JUSTICE SCALIA AND THE LEGISLATIVE PROCESS

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One could not properly take stock of Justice Scalia's judicial career thus far without considering how deeply his approach to statutory analysis has affected the way in which we, as lawyers, talk and think about the problem of statutory construction. Of course, the prescribed format of a brief tribute necessarily requires some simplification of Justice Scalia's powerful, often uncontroversial, and ultimately quite influential contribution to that complex subject. Nonetheless, I will attempt here at least to offer a sketch of the way his writings have altered the basic rules of engagement in matters of statutory interpretation.

When I went to law school twenty-odd years ago, legal academics said very little—and wrote even less—about statutory interpretation as such.[1] No course was offered on the subject.[2] And in the growing number of courses based on statutes (securities law, environmental law, and the like), neither professors nor students troubled themselves terribly much over questions of statutory methodology.[3] What judges should do was simply taken for

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1. *See* Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 215 (1983) (suggesting that legal academics "are no longer certain that statutory interpretation is a definable subject at all").

2. *See* Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 242 (1992) ("Although professors presumably hoped that students would pick up skills in interpreting statutes, the general curricular mood was one of benign neglect, summed up in the notion that we teach so many statutory courses that the students will pick up these skills by osmosis."); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 801–04 (1983) (lamenting the lack of attention to statutory interpretation in law school curricula).

3. As Judge Posner wrote:

> [Most law professors in substantive statutory courses] do not feel they have enough time to explore with the class the process by which the legislation is enacted, the political and economic forces that shaped it, or even the methods the courts use to interpret it, as distinct from the particular interpretations that the courts have made. Moreover, such issues are rarely dealt with in casebooks, and what is not in the casebook is unlikely to get into the course in any systematic fashion.

granted. In matters of interpretation, Hart and Sacks reigned supreme.[4] For two generations, the *Legal Process* teaching materials that they had prepared at the Harvard Law School (but never themselves published) supplied the dominant framework for understanding statutory interpretation.[5] At the most basic level, those materials instructed judges to treat legislators as "reasonable persons pursuing reasonable purposes reasonably."[6] All else flowed from that central idea. Federal judges properly scoured the legislative history for evidence of the background policy impulses and understandings that putatively underlay a statute's adoption.[7] And when the statute's perceived purpose contradicted the rules embedded in the statutory text, federal judges felt at liberty to enforce the spirit rather than the letter of the law.[8]

Posner, *supra* note 2, at 802.

4. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

5. Their *Legal Process* materials came to be the canonical understanding of statutory interpretation in the post-New Deal period. *See, e.g.*, T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 26–27 (1988) (discussing the influence of Hart and Sacks); William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 698–99 (1987) (same).

6. HART & SACKS, *supra* note 4, at 1378.

7. *See, e.g.*, N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 526–27 (1982) ("Although the statements of one legislator made during a debate may not be controlling, Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction.") (citations omitted); Comm'r v. Estate of Church, 335 U.S. 632, 650 n.11 (1949) (noting the "well-known fact" that legislative history is often "[d]ecisive" in statutory construction). For an interesting article charting the post-New Deal increase in judicial reliance on legislative history, see generally George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39.

8. *See, e.g.*, Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 452–53 (1989) (concluding that an acquaintance with the Federal Advisory Committee Act's "purposes, as manifested by its legislative history and as recited in . . . the Act, reveals that it cannot have been Congress' intention" to adopt the conventional import of the word "utilize"); Watt v. Alaska, 451 U.S. 259, 266 (1981) ("The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect.") (citations omitted); Comm'r v. Brown, 380 U.S. 563, 571 (1965) ("Unquestionably the courts, in interpreting a statute, have some 'scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute.'") (citations omitted); Int'l Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp., 342 U.S. 237, 243 (1952) ("That reading of the Act does not, to be sure, take the words . . . in their historic, technical sense. But literalness is no sure

How comfortable it all was. Statutory interpretation allowed judges to impose desirable coherence upon often chaotic legislative outcomes.[9] The statute law of the United States was all the more adaptable because a judge could soften a hard edged rule into a more flexible standard when the purposes of the law so required.[10] And who could be against coherence and adaptability? Most importantly, if Congress enacted words into law in order to achieve some governmental aim, who could object to reading the statutory language to achieve its underlying purpose when extrinsic evidence makes that purpose evident?[11]

Justice Scalia's work has done much to disrupt this calm consensus. So far as I know, Justice Scalia has no abstract, *a priori* objec-

touchstone of legislative purpose. The purpose here is more closely approximated, we believe, by giving the historic phrase a looser, more liberal meaning in the special context of this legislation.").

