An Internal Critique of Justice Scalia's Theory of Statutory Interpretation

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INTRODUCTION

Justice Scalia is committed to the text as the primary criterion of statutory interpretation because it implements his view that the rule of law should be a law of rules. In his view, when possible, the judge should find rules in the statutory text. If faced with an unclear text, however, the judge should avoid judicial lawmaking by adopting clear background rules to interpret the statute or by deferring to an agency interpretation.

Justice Scalia’s text- and rule-based approach directly challenges traditional case-by-case common law judging. The text and rules on which he relies have clear historically set boundaries and the judge’s job is to determine whether the facts fall inside or outside the rule. The common law approach is different. It assumes that rules embody principles which can be

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2. See Scalia, Rule of Law, supra note 1, at 1175. Justice Scalia does not think much of the argument that words are always potentially unclear. He believes that “[f]or purposes of day-to-day judging, [t]hey have meaning enough.” George Kannar, The Constitutional Catechism of Antonin Scalia, 99 YALE L.J. 1297, 1305 (1990) (quoting Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. REV. 849, 856 (1989)).

qualified by other principles, and which expand, contract, and evolve as they are applied to the facts of a case.

Justice Scalia rejects the common law approach because it gives judges too much power to make law. He recalls becoming aware that "restrained" common law case-by-case decision making actually gives judges more power than a clear rule, which binds judges in future cases. He objects to a fuzzy, judicial, "manifest injustice" standard to determine whether statutes are retroactive because a "rule of law [against retroactivity is thus] transformed to a rule of discretion, giving judges power to expand or contract the effect of legislative action." Justice Scalia's main judicial rival is Justice Stevens, who explicitly favors a common law case-by-case approach rather than judicial adoption of general rules. While Justice Scalia believes that giving "precise, principled content" to an otherwise vague text is the "essence of the judicial craft," Justice Stevens prefers "a rule that allows the specific facts of particular cases to make the difference between life and death—a rule that is consistent with the common-law tradition of case-by-case adjudication." Justice Stevens acknowledges that the case-by-case approach "provides less certainty than legislative guidelines," but believes the rule-based approach is better suited to "a Napoleonic Code drafted in accord with the continental approach to the formulation of legal rules." For Justice Stevens,

4. Id. at 1178-80.
5. Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 857 (1990) (Scalia, J., concurring); see also Lehnert v. Ferris Faculty Ass'n, 111 S. Ct. 1950, 1975-76 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part) (criticizing the majority's three-prong test to determine what expenses are chargeable to nonunion members of an agency shop as involving "substantial judgment call[s]" and "calculated to perpetuate give-it-a-try litigation").
7. Scalia, Rule of Law, supra note 1, at 1183.
9. Id.; see also Atchison, T., & S.F. Ry. v. Buell, 480 U.S. 557, 570 (1987) ("As in other areas of law, broad pronouncements in this area may have to bow to the precise application of developing legal principles to the particular facts at hand."); Nix v. Whiteside, 475 U.S. 157, 190 (1986) (Stevens, J., concurring in the judgment) ("[A] word is but the skin of a living thought [but a] 'fact' may also have a life of its own. . ."); Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 502 (1984) ("The content of the rule is not revealed simply by its literal text, but rather is given meaning through the evolutionary process of common-law adjudication. . ."); Clements v. Fashing, 457 U.S. 957, 975 (1982) (Stevens, J., concurring in part and concurring in the
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the case-by-case approach is a matter of judicial responsibility, \(^\text{10}\) applicable as well to statutory interpretation. \(^\text{11}\)

In the context of statutory interpretation, the contrast between Justice Stevens’s common law case-by-case approach and Justice Scalia’s text- and rule-based approach is characterized by their different attitudes toward legislative intent. Justice Stevens, adhering to the “judicial obligation to discern congressional intent,” \(^\text{12}\) prefers to rely on legislative intent rather than the statutory text as the ultimate criterion of statutory interpretation. \(^\text{13}\) Dissenting from a majority opinion written by Justice Scalia, Justice Stevens noted that “[i]n recent years the Court has vacillated between a purely literal approach to the task of statutory interpretation and an approach that seeks guidance from historical context, legislative history, and prior cases identifying the purpose that motivated the legislation.” \(^\text{14}\) He describes the literal approach as a process of putting on “thick grammarian’s spectacles” and “ignor[ing] the available evidence of congressional purpose.” \(^\text{15}\) Discussing the fear of judicial lawmaking, Justice Stevens states: “The Court concludes its opinion with the suggestion that disagreement with its textual analysis could only be based on the dissenter’s preference for a ‘better’ statute. It overlooks the possibility that a different view may be more faithful to Congress’s command.” \(^\text{16}\)

Justice Scalia is, by contrast, wary of the judge’s search for legislative intent. Looking for “genuine” legislative intent is a

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\(^\text{10}\) See Jones v. Thomas, 491 U.S. 376, 396 (1989) (Scalia, J., dissenting) (stating that clear rules define double jeopardy and “[t]hree strikes is out”).

\(^\text{11}\) Cruzan v. Director, Mo. Dep’t of Health, 110 S. Ct. 2841, 2879 (1990) (Stevens, J., dissenting) (“Our responsibility as judges both enables and compels us to treat the problem as it is illuminated by the facts of the controversy before us.”).

\(^\text{12}\) United States v. Kozinski, 487 U.S. 931, 965-66 (1988) (Stevens, J., concurring in the judgment) (stating that the statutory definition of “involuntary servitude” should be defined by the “common-law tradition of case-by-case adjudication”).


\(^\text{14}\) See Popkin, supra note 6, at 1136-60 (discussing Justice Stevens’s deference to legislative language and case-by-case adjudication).


\(^\text{16}\) Id. at 1154.

Id. at 1155-56.
"wild goose chase." Moreover, in Justice Scalia's view, placing legislative intent before the text constitutes a "backwards" method of statutory interpretation because one can determine legislative purpose only by "examining the language that Congress used." Near the surface of these comments lies his suspicion that the judicial quest for legislative intent uncovers only that which the judge chooses to find. He objects to courts beginning the process of statutory interpretation with "an expectation about what the statute must mean" because, inevitably, the court will "interpret[] the words of the statute to fulfill its expectation."

Justice Scalia objects even more adamantly to a judge's use of legislative purpose to determine whether old statutory language applies in a contemporary setting. He claims never to have heard of a theory of statutory construction which asserts a judicial power to find an exception on the ground that, if the enacting Congress had foreseen modern circumstances, it would have adopted such an exception, since otherwise the effect of the law would extend beyond its originally contemplated purpose. . . . The principle of our democratic system is not that each legislature enacts a purpose, independent of the language in a statute, which the courts must then perpetuate, assuring that it is fully achieved but never overshot by expanding or ignoring the statutory language as changing circumstances require.

He expects that "[i]n practice, the rewriting [of the statute] is less likely to accord with the legislative purposes of yesteryear than the judicial predilections [sic] of today." He objects to Justice Stevens's "guess[ing] the desires of the present Congress, or of Congresses yet to be," because the "will of Congress' we look to is not a will evolving from Session to Session,

20. Chisom, 111 S. Ct. at 2369 (Scalia, J., dissenting).
22. Id. at 325; see also Rose v. Rose, 481 U.S. 619, 640-44 (1987) (Scalia, J., concurring in part and concurring in the judgment) (basing his concurrence on a close reading of a statute's text and eschewing the majority's reliance on legislative intent).
but a will expressed and fixed in a particular enactment." 23

Occasionally, Justice Scalia appears willing to indulge in the "benign fiction" of guessing at legislative intent. 24 His concession is very limited, though, and completely unrelated to legislative purpose. He assumes only that the legislature intends to adopt clear background traditions to avoid "absurd" results, 25 or at least to prevent results which are "contrary to fundamental notions of justice." 26 Justice Scalia is also willing to reject the ordinary meaning of the statutory text for a permissible meaning, but only when "established" canons of construction undermine the text. 27 By contrast, Justice Stevens considers a much broader range of background context to determine legislative intent, expressing a willingness to assume that "an old rule that is an established and important part of our national policy" is "not changed simply by inadvertent use of broad statutory language." 28

In the same vein, Justice Scalia strictly limits the role of statutory context to shedding light on the meaning of specific words. He considers the mischief which the statute aimed to remedy only to determine how the legislature used language at the time of the statute's adoption. 29 Moreover, he believes context alone is insufficient to infer a private cause of action from

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24. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527-28 (1989) (Scalia, J., concurring in the judgment) (claiming that the presumption that Congress always has the surrounding body of law in mind when it writes a statute is nothing more than a "benign fiction").

25. Id. at 527 (Scalia, J., concurring in the judgment) (asserting that the text's apparent unequal treatment of civil defendants and plaintiffs is "absurd"); see also K Mart, 486 U.S. at 324 n.2 (Scalia, J., dissenting) (discussing the "venerable principle that a law will not be interpreted to produce absurd results"); INS v. Cardoza-Fonseca, 480 U.S. 421, 452 (1987) (Scalia, J., concurring in the judgment) (supporting 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").


27. Chisom v. Roemer, 111 S. Ct. 2354, 2369, 2372 (1991) (Scalia, J., dissenting) (discussing the use of "established canons of construction" to determine if "some permissible meaning other than the ordinary one applies").


a statute whose text does not provide the remedy.30 Once again, Justice Stevens disagrees, relying on statutory context to infer a private cause of action despite the lack of a remedy in the text.31

This Article critiques Justice Scalia's text- and rule-based approach to statutory interpretation from an "internal" legal perspective. The term "internal" refers to criteria determining the proper role of judging in statutory interpretation, rather than the impact of interpretation on substantive results. There have been suggestions that Justice Scalia's approach is anti-egalitarian32 and reflects a commitment to traditional notions of individual virtue and responsibility.33 While perhaps accurate, these observations are not central to this Article. This Article is concerned with Justice Scalia's conception of judging—specifically focusing on the constitutional, policy, and consequentialist values which might support a text- and rule-based approach to statutory interpretation.

This discussion also omits another much-critiqued aspect of Justice Scalia's textualism—his rejection of legislative history.34 A commitment to the text involves much more than the refusal to consider legislative history, which presents special problems of reliability and availability.35 This Article addresses the broader question of avoiding judicial lawmaking through a text- and rule-based approach to statutory interpretation.

This Article implicitly assumes that a judge's theory of statutory interpretation influences decisions. This may seem fanciful to Legal Realists, who expect substantive orientation to determine results, and there is some evidence in Justice Scalia's opinions that substantive considerations influence statutory interpretation.36 More typically, however, Justice Scalia can be

34. See Eskridge, supra note 1, at 650-56.
35. For British commentary on these problems, see Alec Samuels, The Interpretation of Statutes, STATUTE L. REV. 1980-81, at 86, 95-99.
36. Scalia is willing to go beyond the statutory text to infer a federal common law defense for a private contractor in a cause of action arising out of dealings with the United States military, but is reluctant to infer private remedies from federal statutes which do not explicitly provide them. Compare Boyle v. United Technologies Corp., 487 U.S. 500, 511-12 (1988) (finding federal
faulted for inconsistency and overstating claims that a text is clear. One misses the strength and potential impact of his theory of judging, however, by treating his approach to statutory interpretation as opportunistic. Some inconsistency is probably a product of collaborative opinion writing, of not being too much a judicial bull in a china shop, and (perhaps) of simply not being consistent. There are strong signs that Justice Scalia's perspective is not narrowly focused on substantive results. For at least some judges, a theory of statutory interpretation matters.

military contractors impliedly shielded from state law liability) with Thompson v. Thompson, 484 U.S. 174, 192 (1988) (Scalia, J., concurring in the judgment) (advocating a rule that private rights of action not be inferred).

37. In Anderson v. Creighton, 483 U.S. 635, 644-46 (1987), Scalia expanded qualified prosecutorial immunity beyond the common law, but in Burns v. Reed, 111 S. Ct. 1934, 1945-47 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part), he limited absolute immunity to the common law. In Burns, Justice Scalia reconciled the two approaches on the ground that abandoning the common law in Anderson created a more limited scope for judicial discretion than would rejecting the common law in Burns. 111 S. Ct. at 1946 n.1. Limiting judicial lawmaking is, of course, Justice Scalia's summmum bonum. Cf. Strauss, supra note 32, at 1712-15 (finding Justice Scalia inconsistent regarding which precedents to abandon).

Cases involving issues in which the Court has previously gone beyond the text provide a complex testing ground for the neutrality of Justice Scalia's approach. In such circumstances, Justice Scalia could adopt one of three approaches: reject precedent and return to the original meaning of the text, Robert A. Burt, Precedent and Authority in Antonin Scalia's Jurisprudence, 12 Cardozo L. Rev. 1685, 1685-89 (1991); reject precedent in favor of traditional common law rules, Strauss, supra note 32, at 1705-08; or reluctantly accept the precedent, Lampf v. Gilbertson, 111 S. Ct. 2773, 2783 (1991) (Scalia, J., concurring in part and concurring in the judgment) (accepting the existence of implied causes of action based upon principles of stare decisis).


Part I of this Article provides representative examples of his opinions, illustrating his commitment to ordinary meaning, his "proper English" approach to construing statutory texts, and his reliance on a super-text consisting of multiple statutes. We need to understand exactly how far Justice Scalia is willing to go to avoid case-by-case common law decision making before we can intelligently criticize his theory of statutory interpretation.

Part II addresses the constitutional, policy, and consequentialist arguments which Justice Scalia might advance to support his approach. First, it explains why Justice Scalia does not rest his approach to statutory interpretation on the Constitution. Second, it criticizes his reliance on rule of law policies, such as equal treatment, anti-retroactivity, and separation of powers, for limiting judicial lawmaking. This section argues that recasting separation of powers issues as a problem of legal language puts Justice Scalia's position in a less favorable light. Third, it rejects Justice Scalia's consequentialist argument that the public's perception of judicial lawmaking will undermine respect for the courts and thereby hamper their ability to protect individual rights.

