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THE MUZAK OF JUSTICE SCALIA'S REVOLUTIONARY CALL TO READ UNCLEAR STATUTES NARROWLY

Abner J. Mikva
Eric Lane*

I. INTRODUCTION

THE conservative revolution of the early 1980's landed a group of jurists on our beaches, led by now Supreme Court Justice Antonin Scalia.¹ Their object was to vanquish from judicial use interpretive doctrines that, in their view, empowered courts to enhance the reach of the federal government through the expansion of statutes beyond the meaning of their text. The threat from such "activism" or "the hazard of [such] self indulgence"² was seen as particularly acute because of the explosion of legislative activity during the 1960s and 1970s—legislation that created and protected, among other things, civil rights, voting rights, workplace rights and environmental rights.³ While limiting judicial activism was the revolutionaries' immediate goal, their aim was also at Congress which they saw as an overreaching institution with questionable processes bent on furthering the interests of various special interests. Then Professor Frank Easterbrook's proposed meta canon stated that statutes which do not provide clear answers to litigated questions ought to be ignored.⁴

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1. Others included, for example, Judges Easterbrook, Kozinski, and Starr.

2. Speech by the Honorable Alex Kozinski (Hofstra University School of Law, Oct. 20, 1999).

3. For example, Civil Rights Act of 1964, 42 U.S.C.A. § 2000 et seq., Voting Rights Act of 1965, 42 U.S.C.A. § 1973 et seq., OSHA, 29 U.S.C.A. § 651 et seq., Clean Air and Water, 42 U.S.C.A. § 1857 et seq., Endangered Species Act of 1973, 16 U.S.C.A. § 1538 et seq.

4. See Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983). A sharp example of an attempt to apply this doctrine is the concurrence by Justice Thomas, joined by Justice Scalia, in *Holder v. Hall*, 512 U.S. 874, 891 (1994), in which they argued that the Voting Rights Act of 1965, as amended, did not cover redistricting.

Aware of the mores and traditions of their initial judicial target, this steadfast band of disciplined and clever revolutionaries determined, in the best of revolutionary traditions, to disguise their political agenda under ostensibly modest proposals of neutral cast that could attract followers who shared their views of the problem, but not their ideological solutions. Their approach was time worn, but insightful—they were going to return the federal government to “[a] government of laws, not of men,”⁵ to honor legislative efforts, not to undermine them. Their method was simple, at least rhetorically—read and apply only the text of the statute.

Their emphasis on text found an audience beyond the ideological groups for whom it had special sanctity. We, for example, favored the above noted federal regulatory schemes, but disfavored their expansion by the courts. For us, the question was respect for the legislative process and a belief that, with all of its flaws, it is not only the constitutionally designated institution for lawmaking, but the best institution for transforming competing policy demands into law. Of course, this proposition, without example, is too abstract. A good example is Justice Brennan’s decision in *United Steelworkers of America, AFL-CIO-CLC v. Weber*,⁶ in which Title VII’s clear language and history was ignored in order to give a job preference to a protected minority. In effect, as Justice Burger noted in his dissent, Justice Brennan “amend[ed] the statute to do precisely what both its sponsors and its opponents agreed the statute was not intended to do.”⁷

Decisions such as *Weber* served as a platform for broadening the revolutionary reach of the expedition. These decisions not only challenged legislative authority but also undermined legislative policy compromises that are the basis for statutory enactment. In this case, that compromise paralleled the nation’s tolerance for advancing minority rights in the workplace. The decision, notwithstanding its author’s best intention, destroyed that balance and helped fuel a public policy dispute over racial preferences that not only furthered the conservative revolution, but remains with us today.

In this environment, the revolution quickly gained force and in 1985 won an extraordinary victory with the elevation of Justice Antonin Scalia to the Supreme Court. Since then, Justices Scalia and Thomas have maintained a steady attack on what they judge to be judicial activism, defined as extending statutes beyond their text through the use of legislative history. This exaltation of text as a limitation on judicial interpretation has also spurred extraordinary amounts of writing on statutory interpretation. As one of the articles in this symposium notes in what we consider overglowing terms: “Thanks to Justice Antonin Scalia’s tireless advocacy and

5. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (1997) [hereinafter SCALIA].

6. 443 U.S. 193 (1979).

7. *Id.* at 216.

persistence since arriving on the Supreme Court in 1986, the subject of statutory interpretation has enjoyed an unprecedented renaissance in recent years.”⁸

But other than the abundance of scholarship triggered by Justice Scalia’s “persistence,” what has been the actual impact on either judicial or legislative decision making? Our answer, addressed to the revolution’s scholarly acolytes, is very little. As we survey decisions across the country, we observe little that has changed in the way that courts interpret statutes. In short, the Supreme Court, other federal courts, and state courts throughout the country continue to use legislative history to interpret statutes. In fact, the revolutionary voice, epitomized by Justice Scalia, has become almost unheard, except perhaps in academia, despite or perhaps because of the persistent repetition of its message: “I join the opinion of the Court, excluding, *of course*, its resort . . . to what was said by individual legislators and committees of legislators”⁹ This failure results from two factors. First, in the end, Justice Scalia’s approach does not provide an answer to the important question of how to find the meaning of a statute when its text is unclear in the context of a particular case. Second, his approach itself becomes a model of what it criticizes—judicial lawmaking. This time, however, the activism is directed at limiting statutory scope rather than expanding it. In effect, as we discuss later, Justice Scalia has established a meta canon: all unclear statutes are to be read narrowly.

That said, it also appears that the Scalia outbreak has produced some salutary effects on statutory interpretation. We make this observation based on the work of Professor Charles Tiefer, who observes that the Supreme Court has evidenced greater attention to text as the primary source of legislative meaning and, when the text is unclear, a more careful selection of legislative history for use in determining the statute’s meaning.¹⁰ If this remains the interpretive norm, we will all be better off.

Our purpose in this essay is to describe (in the first section) how judges read statutes and the problems they incur in this effort. It is against this interpretive regime that Justice Scalia has rebelled. Against this regime we will then (in the second section) explore Justice Scalia’s criticism and measure his successes.

II. HOW JUDGES READ A STATUTE

To start with the overly evident, courts (and here we are talking primarily about federal courts) and legislatures have different constitutional

8. John C. Roberts, *The Sources of Statutory Meaning: An Archaeological Case Study of the 1996 Telecommunications Act*, 53 SMU L. REV. 145, 145 (2000).

9. *Department of Commerce v. United States House of Representatives*, 119 S. Ct. 765, 780 (1999) (Scalia, J., concurring) (emphasis added).

10. Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. (forthcoming 2000) [hereinafter Tiefer]. See also Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 MINN. L. REV. 199, 205-206 (1999) [hereinafter Frickey].

functions, different procedures for effecting their functions and different characteristics reflecting different constitutional goals. Most simply put, Congress makes laws and the courts are intended to resolve those relatively few disputes that arise from the application of these laws. Few would disagree (at least in theory) with Judge Posner's frequently quoted expression of legislative supremacy: a statute is "a command issued by a superior body (the legislature) to a subordinate body (the judiciary). . . ."¹¹ Judge Guido Calabresi perhaps comes closest, arguing, as an academic, for judicial authority "to determine whether a statute is obsolete, whether in one way or another it should be consciously reviewed. At times this doctrine would approach granting to courts the authority to treat statutes as if they were no more and no less than part of the common law."¹² Needless to say, this view has not been judicially accepted.¹³

Considering the breadth of statutory reach in the age of statute, only a few cases relating to statutory meaning reach the courts, particularly the appellate courts, although these constitute a large percentage of those courts' dockets.¹⁴ These are usually cases in which the facts argue against applying a statute's clear text, or in which the text is unclear with respect to the facts.

Whether a case in which the text is clear should ever be decided contrary to the application of that text is questionable, but it does happen. This is the result of one of two broad judicial motivations: judicial empathy and judicial ideology.

Empathy of course is natural; acting on it in the face of a clear contrary statement of law is unusual. Courts do not see the law from the same perspective that enacting legislators do. Their view of the law is shaped (not exclusively) by its application to the litigants before them. A case's facts often form the screen through which a statute is read. One of our favorite examples comes from Judge Posner. In *United States v. Marshall*,¹⁵ at question was a statute whose application would often result in stiffer sentences for retailers of LSD than manufacturers and wholesalers of the drug. In response to the majority's plain meaning reading of the statute, Judge Posner argued that the statute was irrational because of its mistreatment of relative sentencing burdens. In effect, Judge Posner attempted to rewrite the statute to address the weight of pure LSD as the exclusive measuring stick for punishment. He anchors his view in "natural law" or judicial authority "to enrich positive law with the moral values and practical concerns of civilized society."¹⁶ Only a year earlier, Judge

11. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 265 (1990).

12. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 2 (1982).

13. See Abner J. Mikva, *The Shifting Sands of Legal Topography*, 96 HARV. L. REV. 534 (1982) (reviewing CALABRESI, *supra* note 12).

14. Justice Scalia has noted, "By far the greatest part of what I and all federal judges do is to interpret the meaning of federal statutes and federal agency regulations." SCALIA, *supra* note 5, at 13-14.

15. 908 F.2d 1312 (7th Cir. 1990).

16. *Id.* at 1335.

Posner authored an opinion in which he upheld the plain meaning of the same statute.¹⁷ What converted the rational to the irrational for Judge Posner? We think the impact of the sentence on the particular defendants in *Marshall* drove Judge Posner's sense of the statute's irrationality. This concern for defendants was certainly not the focus of Congress at the time of enactment. The record before Congress was no doubt laden with stories of the impact of drugs on individuals and communities. As Justice Rehnquist wrote in affirming the sentence of one of the *Marshall* defendants: "Congress did not want to punish retail traffickers less severely, even though they deal in smaller quantities of the pure drug, because such traffickers keep the street markets going."¹⁸

Judicial ideology can also be determinative. Two well known cases, *Church of the Holy Trinity v. United States*¹⁹ and the previously noted *Weber*²⁰ case, are exemplars of this point.

Holy Trinity is the most frequently cited authority for the exercise of judicial discretion to avoid a statute's text. Its fame lies in its highlighting of the interpretive canon: "It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."²¹ The statute basically prohibited anyone from bringing foreigners to the United States "to perform labor or service of any kind . . ." except, among others, foreigners who were "professional actors, artists, lecturers, [or] singers . . ."²² The result of the decision was to allow the Church of the Holy Trinity to contract with an English pastor to move to the United States to serve the church. This result was inconsistent with the statutory text as the Court conceded—"It must be conceded that the act of the corporation is within the letter of this section . . ."²³—but consistent with its spirit and intention. In short, the Court seemed offended that in a "Christian nation," Congress might have limited the discretion of churches.

Holy Trinity is a case we all knock around from an interpretive perspective. For example, Professor Philip Frickey wrote:

In my legislation course, I tell my students that *Holy Trinity Church* [sic] is the case you always cite when the statutory text is hopelessly against you The tactic of relying upon the case does sometimes resemble the "hail Mary" pass in football. As a matter of attorney advocacy, that may be all well and good, but as a matter of judicial resolution of a critical social issue, it may seem like something altogether different.²⁴

17. See *United States v. Rose*, 881 F.2d 386 (7th Cir. 1989).

18. *Chapman v. United States*, 500 U.S. 453, 461 (1991).

19. 143 U.S. 457 (1892).

20. *Weber*, 443 U.S. at 193.

21. *Holy Trinity*, 143 U.S. at 459.

22. *Id.* at 458.

23. *Id.*

24. Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 247 (1992).

Weber, a case of far more substantial social consequence than that of *Holy Trinity*, demonstrates Professor Frickey's point. The question in *Weber* was whether the rejection of a white's bid for admission to a plant's craft-training program on the basis of an affirmative action arrangement that preferred black workers was unlawful discrimination under Title VII of the Civil Rights Act of 1964. The Court found that despite the text, it was not:

Respondent's argument rests upon a *literal interpretation* of . . . the Act. . . .

Respondent's argument is not without force. But it overlooks the significance of the fact that the . . . plan is an affirmative action plan voluntarily adopted by private parties to eliminate traditional patterns of racial segregation. In this context respondent's reliance upon a literal construction of . . . [the Act] is misplaced. It is a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the *intention* of its makers." The prohibition . . . must therefore be read against the background of the *legislative history* of Title VII and the historical context from which the Act arose. Examination of those sources makes clear that an interpretation of the sections that forbade all race-conscious affirmative action would "bring about an end completely at variance with the *purpose* of the statute" and must be rejected.²⁵

Justice Blackmun, reminiscent of Judge Posner in *Marshall*, joined in the majority, expressing an almost mystical view for ignoring a statute: "I believe that additional considerations, practical and equitable, only partially perceived, if perceived at all, by the 88th Congress, support the conclusion reached by the Court today. . . ."²⁶

Such judicial willfulness in the face of statutory restraints is inconsistent with legislative supremacy and a challenge to representative democracy. Aware of this, courts (Justice Blackmun and Judge Posner to the contrary) usually attempt to disguise these lawmaking efforts with references to what they characterize as legislative intent or purpose, usually supported by canons of interpretation or evidenced by legislative history.²⁷ *Weber*, for example, can be read for the proposition that reliance on the text is misplaced if it would bring about an end at variance with the legislature's intent or purpose as evidenced by its legislative history.²⁸ Legislative intent or purpose, used in this way, while the subject of considerable academic exploration,²⁹ simply indicates that through the judicial eye, the legislature meant something other than what it said.