The *Legal Process* materials embraced this strong form of purposive interpretation. Although it is true Hart and Sacks admonished judges not to give words "a meaning they will not bear," HART & SACKS, *supra* note 4, at 1374, their analysis added that "[t]he meaning of words can almost always be narrowed if the context seems to call for narrowing." *Id.* at 1376. Accordingly, their approach surely encompassed the judicial practice of using purpose to cut back a statute's semantic breadth. Though less obviously, Hart and Sacks also favored extending a statute's reach to matters "seemingly within its purpose but not within any accepted meaning of its words." *Id.* at 1194. While rejecting the idea that such extensions could rest on a reading of the statutory command itself, Hart and Sacks suggested that it may still be "proper for the court to rely upon the policy expressed in the statute in formulating, upon its own responsibility, a parallel ground of decision in the case at bar." *Id.*

9. *See generally* T. Alexander Aleinikoff & Theodore M. Shaw, *The Costs of Incoherence: A Comment on Plain Meaning,* West Virginia University Hospitals, Inc. v. Casey, *and Due Process of Statutory Interpretation*, 45 VAND. L. REV. 687 (1992) (explaining the way purposive interpretation produces greater policy coherence and even-handedness of application).

10. *Cf.* William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 327–30 (1989) (demonstrating the way purposive interpretation of directives makes them more adaptable to unforeseeable conditions arising in application).

11. The premise that all statutes are enacted to effect some underlying aim has long served as the guiding principle of purposivism. Hart and Sacks wrote that "[t]he idea of a statute without an intelligible purpose is foreign to the idea of law and inadmissible." HART & SACKS, *supra* note 4, at 1124; *see also* Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370, 370 (1947) (noting that some "purpose lies behind all intelligible legislation"); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538–39 (1947) ("Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government.").

tion to coherence and adaptability.[12] But through his judicial opinions and academic writings, he has argued that those values, so emphasized by the earlier generation, came at a considerable cost to democracy—or, more precisely, democracy as filtered through the processes that our Constitution prescribes for reducing policy impulses into binding law.

Justice Scalia has emphasized that legislation proceeds through an intricate, constitutionally prescribed process that has implications for statutory interpretation. "We are governed," he said, "by laws, not by the intentions of legislators . . . . 'The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself.' "[13] That is to say, Article I, § 7 of the Constitution prescribes a rather specific method of enacting laws (bicameralism and presentment), and the ultimate output of that process is an agreed-upon set of words that possess a singular claim to legitimacy, at least when their semantic import is clear. As

12. Indeed, when a statute is ambiguous, Justice Scalia is very much for reading it in a way that coheres with related laws. *See, e.g.*, W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 100 (1991) (Scalia, J.) ("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."); United States v. Fausto, 484 U.S. 439, 453 (1988) (Scalia, J.) (describing the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination"). Textualist judges like Justice Scalia would resolve ambiguity in that way "not because that precise accommodative meaning is what the lawmakers must have had in mind . . . but because it is [the judiciary's] role to make sense rather than nonsense out of the *corpus juris*." *W. Va. Univ. Hosps.*, 499 U.S. at 100–01.

As far as adaptability is concerned, Justice Scalia has suggested that in choosing among reasonably available understandings of an ambiguous statute, courts may have room to adapt the law to capture its apparent background purposes. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515 [hereinafter Scalia, *Judicial Deference*] ("To begin with, it seems to me that the 'traditional tools of statutory construction' include . . . the consideration of policy consequences. Indeed, that tool is so traditional that it has been enshrined in Latin: '*Ratio est legis anima; mutata legis ratione mutatur et lex*.' ('The reason for the law is its soul; when the reason for the law changes, the law changes as well.')"). Of course, he has also suggested that while textualists are not "too hidebound to realize that new times require new laws," they must leave the adaptation to the legislature rather than allowing judges to "write those new laws" through aggressive interpretation. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 23 (Amy Gutmann ed., 1997) [hereinafter Scalia, *Common-Law Courts*].

13. Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (quoting Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1844)) (emphasis omitted).

Justice Scalia has put it, the enacted text always trumps "unenacted legislative intent."[14]

Of course, to say that one should just follow the clear import of the enacted text seemingly puts textualists like Justice Scalia at odds with the conventional (linguistic) wisdom that human beings sometimes articulate their thoughts imprecisely and, therefore, that listeners can sometimes get a better idea of what a speaker is truly driving at if they do not take his or her words at face value when they do not make sense in some meaningful way.[15] By the same token, then, why not assume that a legislature has simply expressed itself poorly or failed to focus carefully on an embedded detail when it adopts a statute that is badly out of sync with its apparent purposes?[16] For Justice Scalia, the linguist's insights about the way *individuals* communicate do not sensibly translate to the setting of federal legislative authority, which consists of multiple humans in

14. INS v. Cardoza-Fonseca, 480 U.S. 421, 453 (1987) (Scalia, J., concurring). In a recent article, I have argued that textualists speak somewhat imprecisely when they cast their approach as one that favors the enacted text over unenacted extratextual materials. *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006). Instead, I argue that textualists understand that all texts have meaning only in context, and that they prefer to resolve latent ambiguities in a statutory text by consulting the *semantic* context—evidence of the way a reasonable person would *use* the enacted words in context. *See id.* at 92–94. Moreover, when the semantic evidence is clear, textualists give it precedence over *policy* context—evidence about the way a reasonable person would address the mischief at which the statute is directed. *See id.* at 92–93. Ultimately, this proposed change in emphasis may itself be a matter of semantics. *See id.* at 77, 95. For whether one frames the question as text versus purpose or semantic versus policy context, the basic premise underlying textualism remains constant: Viewing the difference in approaches as a choice between competing elements of context, textualists might still properly emphasize that giving precedence to the clear semantic detail of a statutory text offers the only reliable assurance that legislators will have the tools to enable them to strike predictable bargains in the legislative process. *See id.* at 103–05. That is, if legislators with the power to insist upon compromise wish to strike a bargain about the contours of the policy they find acceptable, the only way they can do so is by agreeing upon *language* that frames that policy at an appropriate level of generality.

15. *See* PAUL GRICE, STUDIES IN THE WAY OF WORDS 26–31 (1989) (laying out a framework of conversational interpretation); *see also* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 268 (1990) (discussing the problem of miscommunication in private speech); Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 625 (1949) (same); Gerald C. Mac Callum, Jr., *Legislative Intent*, 75 YALE L.J. 754, 771–72 (1966) (same).

16. *See generally* Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1182 (showing "that the maxims of statutory interpretation can be viewed as instances of Grice's general framework of [conversational] interpretation"); M.B.W. Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, 46 U. PITT. L. REV. 373 (1985) (same).

three distinct institutions (the House, the Senate, and the Presidency) bargaining in complex and often unknowable ways over a statute's wording. When an individual makes a statement whose ordinary meaning is inexplicably at odds with his or her obvious purpose, we may give that person the benefit of the doubt by assuming that (absent knowledge of personal idiosyncrasy) a slip of the tongue, a failure of foresight, or a poor choice of words has occurred. When, however, Congress adopts a seemingly awkward statute (one that fits poorly with its apparent purpose), the odd contours of the resulting text may also reflect behind-the-scenes *legislative compromise*—a factor that could easily produce a less-than-ideally-coherent outcome because of the felt need to split the difference among contradictory policy impulses or even to accommodate unrelated policy objectives in order to secure the assent of legislative actors with bargaining power.

In fact, the whole flavor of the legislative process suggests the centrality of compromise.[17] By dividing power among three competing institutions that answer to distinctively configured constituencies, the bicameralism and presentment requirements of Article I, § 7 effectively create a supermajority requirement for legislation.[18] This feature, in turn, gives political minorities extraordinary power to block legislation or to insist upon compromise as the price of assent.[19] The legislatively adopted rules of procedure for each House reinforce this reality. Among other things, bills must clear all of the relevant gatekeeping committees, find time on the floor of each House, and survive the threat of a filibuster in the Senate;[20]

17. The following discussion builds on John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2408–19 (2003).

18. *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 233–48 (1962) (explaining the way bicameralism results in supermajority requirements).