I. JUSTICE SCALIA'S TEXT- AND RULE-BASED APPROACH TO STATUTORY INTERPRETATION

A. DEFERENCE TO THE TEXT

The concept of a statutory text to which a judge might defer is complex. The conventional definition of the text includes, first, the ordinary meaning of a word or phrase, and, second, consideration of the surrounding textual material within the statute ("internal context"). A third, more controversial, conception expands the relevant text to include all or at least a large group of statutes passed by the legislature—a kind of "super-text" which is presumed to be part of an integrated body of law. Justice Scalia relies on all three concepts of the statutory text rather than looking elsewhere for legislative intent.

1. Ordinary Meaning

When we think of words with an ordinary meaning to which the judge defers, the classic example that comes to mind
is the requirement that the President be thirty-five years old.\textsuperscript{41} The reader knows what this means without even trying, because there appears to be no set of facts which could render the text uncertain.\textsuperscript{42} Justice Scalia does not limit deference to ordinary meaning to such unproblematic examples. In \textit{Chisom v. Roemer},\textsuperscript{43} for example, Justice Scalia, citing \textit{Webster's Dictionary}, states that "[t]here is little doubt that the ordinary meaning of 'representatives' does not include judges," and that "the ordinary speaker in 1982 [when the Voting Rights Act was amended] would not have applied the word to judges."\textsuperscript{44} Elected judges were therefore excluded from the Act's coverage. The fact that the statute was a remedy for discrimination in the electoral process was of no moment. "Section 2 of the Voting Rights Act is not some all-purpose weapon for well-intentioned judges to wield as they please in the battle against discrimination. It is a statute."\textsuperscript{45} Only "established" canons of construction can question ordinary meaning and point instead to a permissible meaning.\textsuperscript{46}

Justice Scalia's opinion in \textit{Chisom} does refer at one point to a policy concern. He notes that the one-person/one-vote rule does not apply to judges, so the application of the Voting Rights Act to judges raises the proportional representation spectre of determining "the voting strength that the minority bloc \textit{ought to have}" in judicial elections.\textsuperscript{47} This policy is not, however, advanced as an affirmative reason to support his interpretation. It is put forward only as a check on his reading of the text, to make sure that it "makes sense."\textsuperscript{48}

Justice Stevens, by contrast, found it "difficult to believe

\begin{thebibliography}{99}
\bibitem{1} U.S. CONST. art. II, § 1, cl. 2.
\bibitem{2} \textit{But see} Anthony D'Amato, \textit{Aspects of Deconstruction: The "Easy Case" of the Under-Aged President}, 84 NW. U. L. REV. 250, 250 (1989) (suggesting circumstances which might create uncertainty).
\bibitem{3} 111 S. Ct. 2354 (1991).
\bibitem{4} \textit{Id.} at 2372 (Scalia, J., dissenting) (citing \textit{WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY} 2114 (1950); Oliver W. Holmes, \textit{The Theory of Legal Interpretation}, 12 HARV. L. REV. 417 (1898-99)).
\bibitem{5} \textit{Id.} at 2369. Scalia discusses his suspicion of judges interpreting a statute in light of its remedial purposes in Scalia, \textit{Canards, supra} note 39, at 581-86.
\bibitem{6} 111 S. Ct. at 2369.
\bibitem{7} \textit{Id.} at 2374.
\bibitem{8} \textit{Id.} at 2375 (stating that there is "enough to convince me that there is sense to the ordinary meaning of 'representative' in [the statute]"). Even legislative history can be considered to make sure that what seems unthinkable to the judge was not the legislature's intention. Green \textit{v. Bock Laundry Mach. Co.}, 490 U.S. 504, 527 (1989) (Scalia, J., concurring in the judgment).
\end{thebibliography}
that Congress, in an express effort to broaden the protection afforded by the Voting Rights Act, withdrew, without comment, an important category of elections from that protection." He notes that the Louisiana Bar Association characterized state Supreme Court members as "representatives," and relies on the "broad remedial purpose of ‘rid[ding] the country of racial discrimination in voting.’" A statute, in other words, is more than the ordinary meaning of the text. The impact of an interpretation set against the background of the statute’s remedial purposes is not only a check on whether the interpretation "makes sense," but is part of the process of determining what the statute means in the first place.

The fundamental difference between Justices Scalia and Stevens is clear. For Justice Stevens, the Court exercises a responsibility to see whether strong legislative policies unsettle the ordinary meaning of the text and support a permissible meaning. For Justice Scalia, only established canons of construction can unsettle ordinary meaning, and substantive policies are admissible only to check whether the statutory text makes sense. This textualism extends well beyond uncontroversial reliance on the plain meaning of the requirement that the President be age thirty-five. It requires that to determine what the statute means the judge put on blinders that shield the legislative purpose from view.

2. Internal Context—Proper English

When we think of relying on internal context to determine the meaning of a statutory text, we think of applying such uncontroversial maxims as the principle that "words grouped in a list should be given a related meaning." Justice Stevens has applied that maxim to conclude, for example, that a statute prohibiting state courts from issuing writs of "attachment, injunction, or execution" against national banks applied only to injunctions by creditors, not debtors, in part because the word "injunction" was sandwiched between two terms applicable only to writs used by creditors to obtain a debtor's assets.

In this example, Justice Stevens properly relies on internal

49. 111 S. Ct. at 2368.
50. Id. at 2367.
51. Id. at 2368 (citing South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966)).
53. Id. at 324.
54. Id. at 322.
context based on the way people often use the English language. A word really does take on ordinary meaning from association with its neighbors in a list. Justice Scalia's reliance on internal context cannot, however, make the same claim to rely on ordinary language practices. Despite his references to the way language is "naturally" used, his resort to internal context in statutory interpretation has very little to do with how people ordinarily use the language. Indeed, he implicitly concedes as much when he contrasts "casual conversation," where "absent-minded duplication and omission are possible," with legislation, where "Congress is not presumed to draft its laws that way." Presumptions about legislative drafting are very different from applying standards of actual usage to interpret a document. As the remainder of this section illustrates, Justice Scalia determines what statutory text means by presuming authorship by an ideal drafter who meets proper standards of style and grammar. This serves his textualist objectives very well, by limiting the judicial interpreter's discretion and, perhaps, goading the legislature into more careful drafting. Such presumptions are not, however, genuinely concerned with how people ordinarily use and understand language.

a. Style

Justice Scalia holds Congress to a standard of good writing style. A good example is Church of Scientology v. IRS. This case involved a statutory exception to a tax law provision limiting public access to income tax return information. The statute defined unavailable "return information" at great length, set forth in the footnote. The definition contains a long list of

55. See, e.g., Chisom v. Roemer, 111 S. Ct. 2354, 2374 (1991) (Scalia, J., dissenting) (stating that the word "candidates" is the more "natural" choice than "representatives" to refer to elected judges); Moskal v. United States, 111 S. Ct. 461, 471, 472 (1990) (Scalia, J., dissenting) ("adverb preceding the word 'made' naturally refers to the manner of making"); Sullivan v. Everhart, 494 U.S. 83, 90 (1990) ("it would have been more natural to refer to 'the correct amount of any payment'"); Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 124-25 (1989) (stating that anything other than consistent usage of phrase in the statute would be "unnatural"); see also Owen v. Owen, 111 S. Ct. 1833, 1837 (1991) (describing various language practices as "permissible," though not "common usage").

58. Id. at 155.
59. 26 U.S.C. § 6103(b)(2) (1988) defines "return information" as:
(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities,
items, followed by a brief “does not include” clause, as follows: “but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.”60 This clause was known as the Haskell Amendment, because it was inserted into the committee-proposed bill by Senator Haskell’s floor amendment.61 The issue in the case was whether the Haskell Amendment allowed the public access to information that did not identify a particular taxpayer because the names, identifying numbers and other similar information had been removed.62

Judge Scalia agreed with the Seventh Circuit’s holding that the statute “protects from disclosure all non-amalgamated items listed in [the subsection], and that the Haskell Amendment provides for the disclosure of only statistical tabulations which are not associated with or do not identify particular taxpayers.”63 Despite his references to how legislative intent would “naturally” be expressed, he in fact imposes an ideal drafting style as a standard of statutory interpretation, the full flavor of which requires a lengthy quote:

The starting point of analysis, of course, is the text of the provision at issue which . . . is ill suited to achieve [the claimant’s interpretation]. It would be most peculiar to catalogue in such detail, in subparagraph (A) of the body of the definition, the specific items that constitute “return information” . . . while leaving to an afterthought the major qualification that none of those items counts unless it identifies the taxpayer. Such an intent would more naturally have been expressed not in an exclusion (“but such term does not include . . .”) but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

Id. (emphasis added).

60. Id.

61. See 792 F.2d at 174-75 (Wald, J., dissenting) (discussing the legislative history of the Haskell Amendment).

62. Id. at 155. Examples of this type of document include tax returns with the taxpayer’s name and social security number deleted or schedules of information attached to returns that did not identify particular taxpayers.

63. Id. at 156-57 (quoting King v. IRS, 688 F.2d 488, 493 (7th Cir. 1982)).
but in the body of the definition—by stating, for example, that “the term 'return information' means the following information that can be associated with or identify a particular taxpayer: . . ." If the intended scope of the exclusion is as [claimant argues], the structure of the provision is akin to defining mankind as “all mammals in the world, but excluding those that are not relatively hairless bipeds with the power of abstract reasoning.” While such a form of definition is conceivable, it would constitute “everyday language” (as the dissent characterizes it, . . .) only for one of Lewis Carroll’s characters, and it hardly takes “talmudic dissection[]” or “microscopic scrutiny,” to reject it as implausible.64

The dissent interpreted the Haskell Amendment more broadly to permit disclosure. It observed that Congress adopted the Haskell Amendment in a rush to final adjournment without the care that an ideal drafter might have lavished on the text.65 The reality of legislative drafting, not the perspective of the ideal drafter, was the relevant criterion for understanding the statute.

b. Grammar

Justice Scalia’s opinion in Crandon v. United States66 illustrates his reliance on correct grammatical standards to interpret a statutory text. The case dealt with termination payments by the Boeing Company to former employees who were about to begin work for the federal government. A statute made the following behavior criminal:

[R]eceive[ing] any salary, or any contribution to or supplementation of salary, as compensation for . . . services as an officer or employee of the executive branch of the United States Government . . . from any source other than the Government of the United States [; and] . . . pay[ing], or mak[ing] any contribution to, or in any way supple-ment[ing] the salary of, any such officer or employee under circum-
stances which would make its receipt a violation of this subsection

. . . .67

The majority concluded that the payment was illegal only if it occurred while the recipient was a government employee.68 Justice Stevens, writing for the majority, relied on the text, legislative history, and the “spirit and policy” of the statute.69 Justice Scalia rejected the majority’s interpretation because,

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64. Id. at 157 (citations omitted) (quoting parts of Judge Wald’s dissenting opinion).
65. Id. at 174, 176 (Wald, J., dissenting).
67. Id. at 169 (Scalia, J., concurring in the judgment) (quoting 18 U.S.C. § 209(a) (1988)).
68. Id. at 168.
69. Id. at 158-68.
according to him, the statute's grammar could not support that result. The essence of his argument is that the object of the verb "pay" is "salary," not "officer or employee," because otherwise the pronoun "its" has no antecedent. Once again, the full flavor of his ideal drafter, "proper English" approach requires a lengthy quote:

The Court is led astray, I think, by its perception that the statute "is directed to every person who 'pays' . . . 'any such officer or employee,' "—which leads to the reasonable enough contention that unless the recipient is an officer or employee at the time of payment the provision is not violated. But in order to make "any such officer or employee" the object of the verb "pays," the clause must be rendered ungrammatical, reading "[w]hoever pays . . . any such officer or employee under circumstances which would make its receipt a violation of this subsection." The pronoun "its" has no antecedent . . . . It seems to me quite clear that the object of "pays" must be, not "any such officer or employee," but rather "the salary of, any such officer or employee," so that the later phrase "its receipt" refers to the receipt of the salary.  

Justice Scalia admitted that his "interpretation of the second clause mean[t] that the comma after the phrase 'the salary of' should instead have been placed after the word 'supplements.' " He concluded, however, that "a misplaced comma is more plausible than a gross grammatical error."  

Justice Scalia's dissent in Moskal v. United States also illustrates his reliance on grammatical English. The statute at is-

70. Id. at 169-70 (Scalia, J., concurring in the judgment) (citations omitted).
71. Id. at 170 (Scalia, J., concurring in the judgment).
72. Id. The majority opinion did not note that the problem with the pronoun "its" is avoided if one assumes that the drafter meant to say "the receipt," instead of "its receipt." The drafter's substitution of "its" for "the" is poor style, but is not an unlikely drafting error.

Justice Scalia concurred with the Court's conclusion that Boeing did not violate the statute despite his disagreement with the majority's statutory interpretation. He concluded that the statutory term "salary" refers to periodic payments, not the single payments Boeing made to its former employees. He based his conclusion on additional evidence of the text's meaning. First, when the statute was adopted there was a serious problem with governmental hiring of individuals at nominal salaries while private organizations paid their real compensation. Id. at 175. Second, another government ethics provision of the United States Code prohibited "compensation" payments under the same circumstances in which Boeing had paid its former employees. If "salary" meant single payments, the "salary" statute was surplusage, prohibiting what the "compensation" statute already proscribed. Id. at 171-72 (referring to 18 U.S.C. § 203 (1988)). See infra text accompanying notes 82-104 for a discussion of Justice Scalia's treatment of multiple statutes as an integrated text.
sue makes criminal a "falsely made" document. The majority held that this included documents whose contents were false. Justice Scalia argued that the phrase referred only to documents which were themselves made falsely, as in a forgery. He appealed to the layman's proper use of English:

Surely the adverb preceding the word 'made' naturally refers to the manner of making, rather than to the nature of the product made. An inexpensively made painting is not the same as an inexpensive painting. A forged memorandum is 'falsely made'; a memorandum that contains erroneous information is simply 'false'.