25. *Weber*, 443 U.S. at 201-02 (emphasis added) (citations omitted).

26. *Id.* at 209.

27. See discussion *infra*, notes 41-59 and accompanying text.

28. *Weber*, 443 U.S. at 193.

29. See generally ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 6-9 (1997) [hereinafter MIKVA & LANE].

Most cases of statutory interpretation, especially at the appellate levels, do not involve disputes over the applicability of clear language, but rather over the meaning of unclear language in the context of a particular case. This is important to remember because, as we note below, Justice Scalia's approach to statutory interpretation provides little help in addressing such cases.

Several factors account for statutory ambiguity. First, words are not perfect symbols for the communication of ideas and may be understood differently by different audiences. This is not in any way to suggest support for some theory of indeterminate language.³⁰ Indeed, our view is that the relatively few real judicial disputes that arise over the meaning of language compared to the number of decisions made by the public with or without their lawyers evidences clarity of most statutory drafting (as well, of course, of other things such as the cost of litigation). Second, while particular events may stimulate the enactment of a statute, statutes are, for the most part, drafted in general terms, addressing categories of conduct. No matter how carefully any statute might be drafted, a dispute over its applicability to a particular fact pattern may be the natural consequence of its generality. Illustrative of this point is a 1991 decision of the Supreme Court, *Chisom v. Roemer*,³¹ in which the Court was asked to decide whether "elected judges" came within the definition of the statutory term "representatives," thereby subjecting the election of judges to section 2 of the Voting Rights Act of 1965, as amended. (The Court decided that they did, with a strong dissent from Justices Scalia and Kennedy, and Chief Justice Rehnquist.)

Third, legislatures sometimes use general language, contemplating that it will be defined by administrative agencies.³² Fourth, sometimes statutes are unclear as a result of legislative compromises that are struck to secure votes for the enactment of a statute. Compromises can be struck by an agreement to leave undefined a general word or phrase in order to protect a particular political position and allow the bill to be enacted into law. Compromises can also be struck by an agreement to remain silent on a particular point. Statutory silence on the effective date of the Civil Rights Act of 1991³³ illustrates this point. As a Senate staff member remarked: "You have to decide if there are votes there to support this type of enactment, and we didn't have the votes on the left. . . . The deal that was cut was to make the (language of the) statute fairly clear . . . [a]nd then leave it to the courts to pound out the issue."³⁴

30. See, e.g., *Pacific Gas and Elec. Co. v. G.W. Thomas Drayage & Rigging Co., Inc.*, 69 Cal. 2d 33 (1968).

31. 501 U.S. 380 (1991).

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

33. 42 U.S.C.A. § 1981 et seq. .

34. *Dispute over Retroactivity of Civil Rights Act Stems From Legislative History*, Hill Staffer Says, *Daily Labor Report* (BNA), Jan 22, 1992, at A-13.

Finally, ambiguities are sometimes created by insufficient legislative thought to the meaning of the language employed or because a legislature has simply not considered the question which has become the subject of litigation. At least one Judge, Robert Cowan of the Third Circuit Court of Appeals, considers such cases to be the bulk of those that reach his court: "I'll say the overwhelming majority cases which involve legislative . . . construction involve a matter which the legislators never thought of in the first place."³⁵ A probable example of the latter is the absence of any reference to "burden of proof or persuasion" in Title VII of the Civil Rights Act of 1964. This silence resulted in two contrary decisions of the Supreme Court, *Griggs v. Duke Power Co.*³⁶ and *Wards Cove Packing Co. v. Atonio*.³⁷ The issue was finally resolved in the Civil Rights Act of 1991,³⁸ in which Congress, among other things, placed the burden of proving business justifications on the employer.

Unclear statutes present courts with the difficult problem of giving meaning when none is extractable from the text. In effect, judges are asked to make policy choices or, as one judge more graphically described, "you're playing God, in effect."³⁹ For some judges, the lack of clarity provides an opportunity to impose their policy views as law. For others, the responsibility for making such decisions is nettlesome. Consider the following exchange among former members of Congress, James Florio and Abner Mikva, and Judge Nicholas Politan at the Twenty-First Annual United States Judicial Conference for the District of New Jersey.

Florio: There is in some respects a conscious policy by the legislature to make sure that something is ambiguous, because failure to have that ambiguity would result in no legislative outcome.

Mikva: [Sometimes the] "easiest answer [is] to punt."

Politan: I think we are in a situation where the Court is faced with the damning subject of trying to create that which the legislature has not spoken to. I mean . . . I think . . . punting by the legislature in inappropriate . . . because we get saddled, as judiciary, we get saddled that we are judicially legislating, that we are doing some we should not do. The very individuals who criticize us for legislating are in fact creating the abyss in the law that we have to cover.⁴⁰

To find the meaning of an unclear statute or to justify judicial lawmaking under an ambiguous statute, courts have traditionally relied on (1) general presumptions about legislative intent, known as canons of construction, and (2) specific presumptions about legislative intent, usually discernible through legislative history. A word on legislative intent is

35. *Twenty-First Annual United States Judicial Conference for the District of New Jersey* 30 (Mar. 13, 1997).

36. 401 U.S. 424 (1971).

37. 490 U.S. 642 (1989) (holding, among other things, that the statute required the employee to disprove a business justification raised by the employer).

38. 42 U.S.C.A. § 1981 et seq.

39. *Twenty-First Annual United States Judicial Conference for the District of New Jersey*, *supra* note 35, at 31 (statement of Judge Robert Cowan).

40. *Id.* at 27-28, 33.

probably necessary. While we have previously written on the historical distinctions between intent and purpose,⁴¹ we, like the courts, use the terms without distinction, usually to refer to a source of statutory meaning (the intent of the legislature, the purpose of the legislation) outside of the language of the statute at issue in the litigation.

Canons have long been the object of academic derision. So consistently unfavorably has their use been viewed that two contemporary scholars of statutory interpretation have written that "almost everybody thinks the canons are bunk."⁴² Two basic observations underlie this criticism: first, that canons are not a coherent, shared body of law from which correct answers can be drawn, and second, that, when viewed individually, many canons are wrong.

