent statutes are not rendered redundant); *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 109 S. Ct. 1468, 1477-78 (1989) (Stevens, J.) (interpreting provision in light of other provisions in statute and of other related statutes); *Coit Independence Joint Venture v. FSLIC*, 109 S. Ct. 1361, 1368-71 (1989) (O'Connor, J.) (whole act rule, related statutory scheme); *TWA v. Independent Fed'n of Flight Attendants*, 109 S. Ct. 1225 (1989) (O'Connor, J.) (precedents for analogous statutory scheme trump apparent textual meaning); *United States v. Ron Pair Enters., Inc.*, 109 S. Ct. 1026, 1030-31 (1989) (Blackmun, J.) (whole act consulted to set plain meaning of one provision); *Argentine Republic v. Amerasia Hess Shipping Corp.*, 109 S. Ct. 683 (1989) (Rehnquist, C.J.) (similar).

170. See generally W. ESKRIDGE & P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 689-95 (1987).

171. See Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989); Sunstein, *supra* note 113.

Textual canons posit that Congress follows certain rules of grammar, language use, and punctuation when it writes statutes. These rules have not always been very important at the Supreme Court level, but this may be changing. To take the most dramatic example, the canon "*inclusio unius est exclusio alterius*" (the inclusion of one thing implies the exclusion of all others) has long been the object of academic scorn because it is not a recognized precept of grammar or logic and poorly reflects the multi-faceted decision-making structure of Congress. The Burger Court rarely invoked the canon except in implied cause of action cases, but the new textualism has given the canon fresh life. It was the key argument for Justice Scalia in *Chan*: Because article 3(2) did not explicitly provide for negation of the liability limits for failure to provide proper notice, and because other sections of the same Convention did provide such an explicit remedy, Justice Scalia inferred that the statute plainly meant to deny a remedy for that right.¹⁷²

Chan is no aberration. *Inclusio unius* arguments have grown like weeds in a vacant lot during the last two Terms of the Court.¹⁷³ So, too, have arguments based upon other technical, grammatical canons of construction. For example, there has been a mini-revival of the long-eschewed punctuation canon, which presumes that Congress follows ordinary rules of punctuation and that the placement of every punctuation mark is potentially significant.¹⁷⁴

Procedural canons are rules of thumb for allocating decision-making authority. Oftentimes, procedural canons reflect policies whereby the courts defer to other decisionmakers, and the new textualism has enthusiastically embraced these canons. For example, the canon favoring arbitration is now an established proceduralist policy of the Court. Since the 1950s, the Court had interpreted the nation's securities laws to be enforceable directly in judicial actions,

172. *Chan*, 109 S. Ct. at 1683.

173. See *Jett*, 109 S. Ct. at 2720 (O'Connor, J.); *Mississippi Band of Choctaw Indians v. Holyfield*, 109 S. Ct. 1597, 1607 & n.22 (1989) (Brennan, J.); *Coit Independence Joint Venture v. FSLIC*, 109 S. Ct. 1361 (1989) (O'Connor, J.); *Karahalios v. National Fed'n of Fed. Employees, Local 1263*, 109 S. Ct. 1282, 1286 (1988) (White, J.); *Pittston Coal Group v. Sebben*, 109 S. Ct. 414, 421 (1988) (Scalia, J.); *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 836-37 (1988) (White, J.); *Honig v. Doe*, 484 U.S. 305 (1988) (Brennan, J.); *Lukhard v. Reed*, 481 U.S. 368 (1987) (plurality opinion). But see *In re American Reserve Corp.*, 840 F.2d 487, 492 (7th Cir. 1988) (Easterbrook, J.) (criticizing *inclusio unius* arguments).

174. See *United States v. Ron Pair Enters., Inc.*, 109 S. Ct. 1026, 1030-31 (1989) (Blackmun, J.); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987) (Powell, J.).

notwithstanding adhesive agreements to arbitrate.¹⁷⁵ Congressional committees were aware of these cases and expressed approval of them, but they came under attack in the 1980s and were overruled in 1988-89, based upon the arbitration canon.¹⁷⁶

Perhaps the most important procedural canon endorsed by the new textualists is deference to administrative agencies. Justice Scalia did not invent the canon, but he is a strong advocate on the Court. In *Cardoza-Fonseca*, for example, the Court majority held that it would displace an agency interpretation of a statute if "traditional tools of statutory construction" (*i.e.*, including legislative history) demonstrated the agency view to be erroneous.¹⁷⁷ This is the traditional view, and the author of *Cardoza-Fonseca* (Justice Stevens) is also the author of the leading case—for both new textualists and traditionalists—on the agency deference canon.¹⁷⁸ Justice Scalia's concurring opinion, however, accused the Court of eviscerating the canon.¹⁷⁹ Furthermore, in the last two Terms, Justice Scalia has been more aggressive in criticizing Justices who are willing to use legislative history or purpose to correct agency mistakes.¹⁸⁰

Federalism canons are rules of construction based upon the nation's federal system of government, with its division of responsibilities among national, state, and local governments. Again, the new textualists did not invent these canons, but they have applied them with exceptional vigor. Many of the Court's statutory opinions in the last two years are anchored in canons derived from quasi-constitutional principles of federalism, including the limited nature of fed-

175. See *Wilko v. Swan*, 346 U.S. 427 (1953), *overruled*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 S. Ct. 1917 (1989).

176. See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 S. Ct. 1917 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

177. *Cardoza-Fonseca*, 480 U.S. at 446-47.

178. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

179. "But this approach would make deference a doctrine of desperation, authorizing courts to defer only if they would otherwise be unable to construe the enactment at issue. This is not an interpretation but an evisceration of *Chevron*." *Cardoza-Fonseca*, 480 U.S. at 454 (Scalia, J., concurring in the judgment).

180. See *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988) (Kennedy, J.) (deferring to agency on one issue, based on *Chevron*, and displacing agency on second issue, based on plain meaning); *id.* at 318-23 (Scalia, J., concurring in part and dissenting in part) (arguing for displacement of agency on both issues, due to plain meaning); *NLRB v. United Food & Commercial Workers Union Local 23*, 484 U.S. 112, 133-34 (1987) (Scalia, J., concurring, joined by Rehnquist, C.J., and White & O'Connor, J.J.) (squabbling with majority's reliance on *Cardoza-Fonseca* rather than just *Chevron*).

eral subject-matter jurisdiction,¹⁸¹ the constitutional principles of intergovernmental immunity,¹⁸² and the eleventh amendment's rule of state immunity. As to this last area, the new textualists have dramatically changed a traditional canon of interpretation.

It has traditionally been recognized that Congress can abrogate states' eleventh amendment immunity from lawsuits pursuant to federal statutory schemes. In 1985 (before Justice Scalia joined the Court), that rule was changed to permit abrogation of state immunity only when Congress has made "its intention unmistakably clear in the language of the statute."¹⁸³ During the 1988 Term, the new textualists seized upon this super-strong presumption of state immunity and carved the states out of several important statutory schemes.¹⁸⁴ For example, the Court in *Dellmuth v. Muth*¹⁸⁵ held that the Education of the Handicapped Act of 1975 did not abrogate state immunity from lawsuits, even though the statute imposed numerous substantive obligations specifically on the states; the statute had a broad and encompassing jurisdictional grant;¹⁸⁶ and the statute's legislative history explicitly indicated Congress thought it was abrogating the states' eleventh amendment immunity.¹⁸⁷ The federalism canons are pretty powerful ones.

III. EVALUATING THE NEW TEXTUALISM: SHOULD THE COURT IGNORE LEGISLATIVE HISTORY?

Justice Scalia's new textualism has already been a valuable intellectual contribution to theoretical literature on statutory interpretation. Its main contribution has been to debunk the formalist claims of intentionalist interpretation. Before the new textualists

181. See *Finley v. United States*, 109 S. Ct. 2003, 2005-06 (1989) (Scalia, J.) (potentially radical reinterpretation of pendent and ancillary jurisdiction, anchored on the precept that federal courts have strictly limited jurisdiction).