As in Crandon, however, Justice Scalia had a problem deciding which proper use of English to prefer. The statute listed a series of criminal actions with respect to documents, including "falsely made, forged, altered, or counterfeited" documents. Defining "falsely made" to include forgery created surplusage in the statute, which Justice Scalia admits is an example of bad drafting. Such drafting is, however, typical of bad legal drafting and, put to the choice, Justice Scalia preferred statutory surplusage to what he called "unnatural meaning."

But how unnatural is sloppy use of adverbs? English users often use adverbs carelessly. If I concluded this Article by stating—"Hopefully, I have written a persuasive Article"—you will take me to mean that I hope I have convinced you, not (what is correct grammar) that I am writing this Article hopefully.

I am not suggesting that Justice Scalia's conclusion in Moskal was wrong. The majority acted questionably in relying on legislative intent to resolve textual ambiguity against a criminal accused, and there was strong evidence that the phrase "falsely made" had the specialized legal meaning of forgery. The

74. Id. at 462 (referring to 18 U.S.C. § 2314 (1988)).
75. Id. at 468.
76. Id. at 471 (Scalia, J., dissenting).
77. Id.
78. Id. (quoting 18 U.S.C. § 2314 (1988)).
79. Id. at 471-72. Scalia stated that:
The Court maintains, however, that giving 'falsely made' what I consider to be its ordinary meaning would render the term superfluous, offending the principle of construction that if possible each word should be given some effect. The principle is sound, but its limitation ('if possible') must be observed. It should not be used to distort ordinary meaning. Nor should it be applied to the obvious instances of iteration to which lawyers, alas, are particularly addicted . . . . Since iteration is obviously afoot in the relevant passage, there is no justification for extruding an unnatural meaning out of 'falsely made' simply in order to avoid iteration.

Id.
80. Id. at 472-74 (Scalia, J., dissenting).
point is that Justice Scalia relies on an ideal drafter's standard of grammar, not legislative intent or background values, as the dominant interpretive criterion. He clearly admits as much when he regards appeal to the Rule of Lenity in *Moskal* as "surely superfluous" in light of his grammatical reading of the text.81

3. Multiple Statutes as a Super-Text

Ordinary meaning and internal statutory context are conventional criteria for determining statutory meaning, even if Justice Scalia's reliance on these criteria is anything but conventional. Much more controversial is his treatment of multiple statutes as a single document written by an ideal drafter who integrates them into a super-text. He applies to multiple texts the same maxims of linguistic usage which are often applied to a single statute: similar terms in different statutes are given the same meaning;82 express inclusions in one statute exclude similar meanings in other statutes which do not contain similar language (*expressio unius exclusio alterius*);83 and a specific statute governs the general.84 These are familiar doctrines in statutory interpretation. They attract considerable support because they may implement legislative intent as well as the textualist's approach. For example, the prevalence of special statutes over the general often prevents the unintentional repeal of a prior specific statute. And interpreting similar language to have the same meaning makes sense when similar purposes underlie two statutory provisions. A textualist, however, is not concerned with whether repeal by general language is unintentional or whether similar language reflects similar statutory purposes. The textualist simply assumes that multiple statutes have been carefully and coherently drafted by a single author, even though that is an obvious fiction.85 Indulging the fiction of an ideal drafter makes sense, however, from several perspectives attractive to a

81. *Id.* at 477.
85. *See* In re *Wagner*, 808 F.2d 542, 546 (7th Cir. 1986). In *Wagner*, Judge Posner stated that it would be unrealistic to attach any weight to an argument which uses language from one section of the United States Code to give meaning to another section because "the United States Code is not the work of a single omniscient intellect." *Id.*
textualist like Justice Scalia. It deters judicial speculation about the purpose of a particular statute, and it might encourage careful drafting by Congress. It may even protect reader reliance interests if the typical reader treats the multiple statutory texts as an integrated document. But this "textualism with a purpose" has little to do with the way ordinary language is used. People do not routinely integrate language usage over time with the care of an ideal drafter. And legislatures often (though not inevitably) fail to write with such care, reacting instead to problems at hand.

The most problematic example of the super-text approach is application of the expressio unius maxim to multiple statutes. For example, in *West Virginia University Hospitals v. Casey* Justice Scalia supported his inference that the statutory term "attorney's fees" did not include fees for experts by contrasting the language of the interpreted statute with other statutes which referred to both attorneys and experts. This attracted a dissent by Justice Stevens, who focused on the history and purpose of the particular statute being interpreted. He stated:

We should look at the way in which the Court has interpreted the text of this statute in the past, as well as this statute's legislative history, to resolve the question before us, rather than looking at the text of the many other statutes that the majority cites in which Congress expressly recognized the need for compensating expert witnesses.

The underlying assumption behind the expressio unius maxim runs counter to what we know about how legislatures operate. Even within a single statute, the idea that express references exclude what is not specifically stated is foreign to the political reality of a busy legislature attending to problems called to its attention. The unstated is more likely to have been disregarded rather than purposefully omitted.

The notion of an integrated super-text focuses attention on a problem which a judge looking at the internal context of a single statute must confront, but which does not bother the super-textualist. The assumption behind looking at "internal context" to interpret statutory language, insofar as it is based on ordinary usage, is that both drafter and reader share common assumptions about how the language is used. However, the fact that the legislature codifies text at a particular place in the statutory code does not mean that all of the surrounding

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87. *Id.* at 1149 (Stevens, J., dissenting).
language was drafted at the same time. When statutory language is added to the code at a later date, the drafter may or may not have meant the surrounding text to be part of an integrated document. Statutory readers might read the text as a whole, which is more than enough for a textualist committed to reading multiple texts as a super-text. But a judge concerned with the legislative drafter's intent regarding the use of language will want more evidence that the drafter was cognizant of the surrounding language before relying on internal context. For example, in two cases Justice Stevens dissented from the Court's assumption that the same words had the same meaning in different parts of the same statute when the texts were drafted at different times, there was no evidence that the drafter was aware of the surrounding text, and there was strong evidence that legislative purpose would not be served by interpreting the words to have the same meaning. Justice Scalia was on the Court when the second of these cases was de-

88. In Sorenson v. Secretary of Treasury, 475 U.S. 851 (1986), the Court interpreted the word "overpayment" found in the 1981 Omnibus Budget Reconciliation Act, which provided for intercept of tax refunds of "overpayments" to pay child support. Id. at 859-65. The Court discussed a 1975 statute, which gave an earned income credit to poor families, to be paid in the form of a refund of "overpayments." Id. at 866. The definition of "overpayment" refunded under the earned income credit program was codified in the section immediately preceding the intercept provision. Id. at 863-64. But the two provisions were drafted at different times. Id. Justice Stevens argued that it defied belief to think that Congress realized that the intercept provision in a vast, hurriedly enacted omnibus statute changed the earned income credit program. Id. at 866-67 (Stevens, J., dissenting).

In Sullivan v. Stroop, 110 S. Ct. 2499 (1990), the Court interpreted 1984 amendments to Part IV-A of the Social Security Act, which permitted the disregard of "child support" in computing income. Disregarding "child support" had the effect of increasing AFDC payments to the poor, and mitigated hardship resulting from the amendments' inclusion of the child's income in family income for computing AFDC benefits. Id. at 2510 (Stevens, J., dissenting). The majority limited the definition of "child support" to parental support and excluded from its definition Social Security benefits to the child. Id. at 2504. It relied on the fact that the "child support" disregard phrase appeared in Part IV-A of the Act, and Part IV-D, though drafted at a different time, dealt with enforcing "child support" orders applicable to absent parents. Id. at 2503. Justice Stevens included government Social Security in the "child support" disregard rule, along with parental child support, citing the hardship mitigation purpose of the 1984 amendments. Id. at 2510 (Stevens, J., dissenting).

In another case, Justice Stevens drew inferences from the Revisor's codification of statutory law, juxtaposing two sections of law passed at different times, rather than on the original drafter's placement of the sections. Third Nat'l Bank v. IMPAC Ltd., 432 U.S. 312, 316-18 (1977). There were good policy reasons, however, to assume that the Revisor was correct. Id. at 322-23 (1977).
cided, and he joined the majority’s super-text approach.\textsuperscript{89}

A comparison of Justice Scalia’s textualist approach to integrating statutes into a super-text with the way Justice Frankfurter treated multiple statutes is especially interesting in view of the alleged affinity between the two Justices.\textsuperscript{90} In United States v. Monia,\textsuperscript{91} the majority held that the plain language of the Sherman Act granted a witness immunity regardless of whether the witness claimed the privilege against self-incrimination.\textsuperscript{92} In his dissent, Justice Frankfurter stated that whether a witness could obtain immunity without claiming the privilege against self-incrimination “cannot be answered by closing our eyes to everything except the naked words of the [statute.] The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification.”\textsuperscript{93} He observed that although three statutes (including the statute at issue) provided immunity regardless of whether the witness claimed the privilege, fourteen statutes provided immunity only where the witness claimed the privilege.\textsuperscript{94} In his view, “the process of construing a statute cannot end with noting literary differences. The task is one of finding meaning; and a difference in words is not necessarily a difference in the meaning.”\textsuperscript{95} He stated, “if a single draftsmen had drafted each of these provisions in all seventeen statutes, there might be some reason to believe that the differences in language reflected a difference in meaning.”\textsuperscript{96} However, he refused to indulge in the fiction that statutes were written by a “single draftsman.”\textsuperscript{97} He concluded that the Sherman Act required the witness to claim immunity despite the plain language to the contrary and even though the Sherman Act differed in statutory text from the other statutes which did grant immunity without it being claimed by defendant.\textsuperscript{98} In Keifer & Keifer v.

\textsuperscript{89} See Sullivan, 110 S. Ct. at 2499.
\textsuperscript{91} 317 U.S. 424 (1943).
\textsuperscript{92} Id. at 426.
\textsuperscript{93} Id. at 431 (Frankfurter, J., dissenting).
\textsuperscript{94} Id. at 442-43.
\textsuperscript{95} Id. at 443.
\textsuperscript{96} Id. at 444.
\textsuperscript{97} Id.
\textsuperscript{98} Id. at 446.
Reconstruction Finance Corp., Justice Frankfurter interpreted a statute to include a waiver of immunity by a government corporation, even though the statute's language did not explicitly provide a waiver. Forty other statutes provided a waiver and he would not impute incoherence to statutory law. This was "not a textual problem; for Congress has not expressed its will in words;" the judge's task was the "ascertainment of policy immanent ... in a series of statutes." Finally, in United States v. Hutcheson, Justice Frankfurter engaged in what the dissent called "a process of construction never ... heretofore indulged by this Court," by interpreting a later statute denying a labor injunction to be an implicit repeal of a prior criminal statute.

The difference between Justices Frankfurter and Scalia is palpable. It is hard to imagine Justice Scalia stating that interpretive questions "cannot be answered by closing our eyes to everything except the naked words of the [statute]." Or that the "task is one of finding meaning[] and a difference in words is not necessarily a difference in meaning." Or that interpretation is "not a textual problem for Congress has not expressed its will in words." But, then, Justice Frankfurter considered a statute a "living organism[,]" a phrase Justice Scalia is unlikely to apply to a statute. For Justice Frankfurter, multiple statutes do not present a textual problem, but a problem of policy coherence for which the judge is responsible.

B. UNCLEAR TEXTS AND CLEAR SUBSTANTIVE PRESUMPTIONS

If the text is unclear, the judge must find a rule to decide the case. Justice Scalia's solution to this problem is to minimize the opportunity for judicial lawmaking by adopting clear rules. The most controversial aspect of this approach is his use of tradition as the primary source of clear rules. In many constitutional cases involving substantive due process, Justice Scalia

100. Id. at 397.
101. Id. at 394.
102. Id. at 389.
103. 312 U.S. 219 (1941).
104. Id. at 245 (Roberts, J., dissenting).
105. See supra text accompanying note 93.
106. See supra text accompanying note 95.
107. See supra text accompanying note 102.
refuses to find due process rights unless supported by a well-established tradition.\textsuperscript{109} In statutory interpretation cases, "established" canons of construction provide the standard against which to test whether ordinary meaning applies.\textsuperscript{110}

Not surprisingly, Justice Stevens takes a different approach. He notes Justice Scalia's view "that 'when a practice not expressly prohibited by the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down.'\textsuperscript{111} He then observes that "if the age of a pernicious practice were a sufficient

\textsuperscript{109.} Justice Scalia has used this "well-established tradition" approach in cases involving abortion, other substantive due process issues, and procedural due process issues. For examples of abortion cases, see Ohio v. Akron Ctr. for Reproductive Health, 110 S. Ct. 2972, 2984 (1990) (Scalia, J., concurring) (abortion is "not to be found in the longstanding traditions of our society, nor can it be logically deduced from the text of the Constitution"); Hodgson v. Minnesota, 110 S. Ct. 2961 (1990) (Scalia, J., concurring in the judgment in part and dissenting in part) ("[O]ur society's tradition regarding abortion [gives] no hint that the distinctions are constitutionally relevant.").

For examples of other substantive due process cases, see Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841, 2859-60 (1990) (Scalia, J., concurring) ("[N]o 'substantive due process' claim can be maintained unless the claimant demonstrates that the State has deprived him of a right historically and traditionally protected against State interference. That cannot possible be established here [because suicide was a crime]," (citations omitted)); Michael H. v. Gerald D., 491 U.S. 110, 121-26 (1989) (plurality opinion) (natural father's parental rights regarding a child born to a woman currently married to another man are not "interest[s] traditionally protected by our society").