As to the first criticism, it is clear that canons are a grab bag of contradictory individual rules from which a judge can choose to support his or her view of the case. This was Karl Llewellyn's point when he observed, in his now famous article, that "there are two opposing canons on almost every point."⁴³ Few have taken issue with Llewellyn's observation. Indeed, it has been almost universally adopted as the starting place for all criticism of canons.⁴⁴ This is not true for Justice Scalia, who, as we will discuss later,⁴⁵ attempts to resurrect canonical virtue to exorcise the evils of legislative history.

Second, canons, as individual rules, are equally flawed. Canons are considered presumptions about legislative intent. How, for example, do we know as a general proposition that when a legislature passes a remedial statute that it intends for it to be broadly applied? It is just as probable that the enacting legislature intends the statute to be moderately or narrowly applied. The point is that, as a rule, the canon bars the inquiry, and it is at odds with legislative supremacy by forcing the burden on the legislature to overcome a judicial presumption, rather than requiring the court to dig for the meaning.

Legislative history also has its problems, although it is the source of choice for most courts.⁴⁶ One is its use to aid in the interpretation of

41. See generally MIKVA & LANE, *supra* note 29.

42. WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION* 639 (1988).

43. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950).

44. See, e.g., Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983).

The usual criticism of the canons . . . is that for every canon one might bring to bear on a point there is an equal and opposite canon, so that the outcome of the interpretive process depends on the choice between paired opposites—a choice the canons themselves do not illuminate. (You need a canon for choosing between competing canons, and there isn't any.)

Id. at 806.

45. See *infra* notes 60-109 and accompanying text.

46. Some state courts have either explicitly or implicitly adopted a preference for legislative history over canons of interpretation. See, e.g., *Portland Gen. Elec. Co. v. Bureau of Labor and Indus.*, 859 P.2d 1143, 1146 (Or. 1993). See also Eric Lane, *How to Read a*

otherwise clear statutes. This "modified plain meaning" rule is chronicled by Judge Patricia Wald:

Two preliminary observations may be made. First, although the Court still refers to the "plain meaning" rule, the rule has effectively been laid to rest. No occasion for statutory construction now exists when the Court will *not* look at the legislative history. When the plain meaning rhetoric is invoked, it becomes a device not for ignoring legislative history but for shifting onto legislative history the burden of proving that the words do not mean what they appear to say. Second, the Court has greatly expanded the types of materials and events that it will recognize in the search for congressional intent.⁴⁷

Several problems arise from such use of legislative history. First, giving weight to legislative history in the face of a clear textual answer diminishes the theoretical, constitutional and real significance of the bicameral vote on the text and its presentment to the executive. It is the text, after all, that is enacted and that is the central object of the enactment process. Second, such use of the text suggests that text and legislative history are interchangeable, draining certainty from law, creating more opportunities to argue that a statute is unclear because of contradictions between text and legislative history, and enhancing judicial power. A striking example of this is extracted from Judge Harold Leventhal's opinion in *Amalgamated Meat Cutters and Butcher Workmen of North Am., AFL-CIO v. Connally*:⁴⁸ "[w]hether legislative purposes are to be obtained from committee reports, or are set forth in a separate section of the text of the law, is largely a matter of drafting style."⁴⁹ Third, the more emphasis that is placed on legislative history, the more parties will attempt to "create" such "history" in an attempt to establish influence upon the courts.⁵⁰

Statute in New York: A Reply to Judge Kaye and More, 28 HOFSTRA L. REV. (forthcoming 2000).

47. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195 (1983) (emphasis added) (citations omitted).

48. 337 F. Supp. 737 (D.D.C. 1971).

49. *Id.* at 750. For a unique case in which the Supreme Court uses legislative history to trump clear statutory language see *Train v. Colorado Pub. Interest Research Group, Inc.*, 426 U.S. 1 (1976). In this case, the Court of Appeals wrote: "In our view, then, the statute is plain and unambiguous and should be given its obvious meaning. Such being the case, . . . we need not here concern ourselves with the legislative history of the 1972 Amendments." *Colorado Pub. Interest Research Group, Inc. v. Train*, 507 F.2d 743, 748 (10th Cir. 1974).

The Supreme Court, in reversing the Court of Appeals, replied:

To the extent that the Court of Appeals excluded reference to the legislative history of the [statute] in discerning its meaning, the court was in error. As we have noted before: When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination."

Train, 426 U.S. at 10 (citation omitted).

50. As stated by M. Douglass Bellis, Assistant Legislative Counsel, U.S. House of Representatives, at the 1996 American Association of Law Professors' annual conference: "If we decide that the legislative history . . . is more important than the legislation, legislators will never really know what they have to do, what levers they need to pull in order to get their ideas firmly cemented in place."

The more frequent use of legislative history—to give meaning to unclear statutes—is not without problems, primarily flowing from the fact that all legislative history is the product of a smaller portion of a legislative body than the whole. The criticism is that “[l]egislative materials . . . at best can shed light only on the ‘intent’ of that small portion of Congress in which such records originate; [the legislative materials] therefore lack the holistic ‘intent’ found in the statute itself.”⁵¹ Another challenge addresses the reliability of legislative history. We have often noted that all legislative history is not reliable or, better, that much of what is characterized as legislative history is not reliable.⁵² What is probative is legislative history that bears a significant relationship to the pre-enactment deliberative process. This includes committee reports and carefully selected debates addressing either the main bill or amendment thereto. It excludes any post enactment declarations by either the executive or legislators. Such statements are not subject to legislative deliberation and are not relevant. Additionally such statements almost always reflect the speaker’s current political needs and not those of the enacting legislature.

Committee reports are the formal products of legislative institutions established by Congress to effect the level of specialization necessary to effect its legislative goals. These reports, characterized by Professor Tiefer as institutional legislative history,⁵³ are relied on by the Congress to express institutional meaning. Similarly, certain types of debate are probative of legislative meaning. Professor Steven Ross captures them nicely:

(1) statements by the sponsor of the legislation or the particular provision at issue when it appears that members who might otherwise desire to amend the bill have relied on those statements; and (2) colloquies between the “major players” concerning a legislative provision when it appears that the majority of members are prepared to follow any consensus reached by these individuals.⁵⁴

Use of such legislative history makes good sense. First, as Judge Patricia Wald points out:

For all its imperfections, legislative history, in the form of committee reports, hearings, and floor remarks, is available to courts because Congress has made those documents available to us. . . . [L]egislative history is the authoritative product of the institutional work of the Congress. It records the manner in which Congress enacts its legislation, and it represents the way Congress communicates with the

51. Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 375 (1987).

52. See, e.g., MIKVA & LANE, *supra* note 29. See also ABNER J. MIKVA & ERIC LANE, *THE LEGISLATIVE PROCESS* (1995) [hereinafter MIKVA & LANE, *THE LEGISLATIVE PROCESS*].