182. See *Cotton Petroleum Corp. v. New Mexico*, 109 S. Ct. 1698, 1706-07 (1989) (Stevens, J.); *Davis v. Michigan Dep't of Treasury*, 109 S. Ct. 1500, 1506-08 (1989) (Kennedy, J.) (creating plain meaning for statute partly through constitutional backdrop of intergovernmental immunity law).

183. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985).

184. See *Hoffman v. Connecticut Dep't of Income Maintenance*, 109 S. Ct. 2818 (1989) (White, J.); *id.* at 2824 (Scalia, J., concurring in the judgment) (Bankruptcy Code); *Dellmuth v. Muth*, 109 S. Ct. 2397 (1989) (Kennedy, J.) (Education of the Handicapped Act); *Will v. Michigan Dep't of State Police*, 109 S. Ct. 2304 (1989) (White, J.) (§ 1983). But see *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273 (1989) (plurality opinion); *id.* at 2295 (Scalia, J., concurring in part and dissenting in part) (finding abrogation of state immunity in CERCLA).

185. 109 S. Ct. 2397 (1989).

186. 20 U.S.C. § 1415(e)(2) (1982).

187. See *infra* text accompanying notes 242-48.

started writing, it was widely accepted that a "formalist" approach to statutory interpretation meant that the judicial inquiry was to implement the "intent" of Congress. As a formalist theory, intentionalism owed much to the mechanical jurisprudence of the turn of the century, when concepts of "will" and "intent" were critical to legal doctrine. Although it was persuasively criticized by the legal realists (such as Radin), intentionalism continued to flourish as a central metaphor for judicial rhetoric and (to a lesser extent) for judicial practice of statutory interpretation because it seemed to provide a majoritarian basis for the Court's reading of statutes.¹⁸⁸

Intellectually, intentionalism (even as modified by legal process theory) collapsed in the 1980s. The old realist indictment of collective legislative intent has been considerably strengthened by modern public choice and institutional process scholarship, and another line of attack has been opened up by the insights of the new jurisprudence of interpretation. As intentionalism suffers these blows to its authority, of course, one must ask, "What should replace it?" The new textualism offers itself as a modern theory of statutory interpretation which has a better formalist pedigree. Its stronger pedigree is a big advantage for the theory, since formalist theory best assuages the countermajoritarian anxiety courts feel when they make policy choices in a democracy.

Indeed, the new textualism is a very attractive formalist theory. By focusing on the plain meaning a statute would have for the ordinary, reasonable reader, the new textualism has the intuitive appeal of looking at the most concrete evidence of legislative expectations and at the material most accessible to the citizenry. The statutory text is what one thinks of when someone asks what the "law" requires. In its focus on statutory logic, structure, and analogies, the new textualism also appeals to the sophisticated legal analyst. By asking the interpreter to consider the textual analysis as a rigorous "holistic" enterprise, the theory poses exciting analytical possibilities.

Significantly, the new textualism also frees formalism from the mortmain of archaeology and invites dynamic statutory interpretation, a move that Justice Scalia's approach shares with most of the anti-formalist theories of the 1980s.¹⁸⁹ Once the statutory text is

188. See Cox, *Ruminations on Statutory Interpretation in the Burger Court*, 19 VAL. U.L. REV. 287 (1985); Eskridge, *supra* note 12.

189. See, e.g., R. DWORKIN, *LAW'S EMPIRE* 313-54 (1986) (an important goal of statutory interpretation is to yield coherence across different statutory schemes); Aleinikoff, *supra* note 113, at 47-50 (statute should be interpreted with a "present-

unencumbered by evidence of original legislative expectations, it is free to evolve dynamically, especially where the statute is open-textured.¹⁹⁰ Moreover, Justice Scalia's holistic approach opens the door for statutes to evolve over time "in the light of surrounding texts that happen to have been subsequently enacted. This classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute."¹⁹¹ The new textualism permits the updating of old statutory policies as new statutory policies are adopted and new constitutional limitations developed.

Notwithstanding these formidable advantages, the new textualism has provoked public controversy. Two types of criticisms have been made to date, neither of which is relevant to the analysis set forth in this Article. First, some criticize Justice Scalia and the new textualists for having a "hidden agenda," to wit: By deferring to Republican-controlled agencies and narrowly construing the liberal laws of the Democrat-controlled Congress, the new textualists (mainly conservative Republicans) seek to reduce the power of government to do good in our society.¹⁹² The reconstruction of the intellectual background of the new textualism set forth in this Article and my reading of the cases makes me doubt that this is the whole story, even if it is partly true. Most of the cases that liberal Democrats dislike, especially in the last Term, are ones where the Court majority invoked legislative history or otherwise failed to follow the methodology of the new textualism. And, as he did in *Cardoza-Fonseca*, Justice Scalia sometimes deploys his methodology to

minded" attitude, as though it had just been enacted yesterday); Eskridge, *supra* note 89 (where text permits, statutes can and should be interpreted dynamically over time).

190. Justice Scalia has endorsed dynamic interpretation for the open-textured Sherman Act, for example. *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 108 S. Ct. 1515, 1523 (1988) ("The Sherman Act adopted the term 'restraint of trade' along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.").

191. *United States v. Fausto*, 484 U.S. 439, 453 (1988) (Scalia, J.); *see also Jett*, 109 S. Ct. at 2724 (Scalia, J., concurring in part and in the judgment) (policy of 1866 Civil Rights Act modified to fit with policy choices in 1871 Civil Rights Act); *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2374-75 (1989) (Kennedy, J.) (policy of 1866 Civil Rights Act tailored to fit statutory scheme of 1964 Civil Rights Act); *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 841-43 (1988) (Kennedy, J., dissenting) (statutory amendment to ERISA broadly interpreted to update other parts of statute).

192. Ross, *Reaganist Realism Comes to Detroit*, 1989 U. Ill. L. Rev. 399, 420-33.

endorse a liberal interpretation of a statute, over the objections of traditional conservatives.¹⁹³

Second, traditional legal process theorists and judges criticize Justice Scalia for ignoring context, which is necessary to give meaning to the bare language of statutes. Judge Wald, in a recent speech, argued, "*You need a sense of context in order to get meaning out of words in statutes as elsewhere in life.*"¹⁹⁴ Justice Scalia recognizes this truism. He differs with the traditional legal process writers in what he will consider as context. The new textualism considers as context dictionaries and grammar books, the whole statute, analogous provisions in other statutes, canons of construction, and the common sense God gave us. The only context not normally considered is legislative history, and most of the new textualists will consider legislative history if the other aids still leave the statutory meaning truly unclear.¹⁹⁵ Not only does Justice Scalia escape the no-context objection, but he urges a more efficient use of context: Do not engage in the potentially exhausting review of legislative history unless necessary. A few paragraphs of rigorous statutory analysis by Justice Scalia in *Cardoza-Fonseca* and *Jett* will get you to the same result as dozens of pages of the Court's excursion through legislative history in the same cases. This position has great appeal.

Although these criticisms do not interest me, I have other reservations about the new textualism. This Part analyzes the new textualism on its own terms, to see if it offers us a compelling reason to abandon recourse to legislative history in most cases. Ultimately, I conclude that Justice Scalia does not give formally rigorous reasons to abandon the traditional approach completely, but that he and

193. In *Cardoza-Fonseca*, recall that Justice Scalia overrode the stingy agency view of the immigration statute because of the statute's plain meaning and rejected the views of the conservatives (Justices Powell, Rehnquist, and White) in dissent. See also *Pittston Coal Group v. Sebben*, 109 S. Ct. 414 (1988) (Scalia, J.) (pro-coal miner opinion joined by liberals, over dissent joined by Chief Justice Rehnquist and Justices White, Stevens, and O'Connor); *Kungys v. United States*, 485 U.S. 759 (1988) (plurality opinion of Scalia, J.) (stringent proof standards for criminal prosecution); *United States v. Johnson*, 481 U.S. 681, 692 (1987) (Scalia, J., dissenting) (attacking logic of moribund exception to Federal Tort Claims Act for military injuries; joined by liberals); *Rose v. Rose*, 481 U.S. 619, 640 (1987) (Scalia, J., concurring in part and concurring in the judgment) (voting for humane exception to statutory anti-assignment rule, but based on narrow reading of statutory text); *California Fed. Savs. & Loan Ass'n v. Guerra*, 479 U.S. 272, 295 (1987) (Scalia, J., concurring in the judgment) (agreeing with liberal majority over dissent by Justices Powell, Rehnquist, and White).

194. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term*, 39 AM. U.L. REV. ____ (1990) (forthcoming) (emphasis in original).

195. See *supra* notes 144-45.

other judges and commentators do raise serious practical problems with the Court's excessive reliance on legislative history. The lesson to be drawn from this analysis of the new textualism, therefore, is not that we should preserve the old intentionalism, but instead that we should discount its rhetoric about the centrality of legislative intent and deemphasize legislative history, or at least view it more critically.

A. *Formalist Problems with Justice Scalia's Positive Justifications for the New Textualism*

Justice Scalia has helped to discredit the formalist credentials of any theory of statutory interpretation focusing only on legislative intent and has worked out a thoughtful positive theory. This is a substantial accomplishment. But the question remains: Does Justice Scalia give us compelling reasons to ignore legislative history in most cases? To answer this question, one needs to explore the strength of his own formalist theory. While Justice Scalia may have persuasive objections to the traditional emphasis on legislative intent and purpose, his own theory is subject to the same central objection, namely that it is not supported by a rigorous constitutional formalism.

Nothing in the Constitution itself directly indicates the method the Court must follow when it interprets federal statutes,¹⁹⁶ and the practice in the eighteenth century was not to limit a court's consideration to the plain meaning of the statutory text (even as supplemented by the whole statute or other statutes).¹⁹⁷ At least some of the early practice explicitly contemplated the importation of reasonableness limits onto bare statutory texts, similar to the Court's later approach in *Holy Trinity Church* and *Public Citizen* and to the dissent's approach in *TVA v. Hill* (all anathema to the new textualists). At the time of the American Revolution, the English humanist tradition left room for considerable judicial elaboration of statutes. Even substantially more conservative theorists, such as Blackstone, believed that statutory language was subject to some judicial elaboration. A statute yielding "absurd consequences, manifestly contradictory to common reason," is void, wrote Blackstone in the most widely promulgated law book of the eighteenth century; and "where some collateral matter arises out of the general words [of a statute],

196. This is conceded in DOJ RE-EVALUATION, *supra* note 99, at 26.

197. See Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799 (1985); Eskridge, *supra* note 89, at 1502-03.

and happens to be unreasonable, there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore, they are at liberty to expound the statute by equity."¹⁹⁸ *The Federalist Papers* echo Blackstone in arguing that courts ought to interpret "partial and unjust" laws by "mitigating the severity and confining the operation of such laws."¹⁹⁹

It does not readily appear that the structure and background of the Constitution support the new textualism over other theories of statutory interpretation. Justice Scalia has at least three arguments to the contrary. He believes that the approach of the new textualism is either formally required or supported by (1) the bicameralism and presentment requirements of article I, (2) the concept of separation of powers and its corollary that judicial discretion must be cabined, and (3) the general constitutional concept that our nation is a democracy and its corollary that statutory interpretation should be democracy-enhancing. None of these arguments rigorously supports Justice Scalia's position.

1. The *Chadha* Argument: Bicameralism and Presentment

Justice Scalia's main constitutional argument seems to be that an exclusive focus on the statute's text is mandated by the bicameralism and presentment clauses of article I.²⁰⁰ Under these provisions, a bill does not become a statute unless it has been accepted in the same textual form by both Houses of Congress and presented to the President for signature. Hence, the only thing that actually becomes law is the statutory text; any unwritten intentions of one House, or of one committee or of one Member, in Congress are not law unless it can be shown that they were understood and accepted by both Houses and by the President. According to Justice Scalia, relying on committee reports to determine a statute's meaning is tantamount to lawmaking by Congressional subgroups that the Court found unconstitutional in *Chadha*.

Justice Scalia's strongest point is that the Court should not consider legislative background materials to have the force of law, for that might violate the constitutional structure of legislation. But in extending the argument to deny the relevance of these materials to the interpretation of apparently "clear" statutes, Justice Scalia

198. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 91 (8th ed. 1778).

199. THE FEDERALIST NO. 78, at 469 (A. Hamilton) (C. Rossiter ed. 1961).

200. U.S. CONST. art. I, § 7, cls. 2-3. See *supra* text accompanying notes 106-12 & 131 for the details of his argument.

reads too much into the bicameralism and presentment requirements, especially as interpreted in *Chadha*. Itself quoting a Senate committee report, *Chadha* held that the bicameralism and presentment requirements are only formally applicable when "actions taken by either House . . . 'contain matter which is properly to be regarded as legislative in its character and effect,' " namely, to alter legal rights and duties.²⁰¹ As a formal matter, committee reports consulted to explain the meaning of the statute do not themselves seek to alter legal rights and duties. Consulting them does not violate bicameralism or presentment any more than would consulting a dictionary. This point was made in *Chadha*, which emphasized that bicameralism and presentment are only limitations on Congress' actions (the requirements are in article I), and not on the actions of branches of government regulated by articles II and III. Bicameralism is formally and technically irrelevant as a limitation on subsequent implementation and interpretation of legislation.²⁰²

Consider the cogency of this argument as illustrated by *Underwood*. The EAJA, enacted in 1980, created the "substantially justified" requirement, and one of the committee reports suggested that the term meant "reasonably justified." The statutory text is quite ambiguous. For that reason, the federal circuit courts consulted the 1980 House committee report, which helped them reach virtually unanimous agreement on the statute's meaning. Even Justice Scalia's opinion mentioned the committee report's explanation,²⁰³ though he emphasized the statute's similarity to the oft-interpreted Federal Rules of Civil Procedure provisions for counsel fees. Consulting the committee report, as the lower courts did, provides information that is at least as probative as that obtained by consulting the Federal Rules of Civil Procedure, as Justice Scalia did. Indeed,

201. *Chadha*, 462 U.S. at 952 (quoting S. REP. NO. 1335, 54th Cong., 2d Sess. 8 (1897)).

202. *Id.* at 953 n.116. The footnote addresses administrative "lawmaking" and observes:

Executive action under legislatively delegated authority that might resemble "legislative" action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution, namely, article II, which describes the President's powers, does not so require. That kind of Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely. A one-House veto is clearly legislative in both character and effect and is not so checked; the need for the check provided by Art. I, §§ 1, 7, is therefore clear.

This same analysis could be applied to judicial interpretation of statutes.

203. *Underwood*, 108 S. Ct. at 2551.

if consulting a contemporaneous committee report somehow violates the letter, or even the spirit, of bicameralism and presentment, consider how much greater a violation the Federal Rules themselves are: While authorized by the Rules Enabling Act, the Federal Rules of Civil Procedure were adopted by the Court itself and were never voted on by either House of Congress or presented to the President. If the Federal Rules themselves are suspect under *Chadha*, how can they be a legitimate source for statutory interpretation (and for interpreting an unrelated statute)? Yet Justice Scalia found them decisive evidence for his "plain meaning" of the EAJA.

The purpose of the bicameralism requirement, as interpreted in *Chadha*, further undermines Justice Scalia's position. "The division of Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings."²⁰⁴ The Constitution's contemplation of deliberative discussion in the legislature suggests an implicit tolerance for reviewing those deliberations on the part of those charged with interpreting and implementing the legislation. To the extent that committee reports and other legislative history shed light on the "study and debate" that Congress is supposed to engage in, the constitutional procedures of legislation would seem to tolerate some consultation of legislative history.

2. Limiting Judicial Discretion: The General Separation of Powers Argument

There are several possible twists to Justice Scalia's separation of powers argument. Most simply, it seems to be that after Congress has performed its article I duty of enacting legislation, its views become irrelevant to the very separate inquiry performed by article III judges (and often by article II administrators) when they interpret and apply the legislation.²⁰⁵ This argument appeals to the animating goal of separation of powers, to prevent any one branch of government (especially the much-feared legislative branch) from having too much power. If the branch that passes the laws has no voice in their enforcement or interpretation, it will be especially

204. *Chadha*, 462 U.S. at 951.