For examples of procedural due process cases, see County of Riverside v. McLaughlin, 111 S. Ct. 1661, 1672, 1677 (1991) (Scalia, J., dissenting) (protection from unreasonable searches and seizures should not be less than the traditional common law protection; the Court improperly balances interests to deprive claimant's rights); Burns v. Reed, 111 S. Ct. 1934, 1945 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part) (common law of 1871 necessary for prosecutorial immunity under statute; common law provided only qualified immunity); California v. Hodari D., 111 S. Ct. 1547, 1549-51 (1991) (traditional common law defines "arrest," after which search must be reasonable); California v. Acevedo, 111 S. Ct. 1982, 1993 (1991) (Scalia, J., concurring in the judgment) (confusion about reasonable searches will be relieved if claimant's rights are defined in terms of traditional common law); Schad v. Arizona, 111 S. Ct. 2491, 2505-07 (1991) (Scalia, J., concurring in part and concurring in the judgment) (common law defines what process is due).

Justice Scalia also admits, however, that the "Equal Protection Clause and other provisions of the Constitution, unlike the Due Process Clause, are not an explicit invocation of the 'law of the land,' and might be thought to have some counterhistorical content." Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1054 (1991) (Scalia, J., concurring).


reason for its continued acceptance, the constitutional attack on racial discrimination would, of course, have been doomed to failure.”

Instead, Justice Stevens argues, “[t]he tradition that is relevant in this case is the American commitment to examine and reexamine past and present practices against the basic principles embodied in the Constitution.”

We fail to understand Justice Scalia’s approach to statutory interpretation, however, if we focus only on the substantive implications of his appeal to tradition. His theory rests primarily on a rejection of judicial lawmaking, not on the substantive desirability of the specific tradition. In statutory interpretation cases, he is therefore adamant about relying on a clear rule even though it does not implement a strong tradition and even though the substantive rule is probably one he would not favor. For example, in *John Doe Agency v. John Doe Corp.*, the Court interpreted a provision of the Freedom of Information Act (FOIA) which exempted from disclosure “records or information compiled for law enforcement purposes.” The case concerned documents originally obtained by the Defense Contract Audit Agency of the Federal Government for accounting purposes which were later used by the United States attorney in a criminal investigation. The Court considered the congressional purpose “to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence.”

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112. *Id.*

113. *Id.* at 2746; see also *California v. Hodari D.*, 111 S. Ct. 1547, 1555 (1991) (Stevens, J., dissenting) (rejecting common law for a more expansive definition of Fourth Amendment rights).

In *Holland v. Illinois*, 493 U.S. 474, 482 (1990), Justice Scalia responded to Justice Stevens rejection of tradition. Justice Stevens contends that the historical record is in any event of not much importance to the question before us, since “[t]he Court has forsown reliance on venerable history to give meaning to the Sixth Amendment’s numerosity and unanimity requirements,” and so should not rely upon it here either. We have certainly held that a departure from historical practice regarding number and unanimity of jurors does not necessarily deny the right of jury trial. But that is quite different from saying that adherence to historical practice can deny the right of jury trial.

*Id.* (citations omitted).

114. See Kannar, *supra* note 2, at 1299 n.8.


116. *Id.* at 147 (citing 5 U.S.C. § 552(b)(7) (1988)).

117. *Id.* at 147-48.

Court concluded that ordinarily the word “compiled” refers to “materials collected and assembled from various sources or other documents,” and is not limited to documents compiled originally for law enforcement purposes. Therefore, the exemption from disclosure would apply in this case if the documents had been gathered for law enforcement purposes by the time the FOIA request was made. Justice Scalia dissented, relying on earlier decisions establishing a presumption that exemptions from the FOIA were to be narrowly construed. He found the word “compiled” ambiguous, capable of meaning either “‘the process of gathering’” material or “a more creative activity,” as in “‘compiling an enviable record of achievement.’” The latter construction would mean that the statute covered records “that the government has acquired or produced for” law enforcement purposes, “not material acquired or produced for other reasons, which it later shuffles into a law enforcement file.” Given this ambiguity, the presumption narrowly construing FOIA exemptions favored the interpretation permitting disclosure. Justice Scalia argued against the majority’s “workable balance” approach because of its uncertainty. He preferred adhering to the rules we have enunciated regarding interpretation of the unclear cases—thereby reducing the volume of litigation, and making it inescapably clear to Congress what changes need to be made. I find today’s decision most impractical, because it leaves the lower courts to guess whether they must follow what we say (exemptions are to be ‘narrowly construed’) or what we do (exemptions are to be construed to produce a ‘workable balance’).

C. UNCLEAR TEXTS AND DEFERENCE TO AGENCY DECISIONS

In Chevron USA, Inc. v. Natural Resources Defense Council, Justice Stevens ushered in the modern doctrine of deference to agency rules in the following terms: “[I]f Congress has not directly addressed the precise question at issue, . . . a court

119. Id. at 153.
120. Id. at 155. The Court noted that it was not clear when the records were compiled. The Court remanded the case to allow the lower courts to determine whether the documents were compiled for law enforcement purposes when the Government invoked the exemption. Id. at 155 n.6.
121. Id. at 161-62 (Scalia, J., dissenting).
122. Id. at 161 (quoting the John Doe majority).
123. Id.
124. Id.
125. Id. at 164.
126. Id.
may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." In later opinions, Justices Scalia and Stevens clashed over how congressional intent should be determined. Justice Stevens affirmed one strand of *Chevron*—the courts' affirmative role in deciding whether congressional intent is ambiguous:

The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing *traditional tools of statutory construction*, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

Justice Scalia, as might be expected, rejected reliance on "traditional tools of statutory construction" to determine whether congressional intent is clear, calling it an "evisceration of *Chevron*." The reason is not hard to find. He notes elsewhere that traditional tools of statutory interpretation include legislative purpose and legislative history, both of which allow the judge too much discretion. I have already noted Justice Scalia's objection to judicial reliance on legislative purpose because of the potential for judicial lawmaking. His objection to the use of legislative history is also partly based on this potential. Although the principal problem with relying on legislative history is that the statutory text is the only document adopted by the legislature and signed by the President, Justice Scalia is also concerned that using legislative history will afford judges too much discretion by multiplying the sources of law used to determine statutory meaning. He finds that the Court uses committee reports "when it is convenient, and ig-

128. *Id.* at 843-44.


130. *Id.* at 454 (Scalia, J., concurring in the judgment).


132. *See supra* text accompanying notes 16-22.

133. *FAIC Secs., Inc. v. United States*, 768 F.2d 352, 362 (D.C. Cir. 1985) ("Legislative history is a second-best indication . . . because it is . . ., in most of its manifestations, not even an expression of the relevant party at all."); *see Cardoza-Fonseca*, 480 U.S. at 452 (1987) (Scalia, J., concurring in the judgment) (rejecting the view that clear legislative intention expressed in legislative history can trump a clear statutory text).

Justice Scalia also stresses that most legislative history is not even known to voting legislators and is often written by unelected staff. *See Begier v. IRS*, 110 S. Ct. 2258, 2267-69 (1990) (Scalia, J., concurring in the judgment); *Hirschey v. Federal Energy Regulatory Comm'n*, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring).
nore[s] them when it is not." 134

Justice Scalia's alternative to traditional tools of statutory interpretation to determine whether congressional intent is clear is, of course, the text. Clarity, for Justice Scalia, is a characteristic of language. It is the opposite of "ambiguity," not "resolvability." 135 Deference to the agency does not turn on whether statutory interpretation is "difficult," but on whether the text is ambiguous. 136

The Stevens/Scalia dispute about how statutory ambiguity should be approached—whether by applying "traditional tools of interpretation" to determine legislative intent or by focusing on the text—continued in two 1990 decisions. In Sullivan v. Everhart, 137 Justice Scalia wrote for the Court, concluding that the provision of the Social Security Act dealing with recovery of overpayments was ambiguous, thus calling into play Chevron's deference to the agency's construction. The statute stated that "[w]henever the Secretary finds that more or less than the correct amount of payment has been made to any person . . . proper adjustment or recovery shall be made, under regulations prescribed by the Secretary." 138 However, the statute then limited recovery of overpayments in the following waiver provision:

[I]n any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment would defeat the purpose of this subchapter or would be against equity and good conscience. 139

The Secretary determined that an overpayment subject to waiver was the netted difference between past under- and over-

135. Scalia, Judicial Deference, supra note 17, at 520.

Deference [to the agency] is appropriate where the relevant language, carefully considered, can yield more than one reasonable interpretation, not where discerning the only possible interpretation requires a taxing inquiry. Chevron is a recognition that the ambiguities in statutes are to be resolved by the agencies charged with implementing them, not a declaration that, when statutory construction becomes difficult, we will throw up our hands and let regulatory agencies do it for us.

138. Id. at 85 (quoting 42 U.S.C. § 404(a)(1) (Supp. V 1987)).
139. Id. at 86 (quoting 42 U.S.C. § 404(b) (1982)).
payments. Justice Scalia gave the example of a recipient who was entitled to $100 in two successive months, but was erroneously paid $150 in one month and $80 in another, producing a net $30 overpayment, to which the waiver provisions might apply. The claimant argued instead that she was entitled to receive the $20 underpayment for one month and to seek a waiver of the $50 overpayment for the other month.

Justice Scalia held for the Court that the "correct amount," which was subject to the statutory waiver rules, could refer either to the amount for a given month or to a netted amount. He noted that the statute referred to the correct amount of "payment," not "any payment." In his view, if Congress had meant to specify that monthly overpayments and underpayments should not be netted, the statute would refer to "any payment," as it does in other sections of the statute. In any event, the text was ambiguous, so that under Chevron the Court should defer to the Secretary's interpretation.

Justice Stevens dissented, asserting "clear congressional intent" as the primary interpretive criterion. He found the netting procedure inconsistent with the mandatory character of the waiver provision and guessed that Congress probably did not have the netting problem in mind when it drafted the language concerning under- and overpayments. He rejected Justice Scalia's premise about precise legislative drafting: "[W]e ... do not sit to insist that Congress express its intent as precisely as would be possible. Our duty is to ask what Congress intended, and not to assay whether Congress might have stated that intent more naturally, more artfully, or more pithily."

Justice Stevens buttressed his conclusion by countering Justice Scalia's example of under- and overpayments encompassing two months in the same year with a different example. He observed that the majority decision would allow an overpayment ten years earlier to be balanced against an underpayment the month before an adjustment for the underpayment would

140. Id. at 87-88.
141. Id.
142. Id. at 90.
143. Id. at 90-91.
144. Id. at 88-83.
145. Id. at 103 (Stevens, J., dissenting).
146. Id. at 106 (Stevens, J., dissenting).
147. Id.
be made.148 This could leave the claimant in dire financial straits, with none of the prior overpayment still available, and "permit the Secretary to accomplish what the waiver provisions plainly and unequivocally forbid; namely a recovery by the United States of overpayments without a hearing on waiver."149 Justice Stevens's appeal to a hypothetical fact situation different from that posed by Justice Scalia illustrates how critical the facts are to statutory interpretation, despite Justice Scalia's effort to remain on the surface of the statutory text.

In Maislin Industries, U.S. v. Primary Steel,150 Justices Stevens and Scalia again differed about what the statute allowed the agency to do. This time Justice Stevens favored deference to the agency, while Justice Scalia opposed it,151 but their rationales were consistent with their underlying approaches to statutory interpretation. The agency rule permitted shippers and carriers to negotiate private flexible rates which were different from the fixed rates filed with the Interstate Commerce Commission. Justice Stevens perceived an evolving statutory shift towards deregulation, which was consistent with the agency's rule. Justice Scalia, however, thought that deference to the agency was improper because the text of the statute was clear.152 He accepted Justice Stevens's description of the contemporary statute as providing only the "skeleton of regulation . . . [with] the flesh . . . stripped away,"153 but he argued that "it is the skeleton we are construing, and we must read it for what it says."154 The agency's ability to update law to implement deregulation was limited, according to Scalia, by the statutory text.155

D. SUMMARY

This review of Justice Scalia's opinions reveals the rigor, even the rigidity, with which he applies his approach to statu-

148. Id. at 99 (Stevens, J., dissenting).
149. Id. at 102 (Stevens, J., dissenting) (quoting Lugo v. Schweiker, 776 F.2d 1143, 1155 (Gibbons, J., dissenting)).
151. See also Zeppos, supra note 38, at 1640 (citing several other examples in which Justice Scalia did not defer to the agency).
152. Compare Maislin, 110 S. Ct. at 2777 (Stevens, J., dissenting) with id. at 2771 (Scalia, J., concurring).
153. Id. at 2772 (Scalia, J., concurring) (citation omitted).
154. Id.; see also Department of Treasury v. Federal Labor Relations Auth., 494 U.S. 922, 928 (1990) (stating that the agency's interpretation is flatly contradicted by statutory language).
155. Maislin, 110 S. Ct. at 2772.
tory interpretation. The statute is its text, interpreted in the light of "proper English" and multiple statutes (the "supertext"). Despite his appeal to ordinary usage, Justice Scalia's text is what an ideal drafter might produce, not what everyday English users might understand. The ideal drafting standard is meant to minimize judicial lawmaking, not determine statutory meaning in the light of the realities of legislative drafting or public understanding.

Moreover, despite Justice Scalia's appeal to democratic values, discussed below, he is not really concerned with a real life and blood legislature behind the text. There is no political vitality underlying the statutory language, and judges certainly lack the political salience to breathe political life into an inert text (Supreme Court Justices are like "9 people picked at random"). It is the Court's task

not to enter the minds of the Members of Congress—who need have nothing in mind in order for their votes to be both lawful and effective—but rather to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times.