53. See Tiefer, *supra* note 10.

54. Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 576 (1992).

country at large.⁵⁵

Second, as Justice Breyer wrote: "[u]sing legislative history to help interpret unclear statutory language seems natural. Legislative history helps a court understand the context and purpose of a statute."⁵⁶ It seems natural because, if the judicial goal is to discover whether the legislature intended to cover the particular conduct under litigation, reference to relevant legislative history directly advances that goal. Remember the choice is not abstract, but it is among legislative history, canons, or the court's naked policy preference. And while probative legislative history may not provide as much certainty of legislative meaning as the text, it can often provide more than canons and judicial divining.

We refer above to the "court's naked policy preference" in recognition of the fact that even a disciplined use of legislative history leaves room for judicial discretion. Searching a legislative record may create an opportunity for making choices among competing pieces of legislative history which of necessity impresses judicial preferences, but there is simply no way around this except to continue to press for judicial self regulation. Judge Nicholas Politan provides a first hand account of this aspect of judging.

I guess, theoretically, in order to really do the job you have to go back to stage one, to the very beginning of the process, and read everything that went on . . . determine what is . . . what is good stuff, what is bad stuff . . . and then make a judgment. Query, whether or not having gone through all of that you don't bring to it your own view of what you think it should be, which is a problem that we try to guard against. I suspect in any judicial decision, you bring to that decision your own background, your own thoughts about the matter, and in essence perhaps you do put yourselves in the position of being the super legislator. Somebody has to do it. The buck stops with the judiciary.⁵⁷

While the careful use of legislative history will sometimes guide a court toward an appropriate legislative answer to a statutory question, often it will not. Even the elaborate federal legislative history maintained by Congress through the Congressional Record and committee reports cannot disgorge the answer to every question. And most state legislative records are comparatively sparse. Such situations provide the maximum opportunity for, and indeed require, judicial lawmaking. These are the hard cases, which present what Professor Harry W. Jones characterized as a "'serious business' situation" or "show-down question,"⁵⁸—one for

55. Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 306 (1990).

56. Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848 (1992).

57. *Twenty-First Annual United States Judicial Conference for the District of New Jersey*, *supra* note 35, at 35.

58. Harry W. Jones, *An Invitation to Jurisprudence*, 74 COLUM. L. REV. 1023, 1041 (1974). The phrase "serious business" is drawn from Justice Cardozo: "It is when the col-

which statutory sources or legislative procedures cannot provide an answer and yet the court must. These, of course, present the maximum opportunity for judicial lawmaking and no limit on judicial discretion, except for the claims of the litigants. It is in these situations we turn the court loose, within the confines of the case, to make law. As described by Judge Cowan:

I think I have to be brutally honest with you and say the unspeakable, that I would decide the case based on what I perceive to be the most just manner of resolving the matter before me, and that all of these tools of legislative history, canons and so forth, would merely be techniques that I would employ to write a decision. . . . I think that's what Courts do and I think we have to say it as it is, and that's how I would resolve the matter.⁵⁹

III. THE SCALIA REVOLUTION

It is against judging as described, for example, by Judges Politan and Cowan that Justice Scalia rebels in both his academic and judicial writings. According to Justice Scalia, such a "Mr. Fix-it mentality [applied to clear or unclear statutes]. . . is a sure recipe for incompetence and usurpation."⁶⁰ This sentiment is hard not to share when the statute is contextually clear, but it is hard to understand when the statute is contextually unclear and more so when the legislative record is barren.

What is missing, that is, what presumptively would fuel restraint in judicial interpretation is, according to Justice Scalia, a theory of statutory interpretation. "Surely this is a sad commentary: We American judges have no intelligible theory of what we do most."⁶¹ And to make matters worse, the "American bar and American legal education, by and large, are unconcerned with the fact that we have no intelligible theory."⁶² This is poignant testimony in 1997 to either the lack of wit of the academy which has produced a tidal wave of writings on statutory construction or (our view) the insusceptibility of the actual practice of interpreting statutes to a simple, precise, unifying theory.

Whether witlessness or intractability is the culprit, Justice Scalia does offer a solution to his perceived problem of judicial lawmaking. It is "textualism." Through the application of textualism, order will be restored. Follow the text and representative democracy will be undergirded. To a point, as we noted earlier, we agree. We diverge at ambiguity. When a text is contextually unclear, that is, the text cannot answer the question posed by the case—textualism cannot provide the answer. Justice Scalia

ors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins." BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 21 (1921).

59. *Twenty-First Annual United States Judicial Conference for the District of New Jersey*, *supra* note 35, at 43-44.

60. SCALIA, *supra* note 5, at 14.

61. *Id.*

62. *Id.*

is, of course, aware of this dilemma. His answer, at least his partial answer, is to rescue from academic bullying the canons of construction. "Textualism," he informs us, "is often associated with rules of interpretation called the canons of construction—which have been widely criticized, indeed even mocked, by modern legal commentators."⁶³ But it is not every canon he favors. He dismisses what he calls "faux"⁶⁴ or "dice-loading"⁶⁵ canons as such remedial statutes to be read liberally.⁶⁶ Apparently, he excepts from this prohibited list such canons as the rule of lenity⁶⁷ and the canon that statutes must be construed to avoid unconstitutionality.⁶⁸

On the other hand, Justice Scalia advocates the use of the grammatical canons such as *expressio unius est exclusio alterius*, *noscitur a sociis* and *eiusdem generis*. While the virtue of common sense may support the use of such canons when no other contradictory probative evidence of legislative meaning can be found, they are keys to only a few cases, leaving the question of what to do when they do not work.

One thing we are emphatically and definitely told not to do is to use legislative history. Justice Scalia's unwavering, intense and repetitious advocacy of this negative has made it the signature piece of his theory of textualism.⁶⁹ It is also what makes his theory radical because of the almost universal judicial use of legislative history in the interpretation of statutes, in most instances to the exclusion of canons.⁷⁰

Justice Scalia's stated rationale for this position is well known. Text alone is the source of meaning. The objective meaning of words "... is what constitutes the law."⁷¹ It is a statute's text that is enacted, not a committee report or the comment of a legislator.⁷² Legislative history, particularly committee reports, should also be ignored because it may be the product of unsupervised staff.⁷³ As all legislative history is fatally flawed he does not generally enter the fray over what legislative history is probative. One recent exception to this principle of non-engagement is found in his dissent last term in *Holloway v. United States*.⁷⁴ The major-

63. *Id.* at 25.

64. *Id.* at 27.

65. *Id.* at 28.