205. See Legislative History Speech, *supra* note 115, at 15-16:

The [new textualism] is also supported by the doctrine of separation of powers Surely it is more consonant with that doctrine that—once a statute is enacted—its meaning is to be determined on the basis of its text by the Executive officers charged with its enforcement and the Judicial officers charged with its application.

careful not to enact oppressive laws which might be turned against its own constituents.²⁰⁶

This strikes me as a sensible position, but it has no strong consequences for Justice Scalia's theory. Nothing said or done in the legislative process *before* the statute is enacted can be fairly said to invade judicial functions, so long as judges are free to consider all the evidence of statutory meaning. If judges for institutional competence reasons choose to look at committee reports to inform their interpretation of statutes, this choice seems to be one they can make, and their liberty to make such choices is guaranteed, rather than precluded, by judicial independence and separation of powers precepts.

Like other formalists, Justice Scalia also draws from the Constitution's separation of powers, in articles I–III, the precept that Congress should do all of the lawmaking, and the Court as little as possible (unless explicitly delegated by Congress, as in the Sherman Act). According to the new textualists, consideration of legislative history creates greater opportunities for the exercise of judicial discretion. This discretion enhances the risk that the Court will exercise its own “WILL instead of JUDGMENT,” effectively “substitu[ting] [its own] pleasure to that of the legislative body.”²⁰⁷ A focus on the text alone, it is argued, is a more concrete inquiry which will better constrain the tendency of judges to substitute their will for that of Congress.

The premise of Justice Scalia's position—that separation of powers denies the Court all but the most minimal lawmaking function—is one that remains to be proved. Republican theorists have questioned this premise and have argued that the “deliberative democracy” created by the Constitution contemplated considerable norm-creating activity by the courts as well as by Congress.²⁰⁸ Even if one accepts Justice Scalia's premise, it is not clear that his new textualism advances the goal of more constrained judicial discretion. To begin with, it is mildly counterintuitive that an approach asking a court to consider materials generated by the legislative process, in addition to statutory text (also generated by the legislative process), canons of construction (generated by the ju-

206. See THE FEDERALIST NO. 78 (A. Hamilton) (C. Rossiter ed. 1961).

207. *Id.* at 469, quoted in *Public Citizen*, 109 S. Ct. at 2575 (Kennedy, J., concurring in the judgment) (changes made to text by Justice Kennedy).

208. See Eskridge, *supra* note 89, at 1498–1501; Eskridge, *supra* note 171, at 1067–73; Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); Sunstein, *supra* note 113.

dicial process), and statutory precedents (also generated by the judicial process), leaves the court with *more* discretion than an approach that just considers the latter three sources. Frankly, a result-oriented jurist will refuse to be constrained under any approach, and a modest and diligent jurist will be constrained under either the new textualism or the traditional approach.

Another way of stating my argument recalls the response to Judge Wald's criticism that the new textualism ignores the need for context. Justice Scalia considers a great deal of context, and the context he emphasizes is just as manipulable as the context emphasized by the traditional approach. That is, Justice Scalia's approach requires choices among competing evidence just as much as the traditional approach does. Furthermore, he potentially expands upon the judge's range of discretion by his revival of the notoriously numerous and manipulable canons of construction.²⁰⁹

Consider his position in *Jett*. Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . ."²¹⁰ The Supreme Court held that the defendant school district was not liable under section 1981 for the actions of its agent (the school principal). The Court justified its position through a scholarly examination of the legislative history of the 1866 Civil Rights Act (of which section 1981 was a part) and of the 1871 Act, which the Court held to have qualified the earlier statute to exclude municipal *respondeat superior* liability.²¹¹

Justice Scalia refused to join any of this discussion and based his agreement with the result on two canons of construction—that the two statutes be construed harmoniously (the 1871 Act has been construed to exclude vicarious liability for municipalities) and that the more specific statute (the 1871 Act) govern the more general one (the 1866 statute).²¹² His position seems arbitrary. While Justice Scalia invokes two widely used canons of construction, he neglects even to mention the canons that cut against his position. The canon that the earlier statute should be interpreted to reflect policy choices made in the later statute is inconsistent with the canon that

209. The classic is 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).

210. 42 U.S.C. § 1981 (1982).

211. *Jett*, 109 S. Ct. at 2715–20.

212. *Id.* at 2724 (Scalia, J., concurring in part and in the judgment).

repeals by implication are disfavored²¹³ and is inconsistent with the canon that a statute setting forth a general right presumably carries with it a remedy.²¹⁴ Apparently, Justice Scalia doesn't "like" these canons.²¹⁵ But his position is also at odds with a canon he does like: The actual text of the statute is controlling.

In endorsing the position that the 1871 Act implicitly modified the 1866 Act, Justice Scalia does not mention the language of the 1871 Act itself: "That nothing herein contained shall be construed to supersede or repeal any former act or law except so far as the same may be repugnant thereto."²¹⁶ There is no repugnance in enforcing the 1866 Act, while not enforcing the 1871 Act, against municipalities under vicarious liability, and so the text of the 1871 Act has a plain meaning that Justice Scalia violates. Indeed, it is difficult to understand how Justice Scalia is faithful to the text of the 1866 Act (quoted above), which is as broadly written a statute as one can desire, and which contains nothing in its text that even implicitly suggests the policy line-drawing that Justice Scalia endorses.

To be sure, in cases like *Jett*, the Court's use of legislative history is subject to quarrel because of selective use of evidence and questionable inferences drawn therefrom.²¹⁷ But Justice Scalia's claim is that the new textualism imposes *more reliable constraints* on judges. Justice Scalia fails to make his case, and performances such as his in *Jett* suggest that the new textualism is no more constraining than the traditional approach. So long as the new textualism relies heavily on the canons of construction, its methodology will often be more arbitrary and less constraining than that of the traditional approach.

213. *Morton v. Mancari*, 417 U.S. 535, 549-50 (1974) (leading case). For recent applications, see, e.g., *Pittsburgh & Lake Erie R.R. Co. v. RLEA*, 109 S. Ct. 2584, 2596 (1989); *Traynor v. Turnage*, 485 U.S. 535, 546-48 (1988); *Atchison, Topeka & Santa Fe Ry. v. Buell*, 480 U.S. 557, 566-67 (1987); *Rodriguez v. United States*, 480 U.S. 522, 524 (1987) (per curiam).

214. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162-63 (1803); see *Jett*, 109 S. Ct. at 2726 (Brennan, J., dissenting) (citing cases).

215. He clearly rejects the remedial canon because he believes Congress must explicitly provide for remedies. He shares his personal belief with a majority of the current Justices (but in my view it is nothing more than their personal beliefs). I am not sure why Justice Scalia doesn't mention the implied repeals canon, but there is a little evidence that he doesn't "like" this one much either. Compare *United States v. Fausto*, 484 U.S. 439, 453 (1988) (Scalia, J.) (structure of statutory scheme trumps implied repeal canon), with *id.* at 461-63 & n.9 (Stevens, J., dissenting) (Justice Scalia is undermining legislative expectations because of his dislike of the implied repeals canon).

216. Civil Rights Act of 1871, § 7, 17 Stat. 13, 15.

217. See *Jett*, 109 S. Ct. at 2731 (Brennan, J., dissenting).

3. The Democracy-Enhancing Argument

Justice Scalia argues that statutory interpretation must not only avoid excesses condemned by the Constitution, but should also be conducted "in a fashion which fosters that democratic process."²¹⁸ That is, a method of statutory interpretation must be evaluated not only according to its ability to constrain unelected judges, but also according to its ability to stimulate legislators to perform their functions better, as by drafting statutes more precisely. "What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts."²¹⁹ Hence, Justice Scalia seems to argue, if Congress is aware that its statutes will be read with a strict literalism and with reference to well-established canons of statutory construction, it will be more diligent and precise in its drafting of statutes.