19. *See* Manning, *supra* note 17, at 2437–38; John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 74–78 (2001).

20. As Professors Shepsle and Weingast thus note:

> The Rules Committee in the House may refuse to grant a rule for a committee bill, thereby scuttling it. The Speaker may use his power to schedule legislation and to control debate in ways detrimental to the prospects of a committee bill. A small group of senators in the U.S. Senate may engage in filibuster and other forms of obstruction. Any individual senator may refuse unanimous consent to procedures that would expedite passage of a committee bill. In short, veto groups are pervasive in legislatures . . . .

Kenneth A. Shepsle & Barry R. Weingast, *The Institutional Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85, 89 (1987). Although these precise procedural considerations are implicit in Justice Scalia's textualism, their link to textualism is more explicitly laid out in the work of his intellectual fellow traveler, Judge Easter-

in other words, there are many ways for a bill to die—and thus many opportunities for legislative stakeholders to insist upon compromise as a condition of its survival. It is hardly surprising, therefore, that a bill might not be coherent with its apparent purpose, even in the absence of some policy miscalculation or imprecision in expression by the legislature.

The possibility of unseen compromise makes it quite difficult to presume that seemingly over- or under-inclusive rules embedded in a statutory text have *inadvertently* fallen short of some identifiable and coherent background purpose. As Justice Scalia has argued, with much influence, Congress has no meaningful purpose in the abstract; the only purpose that counts is what the legislators are able to reduce to words through the highly complicated legislative process.[21] Legislators routinely disagree—and thus compromise—not only about ends but also about means, which represent the price that they are willing to pay for the ends they wish to achieve. And when judges emphasize apparent background legislative policy (however sound) at the expense of a clear statutory text, they ignore the reality that the statute's final wording "may, for all we know, have slighted policy concerns on one or the other side of the issue as part of the legislative compromise that enabled the law to be enacted."[22]

Accordingly, Justice Scalia maintains that "[d]eduction from the 'broad purpose' of a statute begs the question if it is used to decide by what *means* (and hence to what *length*) Congress pursued that purpose; to get the right answer to that question there is no substitute for the hard job . . . of reading the whole text."[23] Or as he wrote for the Court:

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brook. *See, e.g.*, Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 64 (1988); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547–48 (1983).

21. E. Associated Coal Corp. v. United Mine Workers, Dist. 17, 531 U.S. 57, 68–69 (2000) (Scalia, J., concurring) ("The final form of a statute . . . is often the result of compromise among various interest groups, resulting in a decision to go so far and no farther."). In academic writing, Justice Scalia has underscored his doubts concerning the utility and relevance of legislative intent—at least, as distinct from the meaning expressed by the conventional understanding of the enacted text. *See, e.g.*, Scalia, *Judicial Deference*, *supra* note 12, at 517 (observing that "the quest for the 'genuine' legislative intent is probably a wild-goose chase"); Scalia, *Common-Law Courts*, *supra* note 12, at 32 (suggesting that "with respect to 99.99 percent of the issues of construction reaching the courts, there *is* no legislative intent").

22. Artuz v. Bennett, 531 U.S. 4, 10 (2000) (Scalia, J.).

23. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 726 (1995) (Scalia, J., dissenting).

> The best evidence of [a statute's] purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous—that has a clearly accepted meaning in both legislative and judicial practice—we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.[24]

Judges, in other words, "are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes."[25]

Certainly, there are important counter-arguments that merit fuller treatment than a brief essay permits. Among other things, one could question whether it is realistic to think that most legislators care about the semantic detail, rather than broad policy contours, of the legislation for which they vote.[26] Nonetheless, if one accepts the centrality of compromise, then proceeding from the assumption that a statute means what it says—even when it is a bit odd—offers the only means of assuring that when legislators with the requisite bargaining power do assent upon limited terms, the resulting limits will be respected by those charged with implementing the statute.[27] While this is not the occasion to adjudicate such disputes, the important point, for present purposes, is this: The Court now approaches the problem of interpretation with the ever present possibility of awkward compromise at the forefront of its frame of reference.[28] That is itself a significant change.