66. See SCALIA, *supra* note 5, at 28.

67. See *id.* at 29 (This rule he finds "validated by sheer antiquity.").

68. See *Jones v. United States*, 526 U.S. 227, 253 (1999) (Scalia, J., concurring).

69. See Frickey *supra* note 24, at 254-55.

70. For example, the Oregon and New York judiciaries.

71. SCALIA, *supra* note 5, at 29.

72. See *supra* notes 30-38 and accompanying text.

73. Staff authority is delegated by legislators who sometimes are less vigilant than they might be. Occasionally, no doubt, a staff member will cheat and do something improper that is outside of his or her delegated authority. This is the exception and not the rule and should not be the basis of categorically denying the legitimacy of all legislative history. Otherwise we should perhaps deny the legitimacy of judicial decisions on the basis of Judge Posner's observation about judges delegating too much authority to law clerks. See RICHARD A. POSNER, *THE FEDERAL COURTS* 225 (1985).

74. 526 U.S. 1, 119 S. Ct. 966, 972 (1999). See also *Babbitt v. Sweet Home Chapter of Communities for A Great Oregon*, 515 U.S. 687 (1995).

ity's reference to the clearly non-probative floor statements of several legislators drove Justice Scalia to respond: "It supports this statement, both premise and conclusion, by two unusually uninformative statements from the legislative history (to stand out in that respect in that realm is quite an accomplishment) that speak generally about strengthening and broadening the carjacking statute and punishing carjackers severely."⁷⁵

Justice Scalia has carried his anti-legislative history flag high from his earliest days on the Court to the present.⁷⁶ Perhaps, the most well know exposition of his rejection of legislative history is his 1989 concurrence in *Blanchard v. Bergeron*.⁷⁷ In *Blanchard*, the question was whether the "reasonable attorney's fee" permitted under 42 U.S.C. § 1988 was capped by an amount provided in a contingent-fee arrangement entered into by a plaintiff and his counsel. The Court determined it was based on the incorporation of the test for determining reasonable fees set forth in *Johnson v. Georgia Highway Express, Inc.*⁷⁸ in both House and Senate Committee reports.

Johnson provides guidance to Congress' intent because both the House and Senate Reports refer to the 12 factors set forth in *Johnson* for assessing the reasonableness of an attorney's fee award. The Senate Report, in particular, refers to three District Court decisions that "correctly applied" the 12 factors laid out in *Johnson*.⁷⁹

It was use of these committee reports which occasioned Justice Scalia's sharp and factually questionable denunciation of committee reports and their place in the legislative process.

I am confident that only a small proportion of the Members of Congress read either one of the Committee Reports in question, even if (as is not always the case) the Reports happened to have been published before the vote; that very few of those who did read them set off for the nearest law library to check out what was actually said in the four cases at issue (or in the more than 50 other cases cited by the House and Senate Reports); and that no Member of Congress came to the judgment that the District Court cases would trump *Johnson* on the point at issue here because the latter was dictum. As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant (for that end *Johnson* would not merely have been cited, but its 12 factors would have been described, which they were not), but rather to influence

75. *Holloway*, 119 S. Ct. at 975.

76. Although at his confirmation hearing Judge Scalia did not appear to rule out the use of legislative history, his subsequent jurisprudence has allowed almost no exceptions to his anti-legislative history predilection. See Frickey, *supra* note 24 at 254-55.

77. 489 U.S. 87 (1989).

78. 488 F.2d 714, 717-19 (5th Cir. 1974).

79. *Blanchard*, 489 U.S. at 91.

judicial construction. What a heady feeling it must be for a young staffer, to know that his or her citation of obscure district court cases can transform them into the law of the land, thereafter dutifully to be observed by the Supreme Court itself.

I decline to participate in this process. It is neither compatible with our judicial responsibility of assuring reasoned, consistent, and effective application of the statutes of the United States, nor conducive to a genuine effectuation of congressional intent, to give legislative force to each snippet of analysis, and even every case citation, in committee reports that are increasingly unreliable evidence of what the voting Members of Congress actually had in mind.⁸⁰

A further exposition of the evils of committee reports is found in *Bank One Chicago v. Midwest Bank & Trust Co.*,⁸¹ in which Justice Scalia argues that even if what he calls subjective intent was probative of legislative meaning, committee reports could not constitute such intent because they were not widely read.

In my view a law means what its text most appropriately conveys, whatever the Congress that enacted it might have "intended." The law is what the law says, and we should content ourselves with reading it rather than psychoanalyzing those who enacted it. Moreover, even if subjective intent rather than textually expressed intent were the touchstone, it is a fiction of Jack-and-the-Beanstalk proportions to assume that more than a handful of those Senators and Members of the House who voted for the final version of the . . . Act, and the President who signed it, were, when they took those actions, aware of the drafting evolution that the Court describes; and if they were, that their actions in voting for or signing the final bill show that they had the same "intent."⁸²

As we have noted earlier there is much to admire in Justice Scalia's dogged scolding of courts for the use of legislative history when statutes are clear. His fear of judicial usurpation of legislative responsibilities in such situations is well founded. But what is extremely problematic is how the avoidance of probative legislative history in the case of unclear statutes protects the Republic from the evils of judicial statute writing. To paraphrase Dean Landis (whose views were criticized by Justice Scalia), without the use of legislative history how are we to protect against judicial manipulation?⁸³ After all, the interpretation of statutes is not an abstract exercise, it is about the exercise of power in our political system. As Judge Posner pointed out, ". . . the important question concerning statutory interpretation, which is political rather than epistemic: how free should judges feel themselves to be from the fetters of text and legislative intent in applying statutes. . . ."⁸⁴ If the courts are not to use legislative history in the interpretation of unclear statute, what is their alternative?

80. *Id.* at 98-99.

81. 516 U.S. 264 (1996).

82. *Id.* at 279 (Scalia, J., concurring in part).