This is a nice economic argument (consider the *ex ante* effects of the rule you adopt), but I doubt that an unambiguous embrace of the new textualism would have much, if any, effect on the way Congress drafts statutes. The vast majority of the Court's difficult statutory interpretation cases involve statutes whose ambiguity is either the result of deliberate legislative choice to leave conflictual decisions to agencies or the courts,²²⁰ or the result of social or legal developments the most clairvoyant legislators could not have foreseen.²²¹ Even if Congress drafted statutes with a sophisticated appreciation of the Court's ground rules, it is doubtful whether clearer rules would improve the drafting process.

Furthermore, there is reason to doubt that the new textualism will provide Congress with a set of "clear interpretive rules." The new textualists are not only selective about which of the canons of construction they will use in any given case, but they are also prone to tinker with some of the canons. As the canons change over time (which is inevitable anyway), the background assumptions change. What, then, is the point of establishing clear background rules today, when they are likely to change tomorrow? This explanation provides one way to view *Jett*: When the 1866 Civil Rights Act was passed, the "clear interpretive rule" was that federal statutory

218. *United States v. Taylor*, 108 S. Ct. 2413, 2424 (1988) (Scalia, J., concurring in part).

219. *Finley v. United States*, 109 S. Ct. 2003, 2010 (1989) (Scalia, J.).

220. See Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 288-89 (1988).

221. See Eskridge, *supra* note 89.

rights usually carried with them a remedy.²²² When the Supreme Court interpreted the statute in 1989, the prevailing rule among the Justices was substantially more restrictive.

B. *Formalist and Functionalist Problems with the New Textualism's Emphasis on Horizontal Coherence*

The previous section demonstrates that Justice Scalia's new textualism offers virtually no formal constitutional justification for ignoring legislative history. This demonstration is a provisional one, lasting only until Justice Scalia elaborates on his theory. Consider for now my own elaboration of Justice Scalia's theory, based upon the distinction between vertical and horizontal coherence.²²³

Traditional theory emphasizes vertical coherence in statutory interpretation. That is, the Court demonstrates that its interpretation of the statute is coherent with legal sources that preceded the interpretive event—namely, the historical text, its legislative history, and administrative and judicial precedents interpreting the text and its legislative history. Since it claims to be doing nothing more than implementing the original legislative expectations, traditional theory heavily depends upon vertical coherence for its legitimacy. Justice Scalia attacks vertical coherence theory for resting upon unrealistic assumptions, for its inability to exclude horizontal considerations (such as the canons of construction and current statutory context), and for undermining the legislative process.²²⁴ His attacks resonate intellectually with scholars and judges because they are supported by recent academic theory of legislation and interpretation.

Justice Scalia's own theory emphasizes horizontal coherence in statutory interpretation. That is, the Court demonstrates that its interpretation of the statute is coherent with legal sources existing at the time of the interpretive event—namely, the current version of the statutory text, the whole statute in which it is found, analogous statutory texts and their current judicial interpretations, and the canons of statutory construction. The legitimacy of this approach is rooted not in the past, but in the present. The approach is sup-

222. See *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 624 (1838); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162–63 (1803); see also *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33, 39–40 (1916) (synthesis of prior case law).

223. This distinction is developed and explored in Eskridge, *supra* note 52, at 116, 120, 122–25.

224. Each of these criticisms is made in the Legislative History Speech, *supra* note 115, and one or more are made in Justice Scalia's concurring opinions collected *supra* note 116.

ported by the notion that all that binds us as a matter of law is what we can read in the U.S. Code. This is a brilliant move in statutory interpretation theory, but is beset by the same problems Justice Scalia identifies for traditional theory—unrealistic assumptions, inability to exclude vertical considerations, and disruption of the legislative process.

1. Unrealistic Assumptions

Recall Justice Scalia's clearest statement to date of his methodology, that courts ought to seek the statutory meaning "(1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute . . . and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind."²²⁵ A critical assumption made in this formulation is that when it enacts statutes Congress is omniscient about the law. That is, Justice Scalia assumes that both Houses of Congress and the President are aware of judicial interpretations of provisions that a statute borrows or reenacts,²²⁶ of the canons of statutory construction (including grammar and punctuation rules) that might be applied to the statute,²²⁷ and of the surrounding legal terrain into which the statute must be integrated.²²⁸ Indeed, Justice Scalia must make these assumptions, in order to claim (as he does) that the new textualism satisfies the bicameralism and presentment requirements of article I.

Everyone knows that these assumptions have virtually no basis in reality. Legal scholars, especially those who have actually been players in the legislative process, are scornful of these assumptions.²²⁹ Judge Abner Mikva, a former Member of the House of

225. *Green v. Bock Laundry Mach. Co.*, 109 S. Ct. 1981, 1994 (1989) (Scalia, J., concurring in the judgment) (emphasis in original).

226. See *Underwood*, 108 S. Ct. at 2551 ("reenactment, of course, generally includes the settled judicial interpretation").

227. See *Bock Laundry*, 109 S. Ct. at 1994 (Scalia, J., concurring in the judgment).

228. *Id.*

229. The best example is Professor Eric Lane, who served as counsel to the New York Senate Democrats from 1981–87, and has also been Counsel to the New York City Charter Revision Commission. Lane emphasizes that "bill drafters are generally not aware of the canons of construction or other guidelines for interpretation. More importantly, even if they were, it would make no difference, since the logic of the canons is not applicable to the process from which legislation emerges and could not be applied." Lane, *Legislative Process and Its Judicial Renderings: A Study in Contrast*, 48 U. PITT. L. REV. 639, 651 (1987); see also *id.* at 656–57 (assumptions that legislators know

Representatives, says: "[W]hen I was in Congress, the only 'canons' we talked about were the ones the Pentagon bought that could not shoot straight."²³⁰ Members of Congress are not omniscient about legal rules, and the nature of the legislative process gives them incentives to focus on the particular problem and not on future issues of interpretation. As a Member cuts deals in order to gain enough votes to secure enactment of a bill, the Member will typically be uninterested in the "integration" of the bill into the larger corpus of law, or the wisdom of prior judicial interpretations of a borrowed provision. Often, the Member will have a positive incentive to suppress this knowledge, because it may tend to raise problems with the bill that could defeat it.

Justice Scalia knows all this, for he calls these assumptions "a benign fiction." Yet when he is discussing the assumptions underlying the Court's traditional use of legislative history, Justice Scalia is not so tolerant of fictive assumptions. "It is at best *dangerous* to assume that all the necessary participants in the law-enactment process are acting upon the same unexpressed assumptions."²³¹ How are the two fictions—one "benign" and the other positively "dangerous"—so radically different? The traditional approach is willing to assume that Members of Congress and the President have access to committee reports and do rely on them as the best evidence of the purposes and at least some specific understandings embodied in the statute. Justice Scalia is willing to assume that Members of Congress and the President *both* know the canons of construction, judicial interpretations of prior law, the existing statutory terrain, and future statutory developments *and* draw the same conclusions from these sources about the probable meaning of the language they enact. If anything, the assumptions of the traditional approach are more realistic.²³²

or care about canons and surrounding legal terrain are incorrect); Hetzel, *Instilling Legislative Interpretation Skills in the Classroom and the Courtroom*, 48 U. PITT. L. REV. 663, 682–83 (1987) (criticizing *in pari materia* rule); Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983) (criticizing the canons of construction as resting upon unrealistic view of legislative process).

230. Mikva, *Reading and Writing Statutes*, 48 U. PITT. L. REV. 627, 629 (1987).

231. *Thompson v. Thompson*, 484 U.S. 174, 192 (1988) (Scalia, J., concurring in the judgment) (emphasis added).