He has said: "[T]he main danger in judicial interpretation ... of any law is that the judges will mistake their own predilections for the law." Judicial discretion is the "frog" that should be turned "back to a prince," lest it become a "surrogate for [judicial] policy preferences."°

156. See infra text accompanying notes 189-195.


158. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 30 (1989) (per curiam) (Scalia, J., concurring in part and dissenting in part). In another statutory interpretation case Scalia stated:

Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law. We do so not because that precise accommodative meaning is what the lawmakers must have had in mind (how could an earlier Congress know what a later Congress would enact?) but because it is our role to make sense rather than nonsense out of the corpus juris.


160. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 857 (1990) (Scalia, J., concurring). Justice Scalia's concern with judicial discretion extends to both "liberal" and "conservative" political positions. Compare id. at 856-57 (Scalia, J., concurring) (indicating concern that a liberal judiciary would be willing to impose a retroactive burden on landlords but would have balked
How defensible is Justice Scalia's text- and rule-based approach to statutory interpretation? Does Justice Scalia rely on the Constitution? Do rule of law policies support his approach? Can his views on statutory interpretation be defended on consequentialist grounds, on the theory they preserve public confidence in the courts so that judges can successfully protect individual rights? Part II addresses these questions.

II. JUSTICE SCALIA’S JUSTIFICATIONS FOR A TEXT- AND RULE-BASED APPROACH TO STATUTORY INTERPRETATION

This Part addresses three possible justifications for Justice Scalia's text- and rule-based approach to statutory interpretation, which I refer to as constitutional, policy, and consequentialist arguments. Section A considers whether he relies on the Constitution. Section B discusses justifications based on rule of law policies. Section C evaluates the consequentialist claim that public respect for the courts is preserved if they are not perceived as lawmaking institutions, thereby preserving their ability to protect individual rights.

A. THE CONSTITUTION

Justice Scalia does not rest his text- and rule-based approach to statutory interpretation on the Constitution. He concedes that traditional tools of statutory interpretation permit courts to make policy judgments, consider legislative history, and take account of statutory purpose without sticking as closely to the text as he would like. Justice Scalia may, however, be setting the stage to strike legislative history from this list, at least when it is used to establish an authoritative interpretation of a statutory text. See Wisconsin Pub. Intervenor v. Mortier, 111 S. Ct. 2476, 2490-91 (1991) (Scalia, J., concurring in the judgment) (describing judicial use of legislative history as a 20th century phenomenon).

161. Justice Scalia may, however, be setting the stage to strike legislative history from this list, at least when it is used to establish an authoritative interpretation of a statutory text. See Wisconsin Pub. Intervenor v. Mortier, 111 S. Ct. 2476, 2490-91 (1991) (Scalia, J., concurring in the judgment) (describing judicial use of legislative history as a 20th century phenomenon).

162. Scalia never explains the inconsistency in his approach to statutory and constitutional interpretation. He concedes that traditional tools of statutory interpretation include more than the text, but states that constitutional interpretation should adhere to the "usual devices familiar to those in the law," which limit the judge to original meaning in the sense of original textual understanding. Scalia, Originalism, supra note 159, at 854.
This concession makes a lot of sense in light of Justice Scalia's textualism and commitment to tradition. The Constitution is silent about the permissible criteria of statutory interpretation and, as Justice Scalia concedes, tradition permits reference to extra-textual criteria. There may, of course, be sound reasons why courts should stick to the statutory text or adopt clear background rules to avoid lawmaking. One might even base these reasons on separation of powers concerns about the respective lawmaking powers of legislatures and courts implicit in the constitutional structure. It ill suits a textualist, however, to reject traditional tools of statutory interpretation based on a constitution whose text is silent on the matter. Articles I and III of the Constitution do nothing more than invite the fundamental debate between Justices Scalia and Stevens about what judging entails. Article I gives the legislative power to Congress, but Article III gives federal courts the power to decide cases and controversies. The amount of lawmaking discretion implied by the Article III power to decide cases and controversies depends on a theory of judging, which the constitutional text does not provide. To the extent judging requires a case-by-case elaboration of legislative purpose and background values, the Article III power includes something more than the text- and rule-based approach to statutory interpretation adopted by Justice Scalia.

There is one constitutional argument on which Justice Scalia might rely to justify sticking to the statutory text. To support his rejection of legislative history as evidence of specific legislative intent, he explicitly relies on the fact that only the statutory text is adopted by both houses of Congress and signed by the President. This argument might also be ad-

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164. West Virginia Univ. Hosp., Inc. v. Casey, 111 S. Ct. 1138, 1147 (1991) (stating that unambiguous terms cannot be expanded or contracted by legislative history); Begier v. IRS, 110 S. Ct. 2258, 2268 (1990) (Scalia, J., concurring...
vanced to support the view that a clear statutory text blocks consideration of other evidence of statutory meaning, such as legislative purpose and background considerations. I do not believe, however, that Justice Scalia takes this position. The problem with legislative history is that its text can address the same question discussed by the statute. It is, in other words, a rival text to the statutory language. When there is a conflict between the statutory text and legislative history, it is appropriate to remind the reader that only the statutory text is passed by Congress and signed by the President. It is quite another matter to rely on the congressional and presidential role to block consideration, not of a rival text, but of legislative purpose and background considerations, which are traditional tools of interpretation for determining what the text means in the first place. Indeed, Justice Scalia undermines the constitutional argument for the absolute priority of the statutory language when he concedes that the text should be disregarded if background considerations render the text absurd and that, in such a case, ordinary meaning can yield to a permissible meaning indicated by established canons of construction.

in the judgment) (stating that Congress conveys its directions in the Statutes at Large, not in the Congressional Record); Thompson, 484 U.S. at 192 (Scalia, J., concurring in the judgment) (stating that legislative history is a frail substitute for bicameral vote on text and presentment to the President).

165. Justice Scalia has discussed the problem of using legislative history to prove specific legislative intent. See Wisconsin Pub. Intervenor v. Mortier, 111 S. Ct. 2476, 2490 (1991) (Scalia, J., concurring in the judgment) (asserting that the use of legislative history to establish an authoritative interpretation of the statutory text is improper, but its use as evidence of context is acceptable).

166. Justice Scalia may have a pragmatic reason for not resting his approach to statutory interpretation on the United States Constitution. His approach presumably applies to state as well as federal courts. State constitutions do not necessarily incorporate the separation of powers structure that prevails at the federal level and the federal Constitution does not require state governments to conform to federal standards. Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 64 n.15 (1982) (stating that separation of powers requirements are not imposed on state courts by the federal Constitution). If his theory of judging were to apply to state courts, therefore, it must rest on considerations not mandated by the United States Constitution. He notes some difference between state and federal judges in Scalia, Canards, supra note 39, at 588 (explaining that democratic checks on all judges, especially federal judges, are less than those on legislatures).

167. INS v. Cardoza-Fonseca, 480 U.S. 421, 452 (1987) (Scalia, J., concurring in the judgment) (referring to the "venerable principle that if the language of a statute is clear, that language must be given effect—at least in the absence of patent absurdity"); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 324 n.2 (1988) (Scalia, J., dissenting) (stating that "it is a venerable principle that a law will not be interpreted to produce absurd results").

168. See supra note 27.
Any doubt about whether Justice Scalia grounds his approach to statutory interpretation in the Constitution is dispelled by the fact that he is committed to clear background rules when the text is unclear. Even if there was a plausible constitutional argument for deference to the statutory text, nothing in the Constitution suggests that the court should adopt clear background rules absent such clarity. The argument for that view must rest on considerations favoring a restrained judiciary, to which the remainder of this Part is addressed.

B. POLICIES UNDERLYING THE RULE OF LAW

Justice Scalia favors a text- and rule-based approach to statutory interpretation because it restrains judicial lawmaking. He favors such restraint because it serves two rule of law values. First, he argues that judicial lawmaking undermines justice because it increases the likelihood of unequal treatment and retroactive law. Second, judicial lawmaking violates separation of powers values because the democratically elected legislature is the preferred source of law.

1. Justice

Equal treatment and prospective lawmaking are, in Justice Scalia's view, attributes of justice. He asserts that “[a]s a motivating force of the human spirit, [the appearance of equal treatment] cannot be overestimated. . . . [T]he trouble with the discretion-conferring approach to judicial law making is that it does not satisfy this sense of justice very well.” He made this point recently in his scathing criticism of Emerson's aphorism that “[a] foolish consistency is the hobgoblin of little minds.” He argues that consistency is central to the rule of law and has a special role to play in judge-made law—both judge-pronounced common law and judge-pronounced determinations of the application of statutory and constitutional provisions. Legislatures are subject to democratic checks upon their lawmaking. Judges less so, and federal judges not at all. The only checks on the arbitrariness of federal

171. Scalia, Rule of Law, supra note 1, at 1178.
judges are the insistence upon consistency and the application of the teachings of the mother of consistency, logic. 173

Retroactive law is also unjust, a point Justice Scalia makes most forcefully when discussing the presumption that legislation is prospective. He asserts that "there is nothing to be said for a presumption of retroactivity." 174 He maintains that retroactivity "is contrary to fundamental notions of justice" 175 and that the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal." 176 He explicitly rests objections to retroactivity on justice rather than social utility grounds. 177

Justice Scalia’s concerns about retroactively undermining expectations extend to judicial as well as legislative lawmaking. He argues that judges should rely on text and tradition because that allows people to know and observe the law. 178 Because judicial lawmaking may unsettle expectations to at least the same extent as overruling prior precedents, the Court should not be too reluctant to abandon stare decisis to overturn recent and confusing judge-made law. 179

By linking injustice with judicial discretion, Justice Scalia

173. Id. at 588.
175. Id.
176. Id.
177. Scalia has stated:

Once one begins from the premise . . . that, contrary to the wisdom of the ages, it is not in and of itself unjust to judge action on the basis of a legal rule that was not even in effect when the action was taken, then one is not really talking about ‘justice’ at all, but about mercy, or compassion, or social utility, or whatever other policy motivation might make one favor a particular result.

Id. at 1587.

178. McKoy v. North Carolina, 110 S. Ct. 1227, 1248 (1990) (Scalia, J., dissenting) (“When we abandon text and tradition, and in addition do not restrict prior cases to their holdings, knowing and observing the law of the land becomes impossible.”).

179. See Payne v. Tennessee, 111 S. Ct. 2597, 2614 (1991) (Scalia, J., concurring); see also Walton v. Arizona, 110 S. Ct. 3047, 3068 (1990) (Scalia, J., concurring in part and concurring in the judgment) (explaining that stare decisis should not be applied when the earlier case law is responsible for uncertainty because the purpose of stare decisis is to “introduce[e] certainty and stability into the law and protect[] the expectations of individuals and institutions that have acted in reliance on existing rules”); South Carolina v. Gathers, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting) (“The freshness of error not only deprives [the prior case] of the respect to which long-established practice is entitled, but also counsels that the opportunity of correction be seized at once, before state and federal laws and practices have been adjusted to embody it.”).
puts his critics at a rhetorical disadvantage. No one favors unjust judicial decisions. There are, however, a number of responses to Justice Scalia's advocacy of a text- and rule-based approach to avoid injustice.

First, unequal treatment is not necessarily unjust. We generally reject unequal treatment when the categorization offends some substantive principle, such as individual dignity or self-worth. Discrimination on the basis of race, alienage, sex, age, or disability is offensive. Unequal treatment because of institutional arrangements, such as a decentralized decision-making system, is much less offensive. If unequal treatment were per se unjust, we would not tolerate jury trials or unreviewed, diverse appellate court decisions. The geographical and temporal variations in treatment that arise from judicial lawmaking when clear texts and rules do not guide the courts seem more analogous to the problem of decentralized decision making than offensive discrimination.

Justice Scalia sometimes describes judicial lawmaking as random, implying that it is unjust in the way that tossing a coin would be unjust. Random coin-tossing is unjust, however, because it pays no attention to the parties, which is almost as bad as discriminating on the basis of offensive categories. Judging is not like that at all. Judges pay close attention to the parties and the facts of each case, and differences of opinion are not likely to be perceived as the result of random activity. Consistency and logic are simply not the "only checks" on judicial arbitrariness. Justice Scalia's charge of randomness in judging seems to be an indirect way of saying that lawmaking by unelected judges, however much they may try to deliberate conscientiously, is still illegitimate. That argument, however, is based on a concern over separation of powers, not justice.

Just as they must demonstrate the potential for unjust, unequal treatment, critics must demonstrate the injustice of retroactive judge-made law. We derive much of our concern about retroactivity from our image of offensive retroactive lawmaking. The offensive image is that of the lightning bolt decision hurled down by an insensitive decisionmaker. But judging is not usually like that. Frequently, the uncertainty occurs within

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180. Hodgson v. Minnesota, 110 S. Ct. 2926, 2961 (1990) (Scalia, J., concurring in the judgment in part and dissenting in part) (describing the Court's fractured opinions as indicative of the "random and unpredictable results of our consequently unchanneled individual views").
181. See supra text accompanying notes 172-173.
182. See infra text accompanying notes 187-218.
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a range narrowed by prior decisions. The result, though not in-
evitable, may have been strongly presaged by the evolution of
prior decisions. Moreover, if the prior law was itself substan-
tively unjust or the product of an unfair procedural advantage,
retroactivity may not be objectionable because expectations of
stable law may not have been justified in the first place.\textsuperscript{183}

Second, Justice Scalia's text- and rule-based approach may
not produce the certainty which his justice principle re-
quires.\textsuperscript{184} In the interest of sticking to the text, he is forced to
make some very refined judgments about proper English us-
age.\textsuperscript{185} And, of course, there are the inevitable disagreements
about what the plain meaning of a text really is\textsuperscript{186} and on
which specific tradition to rely.\textsuperscript{187}

In sum, the "justice" argument for a text- and rule-based
approach to statutory interpretation is not persuasive. Its
shortcomings suggest that Justice Scalia's more fundamental
position is that courts simply have no business making law—a
separation of powers issue.