83. SCALIA, *supra* note 5, at 30.

84. POSNER, *supra* note 11, at 271.

Justice Scalia's answer to this question is revealingly unclear. First, he seems to frequently argue despite what seems to be evident ambiguity that a statute is clear. In *Bank One Chicago*, for example, Justice Scalia based his concurrence on what he apparently considered to be the statute's plain meaning, despite what would appear to be an evident lack of clarity, as evidenced by the text and every other member of the Court. Second, if he agrees that a statute is unclear his choice is to employ the earlier discussed canons. Last term, for example, in *Jones*,⁸⁵ rather than join Justice Souter's majority opinion in which the significance of legislative history was asserted, Justice Scalia concurred based on the canon that a statute must be read to avoid a constitutional question. Finally, and most surprisingly, if the above two approaches fail, Justice Scalia turns to the "intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."⁸⁶ In *Blanchard*, for example, where no canon was available, rather than using legislative history, he rooted his argument in "an interpretation of the statute that is reasonable, consistent, and faithful to its apparent purpose. . . ."⁸⁷

Certainly calling something clear if it is unclear cannot be a tenet of textualism. We assume that what Justice Scalia is really saying is that under his reasonable person test the statute is clear. Employing the "reasonable person" to provide answers to difficult statutory questions is not new. Hart and Sacks used him to find the purpose of a statute as a substitute for the much criticized intent. According to them, a statute's meaning could be found by "comparing the new law with the old" and asking "[w]hy would reasonable men, confronted with the law as it was, have enacted this new law to replace it?"⁸⁸ The reasonable men, in this case, were legislators. Of course, these men are not the same as those sponsored by Justice Scalia. After all, the employment of such men resulted in *Weber*.⁸⁹ Instead, Justice Scalia's reasonable person must come from outside the legislature. As Professor Tiefer has pointed out about Justice Scalia: "[S]hifting the objective standard to the statutory readers outside the legislature let the textualist close the door of the legislative-chamber and stop peering in at the participant's statements to get the enactment's intent."⁹⁰

How can an approach that leaves the decision to a reasonable non-legislator arrive at the goal of finding a statute's "objectified intent?"⁹¹ Is this standard any different or any better than the reasonable legislator standard of Hart and Sacks? As Justice Scalia himself has noted about the search for meaning by a wise and intelligent person, who we assume

85. 119 S. Ct at 1217.

86. SCALIA, *supra* note 5, at 17.

87. *Blanchard*, 489 U.S. at 99.

88. HENRY HART & ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1415 (10th ed. 1958).

89. *Weber*, 439 U.S. at 1001.

90. Tiefer, *supra* note 10.

91. *Id.* at 17.

also to be reasonable: "ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean—which is precisely how judges decide things under the common law."⁹² And of course this, under cover of legislative supremacy, is what Justice Scalia wants to do and does.

Returning, for example, to *Blanchard*, this case seems an odd one in which to launch such an intense attack on the use of legislative history. This was not special pleaders' legislation, but was a statute designed to reassert the breadth of the private attorney generals' doctrine limited by *Alyeska Pipeline Service Co. v. Wilderness Society*.⁹³ The question for the Court was how to interpret the "reasonable fee" provision of the Civil Rights Attorneys' Fees Award Act of 1976 in the context of a contingency retainer agreement. Should the agreement cap reasonableness? The text did not provide an answer, but committee reports of both the House and Senate Judiciary Committees in their discussion of the "reasonable" provision pointed to *Johnson* and successor cases for factors to use in determining an award's reasonableness. The case for using legislative history in this instance either because it suggests a sensible answer to the question rooted in the legislative process or even because it legitimizes a judicial answer in the legislative process would seem quite sensible and to again quote Justice Breyer, "natural." This epitomizes the institutional legislative history described by Professor Tiefer in which, according to Justice Stevens, "the intent of those involved in the drafting process [the committees] is properly regarded as the intent of the entire Congress."⁹⁴ But to Justice Scalia, it appears heretical. His choice, it seems, would be to impose the cap because, as we have earlier noted, it "is reasonable, consistent, and faithful to its apparent purpose."⁹⁵ The application of this formula is an invitation to judicial lawmaking. While of course the interpretation may be reasonable, so may an alternative interpretation. And of course the imposition of the cap may be consistent with prior law, but what about the subject statute that interrupts the flow of prior law? Are we to ignore it, as suggested by Judge Easterbrook, because of its contextual ambiguity?⁹⁶ Or are we to assume, without reference to the noted legislative history, that Congress through its silence has adopted the existing non-Supreme Court judicial interpretation of "reasonable"—a not unreasonable use of legislative history?⁹⁷ Finally, what interpretive guidance does Justice Scalia provide by making reference to the statute's "apparent" purpose, other than to invite the very judicial lawmaking that is at the heart of his overall criticism of current interpretive practices?

92. SCALIA, *supra* note 5, at 18.

93. 421 U.S. 240 (1975).

94. *Bank One Chicago*, 516 U.S. at 276-77 (Stevens, J., concurring).

95. *Blanchard*, 489 U.S. at 100.

96. See *supra* note 4 and accompanying text.

97. See generally MIKVA & LANE, *supra* note 29.

In the end, we are left with the question of what motivates Justice Scalia to substitute such indeterminate ephemeral formulations for the solidity of probative legislative history. Several answers come to mind. One is that the use of any legislative history opens the door to its use in trumping contextually clear text. Another might be a distaste for Congress. In our textbook, *The Legislative Process*, we tell the story of Justice Scalia's failed quest at the behest of his king, President Ford, to rescue the damsel, Henry Kissenger, from the hands of the monstrous Representative Otis Pike and his Select Committee on Intelligence. They were holding the maiden in contempt and even interrupted then-counsel Scalia's pleas for reason.⁹⁸ Of course, we offer such suggestion lightly because such an experience could not possibly have had such an influence on a member of the Supreme Court.

Finally, Justice Scalia's most probable reason for ignoring legislative history may be the freedom it provides him to argue for limiting statutory scope. A choice in almost every statutory dispute is whether a broad or narrow reading of a statute is to be applied. Justice Scalia's most consistent view of how to read a statute seems to be to read it narrowly. Hence, fealty to a regimen that might compel a broader reading in any given case must be eschewed in all cases. In the earlier noted *Jones*⁹⁹ and *Holloway*¹⁰⁰ cases, for example, he argued in dissent against the use of legislative history and for a narrower reading of a car-jacking statute. In both *Blanchard*¹⁰¹ and *Bank One Chicago*,¹⁰² he concurred with the majority's narrow reading of the statute but dissented from their use of legislative history in support of his judgment. This hypothesis is further supported by the statutory interpretation cases of last term. There, where determinable, the Court applied the narrower reading of the statute twelve times and the broader reading of the statute twelve times.¹⁰³ Justice Scalia wrote, joined, or concurred in all of the narrow decisions. He authored one of the broader decisions, *Reno v. American-Arab Anti-Discrimination Committee*,¹⁰⁴ and joined in only two others.¹⁰⁵ His position in *Reno* and *El Al* suggests, perhaps, a willingness to read a statute broadly if such reading results in a policy determination he favors. In each of these cases, a broad reading of the statute resulted in a reduction of judicial case-loads or potential case-loads. All of this is speculative. We have not reviewed every decision during Justice Scalia's tenure to determine where it fits on the broad-narrow scale. And we acknowledge that his view in

98. See MIKVA & LANE, *THE LEGISLATIVE PROCESS*, *supra* note 52, at 163-211.

99. 119 S. Ct. at 1215.

100. 119 S. Ct. at 966.