232. Thus, House Rule XI and Senate Rule XXV require that a committee report be circulated to all Members of the Chamber within three days of the committee's submission of a bill for the Chamber's consideration. Although Justice Scalia seems to believe these Rules are not always followed, see *Blanchard v. Bergeron*, 109 S. Ct. 939, 947 (1989) (Scalia, J., concurring in part and concurring in the judgment), he presents no evidence to that effect. Indeed, political scientists who actually have studied the legisla-

This analysis suggests an underlying problem with Justice Scalia's theory. In the name of democracy, bicameralism, and presentment, he applies a super-realist analysis of legislative history which enables him to question its legitimacy. But the same super-realism can be applied to his own tools of interpretation. Dropping the sarcastic tone of his analytical scrutiny of legislative history, Justice Scalia simply accepts his admittedly "benign fiction," but there is no apparent reason to prefer that fiction to the other. There may be good reason, indeed, to prefer the fictions surrounding legislative history to those of the new textualism. At least legislative history is created within the legislative process, and subject to legislative reaction and correction.²³³ Indeed, the Court often refuses to consider legislative history created under circumstances in which other legislators were not likely to have noticed or responded.²³⁴ The canons of construction and the like, by contrast, are created by judges over time and are much harder for legislators to negate, especially if (as seems to be the case) they are not aware of them.

2. Inability to Exclude Vertical Considerations

Justice Scalia does not necessarily reject vertical coherence arguments in all instances. For example, where a statute is genuinely ambiguous or absurd on its face, he says he is willing to resort to legislative history, though in practice he will not necessarily rely on legislative history even in these instances, and he insists that his theory depends only upon horizontal coherence.²³⁵ But, just as traditional theory cannot exclude horizontal considerations, neither can Justice Scalia's theory exclude vertical considerations.

tive process disagree with Justice Scalia. "For some members, or their staff aides, the report is the only document they read before deciding how to vote on an issue." W. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 94 (2d ed. 1984).

233. That is, if a staff member or lobbyist "plants" some stuff in a committee report or floor colloquy, see *Blanchard v. Bergeron*, 109 S. Ct. 939, 947 (1989) (Scalia, J., concurring in part and concurring in the judgment), it is not unlikely that staff members or other Members will notice the plant. If the latter Members do not agree with it, there are plenty of ways for them to negate its force—by excising the plant from the committee report (if the Member is on the committee), by denouncing it on the floor, and so forth.

234. *E.g.*, *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 407 (1987) (refusing to consider sponsor's statement made 10 days after the law was enacted).

235. See *Green v. Bock Laundry Mach. Co.*, 109 S. Ct. 1981, 1994 (1989) (Scalia, J., concurring in the judgment) (appropriate to consult legislative history to confirm that what the Court believes is an absurd statutory meaning was in fact "unthought-of," but then refusing to use legislative history to suggest alternate meanings).

For example, the new textualism lacks a satisfactory theory of precedent.²³⁶ Unless the statute is recently enacted, statutory interpretation involves interpreting statutory precedents as well as statutory text. Often the precedents will themselves be quite antique, and will hardly reflect the current statutory terrain that Justice Scalia finds essential. Because the traditional approach has itself held sway for so long, the statutory precedents will usually have considered legislative history and occasionally will have been decisively influenced by precisely the sort of analysis of legislative history that Justice Scalia despises. For all these reasons, and probably others, Justice Scalia is very uncomfortable with statutory precedents.²³⁷ But he frequently analyzes them and follows them, even if unenthusiastically.²³⁸

Why would Justice Scalia follow statutory precedents which disrupt the law's horizontal coherence? One reason is that Justice Scalia is constrained by his role as a judge, by the demands of collegiality, and other limitations. A more interesting reason is that horizontal coherence is just as impossible as vertical coherence. Just as traditional theory cannot exclude present considerations, the new textualism cannot exclude history. Legal argumentation is inherently historical—one always wants to know the background of a legal document, and how it has been interpreted in the past, before an opinion about its current meaning is ventured. Judicial interpretation of statutes always involves an interplay between past and present, and legislative history as much as precedent facilitates this dialogue.

It is noteworthy that the new textualists themselves rely on legislative history (mainly *The Federalist Papers*) when they interpret the Constitution.²³⁹ Surely they do not believe that *The Federalist*

236. The arguments I make about precedent can also be applied to the canons of statutory construction.

237. He is less likely than other Justices to rely heavily on precedent in doing statutory analysis and is substantially more willing than other Justices to overrule or limit statutory precedents, especially those resting upon legislative history. See, e.g., *United States v. Johnson*, 481 U.S. 681, 692 (1987) (Scalia, J., dissenting); *Johnson v. Transportation Agency*, 480 U.S. 616, 657 (1987) (Scalia, J., dissenting).

238. E.g., *Lorance v. AT&T Technologies, Inc.*, 109 S. Ct. 2261, 2267 (1989) (Scalia, J.) (following Title VII precedents, even though "as an original matter" a more lenient interpretation might be better); *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2374–75 (1989) (Kennedy, J.) (declining to overrule arguably incorrect Civil Rights Act precedents but applying precedents narrowly in light of recent statutory developments).

239. See *Public Citizen*, 109 S. Ct. at 2575 (Kennedy, J., concurring in the judgment); *Morrison v. Olson*, 108 S. Ct. 2597, 2622–23 (1988) (Scalia, J., dissenting).

Papers can be rigorously shown to reflect the "collective intent" of the Framers at the Philadelphia Convention *and* of the delegates at the state ratifying conventions. *The Federalist Papers* were, after all, propaganda documents subject to most of the realist and formalist criticisms the new textualists level against statutory legislative history.²⁴⁰ One expects that Justice Scalia relies on these background documents for the same reasons that his colleagues will look at statutory legislative history—because they help explain the goals of constitutional texts, because they carry with them the authority of original participants, and (frankly) because they are intelligent analyses. Though statutory legislative history is not penned by the likes of Madison and Hamilton, it is often worthy of consideration for essentially the same reasons.

3. Subversion of the Democratic Process

Perhaps the biggest problem with Justice Scalia's new textualism is that it seems unfriendly to democratically achieved legislation and threatens to undo much of Congress' statutory work. Whatever the cogency of Justice Scalia's indictment of legislative history, the fact remains that for most of this century the Court has told Congress, "We shall attend to committee reports, at least." That has encouraged Congress to develop conventions by which much of the elaboration of statutes—references to judicial decisions ratified or overruled, purposes to be fulfilled, specific issues thought to be resolved—has been put in committee reports rather than in the statutes themselves, where most of it would be cumbersome and out-of-place anyway. If the new textualism displaces the traditional approach entirely, it will undermine the expectations of decades of statutory drafting. It is doubtful that this would be a national calamity. Nonetheless, it appears that the new textualism is insufficiently sensitive to the conventions Congress has long followed in making law.

Indeed, there is something of a "bait-and-switch" feature to the new textualism in actual practice. That is, Congress enacts a statute against certain well-established background assumptions, many of which the Court created for it. The Court then switches those assumptions and interprets Congress' work product in ways that no one at the time would have, or perhaps even could have, intended. Bait-and-switch is an unfair con game in general,²⁴¹ and when the

240. See A. FURTWANGLER, *THE AUTHORITY OF PUBLIUS: A READING OF THE FEDERALIST PAPERS* (1984) (realist critique of these propaganda documents).

241. See A. LEFF, *SWINDLING AND SELLING* (1975).

victim of the con game is Congress it may be unconstitutional as well.

Recall *Dellmuth v. Muth*,²⁴² where the Court found no waiver of eleventh amendment immunity in the Education of the Handicapped Act of 1975 (EHA), even though (*inter alia*) the sponsor of the Act specifically stated that the Act contemplated lawsuits against the states.²⁴³ Under the Supreme Court's prevailing eleventh amendment precedents in 1975, the general jurisdictional language and specific legislative history were enough to demonstrate that the states could be sued and that Congress had exercised its power to abrogate the states' immunity.²⁴⁴ In 1985, the Court changed the rule to require explicit statutory language to abrogate state immunity and held that the Rehabilitation Act of 1973 did not abrogate state immunity.²⁴⁵ Sensing that the rules had changed, Congress in 1986 enacted the following statute: "A State shall not be immune under the Eleventh Amendment . . . from suit in Federal Court for a violation of [enumerated provisions of the Rehabilitation Act], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance."²⁴⁶ Congress grumbled that its intent had been slighted by the Court and that it had to take the trouble to restate what it thought it had stated in 1973 (the Rehabilitation Act) and thereafter. Three years later, in *Dellmuth*, the new textualists ruled that the EHA did not abrogate state immunity, and that even the 1986 statute did not render the original legislative intent clear!²⁴⁷ Outraged dissenters argued, with justification, that "the Court ignores Congress' actual intent to abrogate State immunity . . . instead resorting to an interpretative standard that Congress could have anticipated only with the aid of a particularly effective crystal ball."²⁴⁸

C. *Uses of Legislative History—A Modified Traditional Approach*

Justice Scalia has not convincingly demonstrated his formalist case against legislative history. But, like more traditional legal process critics, he has a rather good functional case: The traditional

242. 109 S. Ct. 2397 (1989).