2. Separation of Powers

a. Political Theory

Justice Scalia is deeply committed to separation of powers
values, even if the constitutional separation of powers doctrine
does not mandate his text- and rule-based approach to statutory
interpretation. His political theory precludes judges from mak-
ing law because they lack electoral authority. Even prospective
adjudication is beyond the scope of judicial power\textsuperscript{188} because

\textsuperscript{183} See Michael J. Graetz, Retroactivity Revisited, 98 HARV. L. REV. 1820,
1823 (1985) (the issue is the "normative vision of what people should be en-
titled to expect").

\textsuperscript{184} See Eskridge, supra note 1, at 674-75 (arguing that Justice Scalia's in-
terpretive techniques are just as manipulable as reliance on legislative
history).

\textsuperscript{185} See supra text accompanying notes 53-81.

\textsuperscript{186} Compare Bowen v. Massachusetts, 487 U.S. 879, 893 (1988) (holding, in
an opinion by Justice Stevens, that the plain meaning of "money damages"
does not include a decision disallowing federal government reimbursement of
funds to a state) with id. at 915-16 (Scalia, J., dissenting) (arguing that it would
be absurd if "money damages" did not include the disallowance claim at issue).

\textsuperscript{187} Compare Blatchford v. Native Village of Noatak, 111 S. Ct. 2578, 2584
(1991) (holding, in an opinion by Justice Scalia, that a clear statement is re-
quired to abrogate state sovereign immunity) with id. at 2587 (Blackmun, J.,
dissenting) (rejecting the application of the "clear-statement rule" because the
balance of power does not favor the states when the federal government regu-
lates Native American affairs).

\textsuperscript{188} See James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439, 2451
otherwise the courts would be "substantially more free to 'make new law,' and thus to alter in a fundamental way the assigned balance of responsibility and power among the three Branches." 189

Justice Scalia takes every opportunity to argue that law should be made only by the people acting through elected legislatures. When Justice Brennan argued in a recent case that the issue for the Court was whether or not the law should evolve, Justice Scalia responded that the issue had "nothing to do with whether 'further progress [is] to be made' in the 'evolution of our legal system.' It has to do with whether changes are to be adopted as progressive by the American people or decreed as progressive by the Justices of this Court." 190 And when Justice Scalia is forced by existing doctrine to apply evolving case law, he urges the Court to use "statutes passed by society's elected representatives" 191 as the "'[f]irst among the 'objective indicia that reflect the public attitude.'" 192 He even supports the case for interpreting statutes based on the ordinary meaning of the text on the ground that a contrary approach will "poison the well of future legislation, depriving legislators of the assurance that ordinary terms, used in an ordinary context, will be given a predictable meaning." 193 In contrast to legislation, the common law style of lawmaking is simply "the unfettered wisdom of a majority of this Court, revealed to an obedient people

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189. Beam Distilling, 111 S. Ct. at 2451.
190. Burnham v. Superior Court, 110 S. Ct. 2105, 2119 (1990) (citation omitted) (Scalia, J., concurring in the judgment) ("[P]rospective decision-making is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be.").
192. Id. (quoting McCleskey v. Kemp, 481 U.S. 279, 300 (1987) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976))); see also Scalia, Rule of Law, supra note 1, at 1183 ("Even where a particular area is quite susceptible of clear and definite rules, we judges cannot create them out of whole cloth, but must find some basis for them in the text that Congress or the Constitution has provided.").
193. Chisom v. Roper, 111 S. Ct. 2354, 2376 (1991) (Scalia, J., dissenting); see also Finley v. United States, 490 U.S. 545, 556 (1989) ("Congress [should] legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.").
Justice Scalia’s preference for legislative over judicial law-making is vulnerable to two standard responses. First, his theory of statutory interpretation, which rejects judicial law-making, is itself the product of a judicial choice of interpretive theory, and is not derived from a superior constitutional source of law. Second, legislatures do not have a systematic comparative advantage over courts. Hence, an across-the-board preference for legislative rules over judicial lawmaking cannot be justified.

Two arguments undermine the claims that the legislature has a systematic “comparative advantage” over the courts. The first is that the legislature has many weaknesses as a lawmaking institution. These include the potential for arbitrary decision making through agenda control and a preference for well organized and well financed special interests. Even majorities may not be politically effective if the rhetorical framework of the political debate puts them at a disadvantage, as is often the case with feminist positions. Finally, the legislator’s incumbency advantage may sever the electoral connection, which is supposed to give legislatures a democratic edge over courts.

The second argument against the legislature’s comparative advantage is that it is not an affirmative image of legislation. His preference for legislation seems grudging. In United States v. Johnson, 481 U.S. 681, 702 (1987) (Scalia, J., dissenting), for example, it becomes clear that he simply prefers any legal confusion to be the result of legislation, rather than judicial law making. And in Ohio v. Akron Ctr. for Reprod. Health, 110 S. Ct. 2972, 2894 (1990) (Scalia, J., concurring), it is apparent that he favors leaving abortion issues to legislatures, in part because legislative compromise will defuse controversy. There are no affirmative images of legislation in Justices Scalia’s opinions.

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195. This does not suggest that Justice Scalia has an affirmative image of legislation. His preference for legislation seems grudging. In United States v. Johnson, 481 U.S. 681, 702 (1987) (Scalia, J., dissenting), for example, it becomes clear that he simply prefers any legal confusion to be the result of legislation, rather than judicial law making. And in Ohio v. Akron Ctr. for Reprod. Health, 110 S. Ct. 2972, 2894 (1990) (Scalia, J., concurring), it is apparent that he favors leaving abortion issues to legislatures, in part because legislative compromise will defuse controversy. There are no affirmative images of legislation in Justices Scalia’s opinions.
199. See generally Martha Minow, The Supreme Court, 1986 Term—Foreword: Justice Engendered, 101 HARV. L. Rev. 10, 65 (stating that the ground rules for discourse are those of the politically dominant).
200. Mark Tushnet et al., Judicial Review and Congressional Tenure: An
advantage affirms judicial competence, rather than damaging the legislature's democratic credentials. Courts are in a good position to apply public values to the resolution of disputes because they are free from the usual political pressures and because their process of reflective thought and collegial dialogue gives them a unique opportunity to work out the implications of public values.201

These arguments against the legislature's comparative advantage over courts are familiar. One should not demonize the legislature or romanticize courts; one can become too cynical about the legislative process and too misty-eyed about a judge's commitment to public values. Legislatures are not as bad as may be supposed202 and are still more democratic than courts. Moreover, judges have a limited capacity to produce meaningful change.203 Instead of focusing on the legislatures' and the courts' abilities to satisfy democratic values, this Article suggests a perspective which highlights the differences between the two institutions and which is obscured by emphasis on democratic political theory. This difference is accessible through analysis based on the nature of legal language, and it puts the courts' lawmaking role in a more favorable light.

b. Legal Language

Different conceptions of legal language underlie the difference between Justice Scalia's text- and rule-based approach to statutory interpretation and a case-by-case common law approach. Justice Scalia views legal language as inert. A text is

Observation, 66 Tex. L. Rev. 967, 971-75 (1988) (explaining that the incumbency advantage for representatives breaks the electoral connection).


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simply there for the judge to decipher based on conceptions of ordinary meaning, style, and grammar.\textsuperscript{204} The common law conception of legal language is different. At common law, legal language is organic, acquiring meaning from a rich conception of context, which is defined to include the text's history, contemporary values, and the facts of the case to which it applies.\textsuperscript{205}

Once legal language is viewed as organic and contextual, the problem of lawmaking legitimacy shifts from its exclusive focus on the origin of political authority through elections to the institutional setting in which decisions about the meaning of legal texts are made. Legislatures state general rules, but the organic/contextual nature of language requires meaning to be developed through cases, where the relationship between text, context, and specific facts can be established. This leads directly to a lawmaking role for the courts, the institution which resolves cases.\textsuperscript{206}

\textsuperscript{204} Justice Scalia probably shares Judge Posner's view that legal language should not be as flexible as literary language because of its political impact. See Richard A. Posner, Law and Literature: A Misunderstood Relation 243 (1988) (arguing that literary texts, unlike legal texts, do not have to be authoritative). However, while Judge Posner uses that observation to minimize the judicial reader's discretion to interpret the text, he remains a "legal intentionalist." Id. at 211. Justice Scalia, fearful that intentionalism gives the judge too much power, retreats to the text and clear rules as the criteria of statutory interpretation. For example, Judge Posner agrees with Justice Stevens that statutory language requiring notice "prior to December 31" might be a drafting error and that there might be much good in the court reinterpreting the literal language to mean "on or before December 31." Id. at 255-57 (discussing United States v. Locke, 471 U.S. 84, 117-19 (1985) (Stevens, J., dissenting) (arguing that the Court should correct Congress's drafting error)). It is hard to imagine Justice Scalia disregarding such precise text.

\textsuperscript{205} See Martha Minow & Elizabeth V. Spelman, In Context, 63 S. Cal. L. Rev. 1597, 1602-03 (1990) (discussing meanings of context).

\textsuperscript{206} This also leads to paying close attention to the substantive implications of the rhetoric of the judicial opinion. See generally Posner, supra note 204, at 260-316 (discussing the relationships between literary and judicial styles and meanings); Robert A. Ferguson, Rhetorics of the Judicial Opinion, 2 Yale J.L. & Human. 201, 202 (1990) (stating that among officials the judge alone explains his or her actions in writing).

The relationship between political power and the judicial opinion becomes obvious when one examines the form by which the court's judgment is conveyed. For example, seriatim opinions are used in Britain, where Parliamentary sovereignty prevails and courts lack the power they have in the United States. Alan Paterson, The Law Lords 183-87 (1982). The United States Supreme Court's shift from seriatim opinions to one opinion of the Court in the early 19th century was considered by some to be an attempt to increase judicial power. See 1 Charles Warren, The Supreme Court in United States History 653-55 (1926).
The link between organic/contextual legal language and the courts' lawmaking role in deciding cases is apparent in the writings of authors who affirm both a lawmaking role for courts and the importance of attention to context in judicial decisions. For example, Professor Frank Michelman, who argues for a judicial lawmaking role in an article entitled *Law's Republic,* begins his Supreme Court Foreword by discussing sensitivity to context in judicial opinions about whether to allow a member of the Armed Forces to wear a yarmulke. Professor William Eskridge, whose article *Dynamic Statutory Interpretation* justifies judicial lawmaking in statutory interpretation, highlights one judge's context-based opinion in resolving a dispute between the Gay Rights Coalition and Georgetown University. And, in a jointly authored article on practical reasoning in statutory interpretation, Professors Eskridge and Philip Frickey critique a judicial opinion dealing with involuntary servitude for its responsiveness to evolving context. Finally, Professor Martha Minow, whose Supreme Court Foreword on *Justice Engendered* would empower the judge as representing society, illustrates legal pragmatism by discussing the different ways context is considered in a judicial opinion about the testimony of child molestation victims.

This linkage of a rich conception of context and judicial lawmaking is a contemporary revival of the common law approach about which Professor Karl Llewellyn wrote when he argued for a judicial situation sense, a feel for justice and

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208. Michelman, supra note 201, at 5-17 (discussing Goldman v. Weinberger, 475 U.S. 503 (1986)).
212. See Minow, supra note 199, at 81.
213. See Minow & Spelman, supra note 205, at 1643-44.
215. Id. at 122, 126, 157, 245, 268 (explaining the need for a situation type).
216. Id. at 121 (invoking the "felt duty to justice which twins with the duty to the law").
a judicial writing style to match work style. The common law approach demurs to the charge that courts are undemocratic, relying instead on the critical role they play in deciding the meaning of legal texts in particular cases.

C. CONSEQUENTIALIST CONCERNS ABOUT PUBLIC PERCEPTION OF JUDGE-MADE LAW

Legitimacy can be analyzed normatively, as in Section B, or descriptively, in the sense that "[a]n institution is legitimate . . . if it is seen that way by some relevant public." Descriptive analysis is concerned with the consequences of judicial behavior for the acceptance of judge-made law. Justice Scalia has a descriptive as well as a normative conception of legitimacy: A text- and rule-based approach to statutory interpretation should be seen as legitimate so that courts can successfully pro-

217. Id. at 464-68 (arguing for a literary style to match work style).
218. The political left has been associated with judicial lawmaking because its context-based approach appears to favor those who have been omitted from the law, such as racial minorities, women, gays, disabled individuals, and the poor. See Minow & Spelman, supra note 205, at 1605-06 (stating that the context chosen can dictate the analysis applied). Context is too malleable a concept to be appropriated by one political point of view. See Richard A Posner, What Has Pragmatism to Offer Law?, 63 S. CAL. L. Rev. 1653, 1658-59 (1990) (pragmatism has "no inherent political valence").

While it is beyond the scope of this Article to speculate in depth on how the political right could rely on context to support its positions, the possibility should not be overlooked. First, the political right can appeal to some contexts with devastating force, as when victim impact is taken into account in death sentence cases. See Payne v. Tennessee, 111 S. Ct. 2597 (1991) (concern with victim impact in sentencing).

Second, the Court's opinion in Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981), illustrates how a judicial opinion can emphasize the context of limited federal aid to the states to justify an interpretation of a statute's text to deny federal rights for the developmentally disabled. The opinion addresses the structure of the statute, see id. at 11, speculates about congressional intent, see id. at 15, characterizes a statute passed under the Spending Power as analogous to a contract, see id. at 17, and refers to the high cost to the State of a contrary decision, see id. at 18, all before paying any attention to the statutory language.