101. 489 U.S. at 87.

102. 516 U.S. at 264.

103. A schedule of these cases by broad and narrow categories is set forth as Appendix A.

104. 199 S. Ct. 936 (1999)

105. See *Cedar Rapids Community Sch. Dist. v. Garret F.*, 119 S. Ct. 992 (1999); *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 119 S. Ct. 662 (1999).

*Cedar Rapids Community School District*¹⁰⁶ is inconsistent with our hypothesis. But we suspect that a review of his jurisprudence would establish that Justice Scalia overwhelmingly supports a statute's narrowest reading, except in cases in which a broader reading favors one of his strongly held policy preferences.

Where then does that leave us? To us it seems that Justice Scalia has attempted to bring to statutory interpretation another "new" canon of interpretation, namely, that ambiguous statutes should be read narrowly. As canons go, this one does not yet suffer from Llewellyn's point about two opposing canons for every use.¹⁰⁷ But this canon would seem to be in the dice-loading category of canons so incisively scorned by Justice Scalia himself, who wrote: "But whether these dice-loading rules are bad or good, there is also the question of where the courts get the authority to impose them. Can we really just decree that we will interpret the laws that Congress passes to mean less or more than what they fairly say?"¹⁰⁸ While in theory, Justice Scalia's answer to his question is properly "I doubt it,"¹⁰⁹ in practice, his answer seems to be "yes if less." And it is that answer which, in the end, limited the success of Justice Scalia's revolution in statutory interpretation. For most judges share his doubt about the power of the courts to rewrite statutes, in theory, but also, most judges struggle mightily to actually determine legislative meaning through whatever tools are available to them.

IV. CONCLUSION

Professor Phillip Frickey recently observed the following about Justice Scalia's approach to statutory interpretation:

More generally, it is not clear that Scalia's effort has had a beneficial impact upon the practice of statutory interpretation. On the positive side, it has refocused attention on the text. I must agree that courts and attorneys were sometimes sloppy in their handling of ordinary textual meaning before the Scalia-led onslaught. . . . But on the negative side, it is open to question whether the new attention to formalism has increased predictability and certainty. . . . If the new formalism has not resulted in greater predictability and certainty, . . . it has failed on its own terms.¹¹⁰

In one sense Frickey is correct. Justice Scalia's formalism or textualism will not accomplish the goal of certainty because it creates opportunities for the exercise of judicial discretion that are not available to those judges who work carefully to find legislative meaning through, for example, probative legislative history. In another sense he is wrong. Certainty is achievable through the canon of narrow interpretation, but at the awful cost of threatening legislative supremacy.

106. 119 S. Ct. at 992.

107. See *supra* notes 43-44 and accompanying text.

108. SCALIA, *supra* note 5, at 28-29.

109. *Id.* at 29.

110. Tiefer, *supra* note 10, at 207-208.

APPENDIX A

Narrow (unanimous): *Peguero v. United States*, 526 U.S. 23 (1999) (holding that the Federal Rules of Criminal Procedure's judicial obligation to advise defendants of right to appeal protected by harmless error doctrine); *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999) (holding that McCarran-Ferguson Act does not preclude application of RICO to complaint); *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999) (holding that the Immigration and Nationality Act did not authorize courts to impose supplemental weighing tests on Bureau of Immigration Appeals); *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473 (1999) (holding that the Price Anderson Act does not allow for claims from nuclear accidents, or claims whether a claim is from a nuclear accident, to be heard in other than federal courts); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998) (holding that the Sherman Act's per se anti-group boycott provisions did not reach certain activities); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999) (holding that ERISA did not regulate certain employer amendments to a retirement plan); *Clinton v. Goldsmith*, 526 U.S. 529 (1999) (holding that the All Writs Act did not authorize the Court of Appeals for the Armed Forces to enjoin the President and military officials from dropping an officer from the rolls of the armed forces); *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255 (1999) (holding that the Administrative Procedure Act does not waive sovereign immunity of federal government for an equitable lien claim); *Pfaff v. Wells Elecs., Inc.*, 525 U.S. 55 (1999) (holding that the Patent Act's one year on-sale bar commenced when an invention is complete and ready for patenting and when the inventor has accepted a purchase order).

Narrow (other): *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. Partnership*, 526 U.S. 434 (1999) (holding that the Bankruptcy Code does not permit prebankruptcy equity holders to contribute new capital and receive ownership interests in certain instances); *Jones v. United States*, 526 U.S. 227 (1999) (holding that certain provision of carjacking statute are not sentencing provisions, and their elements must be separately charged and proven beyond a reasonable doubt); *Dickinson v. Zurko*, 527 U.S. 150 (1999) (holding that the ADA's review standards are not applicable to the Patent and Trademark office).

Broad (unanimous): *Haddle v. Garrison*, 525 U.S. 121 (1998) (holding that property referred to by 42 U.S.C. §1985(2) does not need to reach property level protected by the Constitution).

Broad (other): *Cedar Rapids Community Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999) (holding that the Individuals with Disabilities Education Act requires as a "related service" provision of nursing service during school hours for ventilator-dependent student); *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155 (1999) (holding that Warsaw Convention preempts a plaintiff who does not qualify under the Convention from access to local courts); *Holloway v. United States*, 526 U.S. 1 (1999) (holding that conditional intent to kill during a carjacking satisfied "intent to

cause death" standard of carjacking statute); *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999) (holding that a criminal statute that prohibited the use or carrying of a firearm "during" a crime of violence could be prosecuted in any district in which crime of violence took place even if the firearm was used or carried in only a single district); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) (holding that Title IX of the Education Amendments of 1972 allows action against school board for indifference to student on student harassment); *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999) (holding that time limits of removal provision of Federal Rules of Civil Procedure are not triggered by receipt of complaint without any formal service); *National Fed'n of Fed. Employees, Local 1309 v. Department of the Interior*, 526 U.S. 86 (1999) (holding that the Federal Service Labor-Management Relations Statute authorizes the Federal Labor Relations Authority to determine questions about midterm bargaining); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) (holding that Illegal Immigration Reform and Immigrant Responsibility Act of 1996 removes from federal court jurisdiction selective prosecution claims); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (holding that in three cases, *Richardson v. United States*, 526 U.S. 813 (1999); *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33 (1999), and *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), it was difficult determine which was the broad or narrow reading of a statute.); *National Aeronautics & Space Admin. v. Federal Labor Relations Auth.*, 527 U.S. 229 (1999) (holding that 5 U.S.C.S. 7114 allowed union representation at certain examinations of employees); *West v. Gibson*, 527 U.S.212 (1999) (holding that Title VII of the Civil Rights Act of 1964 authorized certain actions by the EEOC).