243. 121 CONG. REC. 37,415-16 (1975) (statement of Sen. Williams).

244. See *Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 283-85 (1973) (general language plus confirming legislative history indicative of legislative intent to abrogate state immunity).

245. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985).

246. 42 U.S.C. § 2000d-7(a)(1) (Supp. IV 1986).

247. *Dellmuth*, 109 S. Ct. at 2400-02.

248. *Id.* at 2407 (Brennan, J., dissenting).

approach relies too much on legislative history, much of it obscure, for too little payoff.²⁴⁹ The “cost” of this research into legislative history is borne not just by the Court and its litigants, but by litigants at all levels and, most of all, by counsel rendering predictive advice to clients. “It is hard enough to search a long, heterogeneous and often conflicting legislative history as relates to a particular issue in a current controversy,” Professor Dickerson writes. “It is vastly harder and impracticable to search all aspects of the legislative history as they relate to the myriad of potentially troublesome problems that the lawyer would like to anticipate.”²⁵⁰

Traditional legal process theory tries to solve the problem of excessive legislative history by trimming away certain types of history (such as anything but committee reports and sponsor statements). This is a difficult strategy to follow because of the legal process emphasis on context: In many cases, as the new textualists argue, committee reports will be misleading (by design), and the most reliable evidence of a true legislative deal will be testimony at hearings, presidential statements, or even legislative silence. In short, once you open the door to consideration of legislative history, it is hard to exclude any type of evidence without viewing it in the context of the whole story. The new textualists suggest another strategy for dealing with excessive legislative history. This approach advocates prophylactic rules to exclude legislative history altogether in certain types of cases and to treat legislative history more critically in all cases. In the spirit of the new textualism (but without agreeing with its particular formalism), I propose the following three strategies.

1. A Somewhat Harder Plain Meaning Rule

I join those objecting to the peculiar way the Court has traditionally administered the plain meaning rule (*i.e.*, delving extensively into the legislative history after finding the “plain meaning”). Like Justice Scalia, I do not accept legislative intent as the foundational inquiry in statutory interpretation, and so I am open to a harder plain meaning rule. The rule advocated here is only slightly

249. Classic examples of the excesses of seeking original intent include *Smith v. Wade*, 461 U.S. 30 (1983) (skim both the Brennan opinion and the Rehnquist dissent, and compare them to the cogent and brief O'Connor dissent); *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). For traditional criticisms of the Court's excessive use of legislative history, see H. FRIENDLY, *Mr. Justice Frankfurter and the Reading of Statutes*, in *BENCHMARKS* 196 (1967); R. DICKERSON, *supra* note 77, at 137–97 (chapter on “the uses and abuses of legislative history”).

250. R. DICKERSON, *supra* note 77, at 150–51; see Starr, *supra* note 95, at 377–78.

harder, however, because original legislative expectations are of great use in at least some cases. The following plain meaning rule is proposed: Arguments from a statute's legislative history cannot displace a clear statutory text, when the text's clarity is reinforced by arguments of horizontal coherence. Hence, legislative history cannot displace a statutory meaning suggested by its plain language, the whole act, statutory analogues, current policy, and the canons of construction.²⁵¹

This version of the plain meaning rule is consistent with the cautious approach taken by some of the circuit court of appeals judges influenced by the new textualism²⁵² but is not nearly as restrictive as that posed by Justice Scalia and some other new textualists. Specifically, I should consider appeals to legislative history in three types of cases where Justice Scalia would not. First, courts should consider legislative history when there are two or more plausible meanings of the provision being interpreted, even though one meaning seems *more* plausible and is backed up by structural arguments.²⁵³ Therefore, legislative history should have been consulted in *Underwood*, because (as even Justice Scalia admits) "substantially justified" is amenable to several different meanings. Ultimately, I agree with Justice Scalia's interpretation, because the statutory analogues *and* the 1980 committee report both support the Court's interpretation. I have greater confidence in *Underwood*'s interpretation because of the 1980 legislative history and the fishiness of the 1985 history. Also, I disagree with Justice Scalia (and

251. This position is a refinement of the views expressed in Eskridge & Frickey, *supra* note 58. In that piece, Professor Frickey and I argue that legislative history is just one of several considerations in statutory interpretation. Under our model in that piece, legislative history could not affect the result of the situation described in text here. See also Farber & Frickey, *supra* note 82 (similar views).

252. Circuit court discussions that I find most congenial with my slightly harder plain meaning rule include *In re Sinclair*, 870 F.2d 1340 (7th Cir. 1989) (Easterbrook, J.) (clear statutory language prevails over clear committee report language); *Natural Resources Defense Council, Inc. v. EPA*, 822 F.2d 104, 113-14 (D.C. Cir. 1987) (Starr, J.) (very brief and cautious examination of legislative history, finding it not to rebut apparent plain meaning adopted by agency); *IBEW Local 474 v. NLRB*, 814 F.2d 697, 715-18 (D.C. Cir. 1987) (Buckley, J., concurring) (declining to give force to committee report "admonition" that apparently had insufficient votes to clear Senate committee); *Abourezk v. Reagan*, 785 F.2d 1043, 1054-55 n.11 (D.C. Cir. 1986) (Ginsburg, J.) ("In sum, we think it plainly wrong as a general matter . . . to regard committee reports as drafted more meticulously and as reflecting the congressional will more accurately than the statutory text itself. Committee reports, we remind, do not embody the law."), *aff'd*, 484 U.S. 1 (1987).

253. Thus, I reject the view of the DOJ RE-EVALUATION, *supra* note 99, that legislative history cannot be consulted when there is a "most plausible" meaning apparent from the statute's text. *Id.* at iv, 71-73.

the Court) concerning the plain meaning of "well-founded fear of persecution" in *Cardoza-Fonseca*. While the Court may be correct that the term means something other than "more likely than not to be persecuted," the term cries out for historical context to explain its burden of proof more precisely. The legislative history in *Cardoza-Fonseca* is enormously more helpful than the text and statutory structure.

Second, courts should look at legislative history when there is a strong possibility that the text reflects a scrivener's error. There are many more of these cases than the Court is willing to admit,²⁵⁴ and *Chan* is one such case. Justice Scalia is right that the Warsaw Convention's sections on baggage checks and waybills provide explicit remedies for failure to provide the passenger notice of the liability limitations, and that the section on passenger tickets does not. The correct response to this, however, is not to conclude, as Justice Scalia does, that the drafters obviously intended no remedy for failure to notify passengers, but rather to wonder if there was some drafting error that accounts for this mildly irrational distinction. Hence, one should have looked at the drafting history, which does in fact strongly suggest that the distinction was inadvertent.²⁵⁵

Third, courts should look at legislative history when the apparent textual meaning of a statute is unreasonable or raises constitutional problems, even though the interpretation is not literally "absurd." Thus, I do not agree with the new textualist analysis of *TVA v. Hill*, where the broad language of the statute supported a draconian result, or of *Public Citizen*, where the broad language of the statute supported a possibly unconstitutional result. In each case, like the Court, I should have examined the legislative history to be sure that the unreasonable interpretation is the one sought by the statutory drafters. While the new textualists make an appealing point that the Court ought not use this exception as a roving power to rewrite statutes, courts should at least accept Blackstone's (very conservative) formulation, "that, where the main object of a statute is unreasonable, the judges are [not] at liberty to reject it But where some collateral matter arises out of the general words, and happens to be unreasonable; there the judges are in decency to con-

254. See, e.g., *Sorenson v. Secretary of the Treasury*, 475 U.S. 851 (1986) (compare *id.* at 866 (Stevens, J., dissenting)); *United States v. Locke*, 471 U.S. 84 (1985) (compare *id.* at 112 (Stevens, J., dissenting)); see also *Shine v. Shine*, 802 F.2d 583 (1st Cir. 1986).