Third, the political right might claim that it truly pays attention to omitted groups rather than to the symbolism and emotional pull of litigants in each particular case. This theme is common in law and economics, a field in which practicing professionals worry about the ex ante impact of a rule (for example, the effect of increasing labor costs on an employer's willingness to hire workers). Cf. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2096 (1991) (Scalia, J., dissenting) (arguing that symbolism of allowing race-based challenges to exclusion of potential jurors in civil cases might hurt minority litigants).

tect individual rights against popular will. The point is not whether his conception of individual rights is robust. The point is that one strand supporting Justice Scalia’s text- and rule-based approach to statutory interpretation is preserving the appearance that courts do not make law so that they can better perform their central role, which is the protection of individual rights as Justice Scalia defines them.

Though Justice Scalia does not express this view directly, it is implied in his statement that the courts’ “most significant roles, in our system, are to protect the individual criminal defendant against the occasional excesses of that popular will, and to preserve the checks and balances within our constitutional system that are precisely designed to inhibit swift and complete accomplishment of that popular will.”

Justice Scalia is not optimistic about judges being strong enough to perform this role, but argues that “[t]he chances that frail men and women will stand up to their unpleasant duty are greatly increased if they can stand behind the solid shield of a firm, clear principle.” He expressed a similar concern in his Webster opinion, where he stated that delaying reconsideration of Roe v. Wade would mean that

[w]e can now look forward to at least another Term with carts full of mail from the public, and streets full of demonstrators, urging us—their unelected and life-tenured judges who have been awarded those extraordinary, undemocratic characteristics precisely in order that we might follow the law despite the popular will—to follow the popular will.

Justice Scalia’s view that erosion of public support might impair the courts’ ability to protect rights rests on a familiar

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220. See Edelman, supra note 90, at 1800 (observing an overall tendency to favor property over individual rights); Kannar, supra note 2, at 1320-42 (discussing Justice Scalia’s decisions protecting the rights of criminal defendants in cases involving searches, confronting witnesses, double jeopardy, and drug testing).

221. Scalia, Rule of Law, supra note 1, at 1180.

222. Id.


225. Webster, 492 U.S. at 535. But cf. South Carolina v. Gathers, 492 U.S. 805, 824 (1989) (Scalia, J., dissenting) (expressing doubt that overruling a recent case would shake the citizenry’s faith in the Court by appearing to embrace only the “opinions of a small group of men who temporarily occupy high office” (quoting Florida Dep’t of Health and Rehabilitative Servs. v. Florida Nursing Home Ass’n, 450 U.S. 147, 154 (1981) (Stevens, J., concurring))).
tradition. Professor Alexander Bickel explained it this way:

The Court's effectiveness... depends substantially on confidence, on what is called prestige. ...

... [T]here must eventually be a limit to the number of judicially-pronounced principles that the political institutions will have the will to make their own and the energy to execute. ... A Court unmindful of this limit will find that more and more of its pronouncements are unfulfilled promises, which will ultimately denude the function of constitutional adjudication.

In 1980, Professor Jesse Choper elaborated on this point, arguing that the courts have limited institutional capital to protect individual rights, capital that should not be dissipated by deciding other types of controversial cases. Justice Scalia's variation on this theme is that public awareness of judicial law-making will undermine public confidence in the courts and that judicial adherence to a text- and rule-based approach to statutory interpretation will avoid this pitfall. The Bickel-Choper thesis and the Justice Scalia variation can be criticized on a number of grounds.

One version of the Bickel-Choper thesis, traceable to a much-cited article by Professor Lerner, is that the public derives its confidence in the Supreme Court from the Court's mythic role as guardian of the Constitution and its tradition of neutrality and detachment, which further satisfies the public's deep yearning for authority. Some commentators argue that there is no need to worry about dissipation of the Court's prestige because its stature is sufficient to withstand adverse reaction to particular decisions. President Roosevelt's

227. Id. at 94-95.
229. Id. at 169 (arguing that the Court should refrain from using federalism concerns to invalidate federal laws in order to preserve its limited prestige for more important issues).
231. Id. at 1307-12, 1315-16; see Gregory A. Caldeira, Neither the Purse nor the Sword: Dynamics of Public Confidence in the Supreme Court, 80 AM. POL. SCI. REV. 1209, 1210 (1986); Gregory Casey, The Supreme Court and Myth: An Empirical Investigation, 8 LAW & SOC'Y REV. 385, 387-88 (1974).
unsuccessful effort at court-packing is an oft-cited illustration of the Court's inherent strength.\textsuperscript{233}

Many political scientists raise a more fundamental objection. They are unable to find convincing evidence that the Court enjoys mythic stature.\textsuperscript{234} It is possible that political scientists waited too long to look. They began paying serious attention to this issue in the 1960s,\textsuperscript{235} and the Court's stature might have been frittered away by the Warren Court.\textsuperscript{236} The more likely explanation, however, is that the pre-Warren Court's mythic stature was overrated. This possibility is supported by evidence that the Court's inherent capacity to survive the threat of the 1937 court-packing plan was as much the result of strategic judicial retreat as any mythic stature.\textsuperscript{237}

The Court's mythic stature is further called into question by confusion over who among the public might share that perception. The traditional view is that the less attentive mass
public falls back on its symbolic attachment to the Court because it knows little of the Court's work. If they knew more, familiarity would breed contempt or at least "break[] the spell cast by symbols and myth." By contrast, more knowledgeable, attentive, and influential political elites do not view the Court in symbolic terms and are not taken in by myths about the Court. While there is still support for the traditional view, there is also evidence that the Court's mythic stature is greater among the more advantaged strata of society, which likely include the political elite. Scholars may be ascribing to the mass public perceptions which in fact exist primarily in the social and cultural milieu of the opinion elites in which the scholars themselves operate. Difficulty in discerning a mythic view of the Court does not disprove its existence but does raise doubts about its significance.

If mythic support for the Court is itself a myth, then cautioning the Court against action which might dissipate that sup-

238. The political science literature frequently distinguishes between the less attentive mass public and the more attentive political elites, capable of direct political action and influence. See, e.g., Johnson & Canon, supra note 235, at 176. The measurement of public attentiveness is controversial. Crude measures focus on memory of specific information, such as the number of justices on the Court. David Adamany, Legitimacy, Realigning Elections, and the Supreme Court, 1973 Wis. L. Rev. 790, 808-10. A more sophisticated measure accounts for the fact that accurate impressions can outlast specific memory. Adamany & Grossman, supra note 234, at 423 (voter studies reveal accurate impressions survive memory of specific information).

239. Casey, supra note 231, at 385-89.

240. Id. at 410; see Johnson & Canon, supra note 235, at 195 (those who know the most about the Supreme Court are those who dislike its decisions); Lerner, supra note 230, at 1314-15 (public understood real functioning of the judicial process from the New Deal decisions).


244. Casey, supra note 231, at 389. One author suggests that political elites may be more committed to the Court because they are more socialized to existing norms and have a greater stake in the existing order. Adamany, supra note 238, at 819.
port is misplaced. There is no point in trying to preserve something which does not exist. Whatever importance might be placed on obtaining support for individual rights decisions, upholding the Court's mythic stature may be an ineffectual way to achieve that result.

The Bickel-Choper thesis, however, does not necessarily depend on the public having a mythic view of the Court. There need only be what political scientists call "diffuse support,"245 which can survive adverse reaction to specific judicial decisions and which might be lost as a result of what judges do. Political science studies find that diffuse support for the Court exists,246 but the findings provide little support for Justice Scalia's approach to statutory interpretation. Justice Scalia's text- and rule-based approach to statutory interpretation is a commitment to a particular process by which courts determine the meaning of a statutory text, while, in contrast, the empirical evidence suggests that substantive rather than procedural considerations influence the public's diffuse support of the courts.247

The studies show that substance has an impact on diffuse support in two ways. First, agreement or disagreement with specific judicial decisions affects the public's diffuse support.248 Several studies have examined the public's reaction to specific decisions. These decisions address issues such as school prayer, civil rights, reapportionment, the criminal accused, Watergate, and abortion. See Adams, supra note 238, at 810; Casey, supra note 231, at 403-04; Casey, supra note 241, at 8-14; Walter F. Murphy & Joseph Tanenhaus, Public Opinion and the Supreme Court: The Goldwater Campaign, 32 PUB. OPINION Q. 31, 34-36 (1968); Murphy & Tanenhaus, supra note 245, at 362-63; Joseph Tanenhaus & Walter F. Murphy, Patterns of Public Support for the Supreme Court: A Panel Study, 43 J. POL. 24, 31-33 (1981).
Second, diffuse support is a function of ideology\textsuperscript{249} and party affiliation,\textsuperscript{250} suggesting that the public views courts the same way they view other political institutions.\textsuperscript{251}

There is some contrary evidence supporting the view that procedure is important to the public's sense of an institution's legitimacy. Tom Tyler's recent study of the Chicago police and lower courts shows that the public's experience of fair procedures had a positive impact on legitimacy.\textsuperscript{252} It is a substantial move, however, from finding that procedure matters to concluding that a text- and rule-based approach to statutory interpretation matters to the public in evaluating a court's performance. The Tyler study focused on direct experience with decision makers, not with the public's acceptance of the lawmaking function of comparatively remote appellate courts. James Gibson, for example, finds that "the fairness of the decisionmaking processes ... ha[...] virtually no impact" on diffuse support for the Supreme Court.\textsuperscript{253} Although some data sug-

\textsuperscript{249} Casey, \textit{supra} note 241, at 27 (ideology explains decline in diffuse support better than reactions to specific decisions).


\textsuperscript{251} See Caldeira, \textit{supra} note 231, at 1220-21 (perception of Court moves up and down with perceptions of other political institutions); Dolbeare, \textit{supra} note 242, at 211; Stephen M. Griffin, \textit{What is Constitutional Theory? The Newer Theory and the Decline of the Learned Tradition}, 62 S. Cal. L. Rev. 493, 522-23 (1989); see also Adamany, \textit{supra} note 238, at 818-19 (Court viewed as political institution by political elites).

Some authors suggest that ideology works its way through the political system to prevent court-curbing legislation as a result of the prominence of liberal ideology among active political elites. See Adamany & Grossman, \textit{supra} note 234, at 429. \textit{See generally} Nagel, \textit{supra} note 237, at 926, 939-41 (Court-curbing is defined as bills limiting judicial review and dealing with personnel, but excludes bills designed to reverse a single decision). By taking advantage of political inertia, the filibuster, and the Presidential veto, liberals have protected the Court from adverse reaction to specific cases. Adamany & Grossman, \textit{supra} note 234, at 406, 426-28; see also Charles H. Franklin & Liane C. Kosaki, \textit{Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion}, 83 \textit{Am. Pol. Sci. Rev.} 751, 766-69 (1989) (determining the political impact of public reactions to judicial decisions requires evaluating how support is distributed among publics with political clout).

\textsuperscript{252} \textit{Tom R. Tyler, WHY PEOPLE OBEY THE LAW} 106-07 (1990).

\textsuperscript{253} Gibson, \textit{supra} note 243, at 483-89. In a recent article, Tom Tyler and Kenneth Rasinski acknowledge that studies of procedural justice have focused on personal experience with local institutions. They reanalyze available data, however, and find that perceptions of procedural justice have an indirect effect on acceptance of Supreme Court decisions, as mediated by attitudes toward legitimacy which produce diffuse support. Tom R. Tyler & Kenneth Rasinski, \textit{Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson}, 25 \textit{Law & Soc'y Rev.}
gests that the public favors a text-based approach to constitutional adjudication, the public does not seem to view law primarily in constitutional terms and does not expect the law to be applied mechanistically in nonconstitutional settings.

Justice Scalia might respond to this critique as follows. It is unsurprising that political science studies do not reflect the Court's mythic stature. Political scientists cautiously admit that the source of much diffuse support remains unexplained, and it is difficult to design public opinion surveys to identify something as uncertain as mythic stature. The absence of information about the public's attitude towards the process by which courts interpret statutes is also not surprising because political scientists view law in terms of substantive politics. Political scientists are as likely to treat courts as they would other political institutions as lawyers are to exaggerate the public's concern with process. The erosion of public confidence in judicial lawmaking may be the kind of gradual cultural shift which escapes ready detection, eating away at the Court's institutional status. At some point in the future, with the Court's credibility sufficiently weakened, that status might be swept away in a crisis. Judge Bork put it this way in another context:

The taint will wear off, and what seemed unattractive will appear inevitable. Alexander Pope's dictum, though grown trite, is too apt to


254. Kenneth Dolbeare, The Supreme Court and the States: From Abstract Doctrine to Local Behavioral Conformity, in The Impact of Supreme Court Decisions 207 (Theodore L. Becker ed., 1973) (stating that those who think the Court adheres to the constitutional text give the Court higher ratings); cf. Casey, supra note 231, at 392 (stating that more than half of respondents who mentioned the Constitution viewed it as static).

255. Casey, supra note 231, at 394-95 (finding that only a small percentage of respondents viewed the Court as providing certainty and stability to the law).

256. Tanenhaus & Murphy, supra note 248, at 38.

257. See, e.g., Adamany, supra note 238, at 813 (correlating public attitudes toward the Court with attitudes towards school prayer); Caldeira, supra note 231, at 1215 (measuring public reaction to invalidation of federal law).

Political scientists may also fail to understand how courts deal with statutes. See, e.g., Jonathan D. Casper, The Supreme Court and National Policy Making, 70 Am. Pol. Sci. Rev. 50, 56-57 (1976) (criticizing Dahl for failing to understand that upholding a statute by reinterpreting it to avoid a constitutional issue still makes a contribution to public policy).
ignore: "Vice is a monster of so frightful mien/As to be hated needs but to be seen;/Yet seen too oft, familiar with her face,/We first endure, then pity, then embrace."258

Let us assume that Justice Scalia is correct that the public is concerned with the process by which courts interpret statutes, and that dissatisfaction with that process will influence diffuse support for judicial decisions. What reason is there to suppose that Justice Scalia’s text- and rule-based approach will attract a favorable public reaction? This Article concludes that his approach is likely to have just the opposite impact, attracting public disrespect rather than providing the public with a reassuring image of the judicial process.