255. See *Chan*, 109 S. Ct. at 1686-91 (Brennan, J., concurring in the judgment).

clude that this consequence was not foreseen by the [legislature],”²⁵⁶ if the legislative history bears out that conclusion.

2. Prospective Clear Statement Rules

I believe, with the new textualists, that clear statement rules can be a useful way of avoiding unnecessary recourse to legislative history. The best cases for such a rule are those in which there are constitutional concerns. *Dellmuth* holds that any Congressional abrogation of states’ eleventh amendment immunity must be clear on the face of the statute. Other similar rules could be constructed: Statutes, and agency rules pursuant to statute, cannot be applied retroactively unless explicitly authorized by clear text. Jury trials are required under any federal statutory scheme authorizing damage remedies, unless specifically negated by statutory language. And so forth. The Court ought to be formulating such rules, but it ought not make them applicable retroactively, as in *Dellmuth*, because of the bait-and-switch problem. Prospective rulemaking might obviate that problem.

A clear statement rule might be the best approach to *Public Citizen*, where the Court seemed to be straining the legislative history and the language of the statute to avoid the constitutional problem.²⁵⁷ The clear statement rule might be: The Court will not invalidate a statute as applied to a specific problem, unless the statutory language unmistakably targets that problem. Thus, in *Public Citizen*, the Court should have ignored the legislative history, noted the constitutional problem, and refused to apply the broad statutory language to the problematic area. A clear statement approach avoids an unnecessary constitutional decision (yet carves out the possibly unconstitutional application of the statute) and may even provoke a mini-constitutional debate within Congress (which could force a constitutional decision, of course, by supplying the requisite clear statement).

Notwithstanding my general interest in clear statement rules, I enter a substantive caveat: These rules are not neutral, and the Court should be quite aware that it is making policy choices. For example, the Court has already moved toward a rule that federal statutes will not be interpreted to supersede parties’ agreements to arbitrate disputes unless there is clear statutory language to that

256. 1 W. BLACKSTONE, *supra* note 198, at 91.

257. See *Public Citizen*, 109 S. Ct. at 2574–80 (Kennedy, J., concurring in the judgment) (comprehensively criticizing the Court’s reasoning).

effect. This is a policy choice, and a potentially troubling one, because some federal statutory schemes seek to protect vulnerable citizens against fraud and overreaching by the more savvy or the more powerful. It is precisely in these areas where arbitration is a second-best remedy. The same disparity in knowledge and bargaining power that triggers the federal statute makes it more likely that an adhesive arbitration clause will discourage assertion of federal rights. Arbitration is more expensive for the victim than filing a federal lawsuit is, and arbitrators may show a bias toward the repeat players in the industry.²⁵⁸ Hence, the Court should be discouraged from adopting this clear statement rule.

3. A More Critical Use of Legislative History

At the very least, the new textualists urge a more critical use of legislative history, and I join their call, based upon the realist problems with legislative history in many cases. On the whole, though, I am impressed by the Court's sophistication in using legislative history—I don't believe the Court is often "tricked" by phony or wholly contrived history. For example, Justice Scalia was right to question the main legislative history argument in *Underwood*: When the EAJA was reenacted in 1985, a House committee report stated that "substantially justified" meant more than "reasonably justified." This was contrary to the legislative history of the 1980 Act and the interpretation of the language by twelve of the thirteen circuits (the District of Columbia Circuit had just interpreted the statute more liberally). Yet the House committee did not seek to add new language clarifying legislative intent, and only added language to the committee report. With no similar language in the Senate report, and no changes at all in the text of the statute, Justice Scalia seems "substantially justified" in declining to follow the 1985 committee report.

Critical use of legislative history means more than avoiding manipulation and trickery, however. Recall that the second important objection to the Court's use of legislative history is historicist. This objection does not apply in full force to recently enacted statutes, such as the one in *Underwood*, but does apply to older statutes such as the 1866 act construed in *Jett*. Legislative history ought to be less important in these cases. The passage of time has rendered most of the legislative history obsolete. The problems that con-

258. See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 257–62 (1987) (Blackmun, J., concurring in part and dissenting in part).

cerned the original legislature have either been solved or have changed, new problems have arisen in response to changes in society or even to the statutory scheme, and new legal developments provide a different context for evaluating the statute. In short, at least some of the underlying assumptions of the drafters have changed. The new textualists are right in pointing legal scholars toward the process of evolution, and away from a focus on the original discussions. Hence, as Justice Scalia asserts, the legislative history discussion ought not be central to the interpretive enterprise in cases like *Jett*.

CONCLUSION

Notwithstanding my skepticism about the new textualism, I find it a fascinating theory, with three powerful messages for the study of statutory interpretation. To begin with, the new textualists remind us that statutory interpretation is, most of all, textual analysis. We start with the text, and most practitioners end with the text when rendering "quick and dirty" advice to their clients. The Court's longstanding tendency to ignore the text and go straight to legislative history in many cases is a tradition in need of correction, and I applaud the new textualists for turning us back to the text. Additionally, they have revived techniques of structural analysis and argumentation that deserve emphasis, both in the courtroom and in the classroom.

Moreover, the new textualists have provided a distinctive twist on the theoretical movement in the 1980s toward theories of dynamic statutory interpretation. Judge Easterbrook and Justice Scalia have been eloquent critics of archaeological approaches to statutory interpretation and have discredited their claim to represent a rigorous formalist theory of interpretation. Justice Scalia's focus on the changing statutory context of a provision, on the evolution of statutes delegating rulemaking authority to courts as well as agencies, and on the protean canons of statutory construction highlights the many ways in which statutes evolve over time. To be sure, the new textualism is not nearly as dynamic as functionalist theories of statutory interpretation. But it demonstrates that a "conservative" formalist theory need not tie itself to the past.

Even the analytical difficulties with the new textualism (particularly as practiced by Justice Scalia) are significant, because the reasons for its failure are similar to the reasons for the analytical collapse of the traditional approach. While in most ways more sophisticated than the traditional approach, the new textualism shares

a common intellectual substructure with it: Both are deeply suspicious of judicial discretion to make policy, seek to constrain that discretion through method, and uncritically accept the dichotomy between the "object" of interpretation and the "subject" doing the interpretation. By questioning the subject/object dichotomy and the ability of method to constrain interpretation, the new jurisprudence of interpretation casts all of these assumptions into considerable doubt.²⁵⁹ Method is not critical, and rules of interpretation do not necessarily constrain judges. It is possible to criticize the coherence of virtually any formalist practice, because it truly does not describe what is going on in statutory interpretation.

This phenomenon helps explain the revival of anti-formalist theories of dynamic statutory interpretation. These theories are skeptical that there is an object lurking in the text waiting to be "discovered" by the subject. Interpretation is a social process of construction, not a scientific process of discovery. Method can channel the argumentation and suggest information to be considered, but it cannot dictate all that goes on in statutory, or any, interpretation. Discourse about the new textualism ought to consider this timeless theme of the relationship of truth and method, for it goes to the heart of the formalist/anti-formalist debate in statutory interpretation.

259. See Eskridge, *supra* note 87. *Cardoza-Fonseca* illustrates the point. I don't think that methodology was critical to the Court's interpretation of the immigration law in that case. The case was driven by the Justices' reactions to the facts of the case, the words of the statute (which really are pretty open-ended), and the rich tradition of discourse about asylum for political dissenters. If the Court adopted the new textualism, or a completely dynamic theory of interpretation, it would in *Cardoza-Fonseca* and most other cases reach the same result as it reached under an avowedly intentionalist approach.