Recall that Justice Scalia does not limit his argument for reliance on the statutory text to texts which have a plain meaning in any commonly understood sense of that phrase, such as the requirement that the President be thirty-five years old.259 Recall further his arguments made in the interest of sticking to the text: “a misplaced comma is more plausible than a gross grammatical error”;260 “inelegance” is more likely than “redundancy and omission;”261 “the adverb preceding the word ‘made’ naturally refers to the manner of making, rather than to the nature of the product made;”262 and good writing style does not leave major qualifications to a textual afterthought.263 I doubt that the public is likely to accord much respect to this kind of textual analysis. Considering how carelessly people use language, Justice Scalia’s insistence on proper English is unlikely to attract much public favor.264 When a lawyer focuses on proper English, the public may actually view this as another example of lawyers manipulating language. The long history of

258. Barnes v. Kline, 759 F.2d 21, 61 (D.C. Cir. 1985) (Bork, J., dissenting), vacated as moot, 479 U.S. 361 (1987); see also Sarat, supra note 242, at 19-20 (although satisfaction with the legal system is low and compliance high, compliance may erode over time).
259. See supra text accompanying notes 41-42.
264. Political elites, sophisticated in the ways political language is adopted, are unlikely to take a different view. They would be aware, for example, that legislation is hastily drawn and passed under pressure to solve a particular problem, which makes style and grammar a poor guide to what the legislature was trying to do. See Church of Scientology, 792 F.2d at 174 (Wald, J., dissenting).
public distrust of lawyer language, which has reemerged in the recent plain English movement, supports this inference.

Consider, for example, Justice Scalia's opinion in *Sullivan v. Everhart*. As explained earlier, the case involved a provision of the Social Security Act which required the government to compensate recipients for underpayments while waiving recovery of overpayments under certain hardship conditions. The issue was whether the overpayments and underpayments were to be considered on a separate monthly basis, so that each underpayment had to be paid to the claimant but each overpayment would be subject to government waiver. Justice Scalia agreed with the government, arguing that the more "natural" way to express a policy separating the over- and underpayments would have been to state "the correct amount of any payment."

I do not know what would have been the textually more "natural" way of resolving that policy issue. I suspect, however, that the public is likely to perceive Justice Scalia's textual analysis as serving policy goals, with the text trailing along after the desired result. This perception would be enhanced, by considering the different examples chosen by Justices Scalia and Stevens to support their decisions. Justice Scalia's example was of two erroneous payments, one an overpayment and one an underpayment, occurring in successive months. Justice Stevens posited payment errors occurring ten years apart. Hardship, which is the object of the statutory waiver policy, is much less likely to arise if the government does not make good on the full amount of an underpayment occurring very close to the time of an overpayment (Justice Scalia's example) than if the erroneous payments are years apart (Justice Stevens's example). A frank judicial statement of policy justifications for netting the payments (for example, that budget deficits or welfare


266. See RUDOLF FLESCH, HOW TO WRITE PLAIN ENGLISH (1979).


268. See supra text accompanying notes 137-149.


270. Id. at 90.

271. I am not suggesting that Justice Scalia is manipulating the text, only that textualism is not likely to produce the desired favorable public reaction.
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fraud is a more serious problem than protecting claimants) seems more likely to win respect for the Court than the claim that the statutory language, subjected to close textual analysis, requires that result or creates an ambiguity which forces deference to the agency’s interpretation.

Perhaps Justice Scalia is not really concerned with the nonlawyer public's attitude towards judicial decisions. He may instead be concerned about the legal profession's respect for the judicial process, about "internal" rather than "popular" legal culture.\textsuperscript{272} In focusing on the general public's attitude one may miss the more cogent point that an institution is most vulnerable when professionals who operate within its traditions lose faith in its legitimacy. The trouble with this argument is that lawyers are probably no more committed to a text- and rule-based approach to statutory interpretation than is the nonlawyer public.

At least some prominent lawyers explicitly reject Justice Scalia's theory of statutory interpretation. Judge Wald referred to it as a "talmudic" approach.\textsuperscript{273} Justice Stevens made reference, with obvious disapproval of a Justice Scalia authored majority opinion, to the "thick grammarian's spectacles" that produce results unfaithful to congressional intent.\textsuperscript{274} Justice Marshall claimed that "the demand for tidy rules can go too far."\textsuperscript{275}

Justice Scalia bridles at these criticisms,\textsuperscript{276} but he nonetheless invites them when he compares the "parsing" of statutory


\textsuperscript{273} Church of Scientology v. IRS, 792 F.2d 146, 174 (D.C. Cir. 1986) (Wald, J., dissenting).

\textsuperscript{274} West Virginia Univ. Hosps., Inc. v. Casey, 111 S. Ct. 1138, 1154 (1991) (Stevens, J., dissenting). Justice Stevens has also stated, in response to Justice Scalia, that "[o]ur duty is to ask what Congress intended, and not to assay whether Congress might have stated that intent more naturally, more artfully, or more pithily." Sullivan v. Everhart, 494 U.S. 83, 106 (1990) (Stevens, J., dissenting).

\textsuperscript{275} Sisson v. Ruby, 110 S. Ct. 2892, 2896 n.2 (1990). \textit{Contra id.} at 2900 n.2 (Scalia, J., concurring) (arguing that application of a general rule rather than a case-by-case analysis is not a "demand for tidy rules" but "rather an aversion to chaos").

\textsuperscript{276} Writing for the majority, Scalia stated in Church of Scientology, 792 F.2d at 157, that "it hardly takes 'talmudic dissection['] or 'microscopic scrutiny' to reject" the dissent's interpretation of the statute. See California v. Hodari D., 111 S. Ct. 1547, 1550 n.2 (1991) (rejecting the dissent's charge that Justice Scalia was engaged in "logic-chopping").
language to the way courts interpret the language of a case.\textsuperscript{277} Whatever the merits of the various approaches to statutory interpretation, the idea that the legal profession's respect for the legal craft rests on following a text- and rule-based approach to statutory interpretation seems far-fetched.

Justice Scalia's concern about the public's view of judicial lawmaking comes down to what people think legal rules are. There is a widespread but unproven assumption that people have a formalistic conception of law as clear rules, which corresponds to Justice Scalia's approach to statutory interpretation, but I doubt that this is so.

Jean Piaget's work supports the view that the public has a rule-oriented view of law. Piaget found that children approached games in terms of rules, although the grounding of a rule altered over time from habit to coercive tradition to rules sanctioned by mutual agreement and collective opinion—from theocracy to gerontocracy to democracy.\textsuperscript{278} Piaget's work cannot, however, be casually extended from children's games to conclude that the adult public views law in terms of formal rules. One obvious objection is that law may not be viewed by the public as a game.\textsuperscript{279} A more serious objection to generalizing from Piaget is his finding that girls adopted a less rule-oriented attitude than boys.\textsuperscript{280}

Piaget's finding that people accept rule changes through "democracy" as they grow older requires special attention because it implies support for Justice Scalia's view that people prefer legislative to judicial lawmaking. The first response is that the context for Piaget's study was participation in playing games without any pre-existing institutional structure for making and interpreting rules. In Piaget's game setting, democracy carries the connotation of participatory democracy, from which we cannot infer anything about public acceptance of judicial lawmaking when rules are usually made by previously established representative institutions.

More importantly, Piaget's discussion of democracy frequently sounds a lot like acceptance of rules by the group after case-by-case changes have been introduced. Thus, when he

\begin{itemize}
\item \textsuperscript{277} Commissioner v. Bollinger, 485 U.S. 340, 349 (1988) ("[W]e decline to parse the text of [a case] as though that were itself the governing statute.").
\item \textsuperscript{278} \textit{Jean Piaget, The Moral Judgment of the Child} 51, 65, 72, 95 (Marjorie Gabain trans., 1965).
\item \textsuperscript{280} Piaget, supra note 278, at 82.
\end{itemize}
asked a child "[a]nd if everyone played your way?" he received
the answers "[t]hen it would be a rule like the others," and "[i]f
the boys play that way (changing something) you have to play
like they do."281 The public seems to accept rules established
through case-by-case lawmaking.

With regard to lawyers, Professor Judith Shklar's study of
legalism282 suggests that lawyers view law in formalistic terms.
She asserts that the legal profession is imbued with "legalism,"
which she defines as "rule following."283 The primary import
of her argument, however, is that the legal profession believes
legal rules to be "sealed off from general social history, from
general social theory, from politics, and from morality,"284 not
that lawyers believe in formal rules rather than case-by-case
legal evolution. Indeed, she links rule-following with a case-by-
case approach,285 which suggests that she has not focused on
Justice Scalia's contrast between common law case-by-case law-
making and adherence to clear rules.

Finally, law professors may have a more immediate basis
for assuming that the public views law as clear rules. Law stu-
dents seem to want law to be certain and professors may read-
ily assume that students bring the lay public's attitude into law
school. But a student's desperate search for the rule probably
arises from his or her effort to ease law school anxiety and
should not be taken as evidence of the public's and the savvy
lawyer's understanding of how law operates.

Although I cannot prove it, I suspect that a case-by-case ef-
fort to understand legislative intent comes much closer to how
people expect courts to interpret a statute than does Justice
Scalia's text- and rule-based approach. The following popular
conception of texts would support this view. When we want to
know what people mean, we are uncomfortable confronting
just the bare text. We want to hear the author speak the
words, ask the author questions about what was meant, and be
flexible enough to adjust meaning to changing context and the
particular facts. The judge's creative effort to reconstruct legis-
lative intent in a particular case can be viewed as a serious at-
tempt to hear what the necessarily silent author is trying to say
in a modern context. It is no accident that we are unable to do

281. Id. at 68; see also id. at 70 (rules are "built up progressively and
autonomously").
283. Id. at 1-2.
284. Id. at 2.
285. Id. at 10.
without the language of "legislative intent" even though we know full well that it is a fiction. That phrase anthropomorphizes the legislature because we want to imagine that there is a contemporary speaker behind the text whose meaning the interpreter is trying to determine. A creative judge is simply doing his or her best to hear the legislature's voice when there is no immediate opportunity for a response. 286

CONCLUSION

The fundamental issue raised by Justice Scalia's text- and rule-based approach is how to adapt modern judging to an age of statutes. Justice Scalia's approach promises to eviscerate the traditional common law case-by-case approach exemplified by Justice Stevens.

Justice Scalia opposes the case-by-case determination of legislative intent because judicial lawmaking should be avoided whenever possible. This view may be grounded in the Constitution, rule of law policies, or a consequentialist concern about the public's perception of judicial lawmaking.

I have argued that Justice Scalia does not ground his theory of statutory interpretation in the Constitution. Indeed, as a textualist, he would have trouble doing so. His position rests instead on conceptions of legitimacy, in the normative sense of the rule of law and the descriptive sense of what the public thinks judges should do.

Justice Scalia's rule of law arguments are based on considerations of justice, specifically equal treatment and anti-retroactivity, and on separation of powers values. His concern with equal treatment and retroactivity is misplaced. Unequal treatment resulting from conscientious efforts to decide cases is more like the inevitable consequences of a decentralized judiciary than offensive discrimination against certain groups of people or random decisionmaking. Moreover, the evils of retroactivity depend on the extent to which the rules could have been anticipated and the interests claiming protection.

Separation of powers concerns raise the fundamental question of legitimate lawmaking. One case for judicial lawmaking rests on the argument that the legislature's comparative lawmaking advantage is exaggerated and that courts have

286. Judge Posner suggests thinking about the written statutory text as though it were speech. Posner, supra note 204, at 213, 240. However, his analogy of a text to speech makes him an intentionalist. I think the image of a legislative speaker invites a more creative response by the reader-judge.
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strengths in developing public values. An even stronger case can be made by shifting attention to the nature of legal language. Organic/contextual legal language develops best in the institutional setting of the case, which leads directly to judicial lawmaking through the judicial opinion.

Justice Scalia is also concerned that public respect for the courts might dissolve if judges are viewed as making law, thereby impairing their ability to protect individual rights. The problem with this argument is that the public is more likely to be concerned with substantive results than the legal process by which cases are decided. To the extent process matters to members of the public, they care about their experience of fair procedures at the initial decision-making level, not adherence to texts and rules at the more remote appellate stage. If members of the public are concerned with how judges interpret legal texts, they are likely to view Justice Scalia's proper English, ideal drafter approach with suspicion, as just another example of lawyers manipulating legal language.

The dispute between Justices Scalia and Stevens might best be summarized by recalling Justice Scalia's remark that the "only checks on the arbitrariness of federal judges are the insistence upon . . . the teachings of the mother of consistency, logic." It is curious that someone who enthusiastically quotes Holmes to the effect that courts should interpret statutory texts in accordance with common usage would fail to heed Holmes's more famous statement that "[t]he life of the law has not been logic; it has been experience." In an age of statutes, experience filtered through judicial interpretation of statutes continues to be an important source of law.

287. Scalia, Canards, supra note 39, at 588 (emphasis added).
289. OLIVER W. HOLMES, THE COMMON LAW 1 (Mark D. Howe ed., 1963); see Leis v. Flynt, 439 U.S. 438, 457 (1979) (Stevens, J., dissenting) ("[J]udicial construction of the words 'life, liberty, or property' is not simply a matter of applying the precepts of logic to accepted premises. Rather, it is experience and judgment that have breathed life into the Court's process of constitutional adjudication.").