In the "old days," the Court was prone to emphasize its authority to depart from the clear import of the statutory text when it produced an "unreasonable" result, one that to the Court seemed "plainly at variance with the policy of the statute as a whole."[29] And the Justices held in ready reserve the "familiar rule" that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its mak-

24. W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98–99 (1991) (Scalia, J.) (citation omitted).

25. MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 n.4 (1994) (Scalia, J.).

26. For a particularly cogent articulation of this point, see Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388, 400 (1942), which argues that the "definite written words" of a statute "have been selected . . . primarily to let us know the statutory purpose."

27. *See* Manning, *supra* note 14, at 103–05.

28. *See infra* note 35.

29. United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940).

ers."[30] Today, things are different. The Court is, instead, apt to explain that "the reach of a statute often exceeds the precise evil to be eliminated" and that "it is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy—even assuming that it is possible to identify that evil from something other than the text of the statute itself."[31] Or it is likely to note that "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[32] That is, the Court now acts on the apparent assumption that legislation typically entails the delicate crafting of a compromise—and that courts risk disturbing such compromise when, in the name of abstract purpose, they deviate from clearly expressed statutory wording that has emerged from the complex, path-dependent, and in many ways quite opaque process of legislative negotiation and compromise.[33]

Perhaps no one is more responsible for this change in judicial focus than is Justice Scalia.[34] His effect on judicial behavior has been palpable.[35] But even more impressive is the fact that students

30. Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892).

31. Brogan v. United States, 522 U.S. 398, 403 (1998) (Scalia, J.).

32. Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79 (1998) (Scalia, J.).

33. As the Court recently emphasized:

> [N]egotiations surrounding enactment of this bill tell a typical story of legislative battle among interest groups, Congress, and the President . . . . As such, a change in any individual provision could have unraveled the whole. It is quite possible that a [different] bill . . . would not have survived the legislative process. The deals brokered during a Committee markup, on the floor of the two Houses, during a joint House and Senate Conference, or in negotiations with the President . . . are not for us to judge or second-guess.

Barnhart v. Sigmon Coal Co., 534 U.S. 438, 461 (2002).

34. *See* William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1513 (1998) (noting that while textualism "is treated skeptically and often dismissively by Scalia's colleagues on the Court," it nonetheless "influences the way all the other justices write their opinions and advocates argue their cases before the Supreme Court"); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 656 (1990) (noting Justice Scalia's influence on the way the Court interprets statutes); Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 351, 363–66 (1994) (considering ways in which Justice Scalia's "unyielding stance" on the appropriate interpretive method, among other factors, may have altered the Court's internal dynamic in statutory interpretation cases).

35. The influence of his text-based approach is evident in the emphasis of numerous recent decisions. *See, e.g.*, Cooper Indus. v. Aviall Servs., 543 U.S. 157, 167 (2004) (Thomas, J.) ("Given the clear meaning of the text, there is no need to resolve this dispute or to consult the purpose of CERCLA at all."); Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 93–94 (2002) (Kennedy, J.) ("Like any key term in an important piece of legislation, the [relevant] figure was the result of

compromise between groups with marked but divergent interests in the contested provision . . . . Courts and agencies must respect and give effect to these sorts of compromises."). Even nontextualist judges have embraced concerns about compromise. *See, e.g.*, Bates v. United States, 522 U.S. 23, 29 (1997) (Ginsburg, J.) ("The text of §1097(a) does not include an 'intent to defraud' state of mind requirement, and we ordinarily resist reading words or elements into a statute that do not appear on its face."); Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 262 (1994) (Rehnquist, C.J.) ("[T]he fact that [the Racketeer Influenced and Corrupt Organizations Act] has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." (alteration in original) (citation and internal quotation marks omitted)); Landgraf v. USI Film Prods., 511 U.S. 244, 286 (1994) (Stevens, J.) ("Statutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal."); Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 646–47 (1990) (Blackmun, J.) ("'[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.'" (alteration in original) (quoting Rodriguez v. United States, 480 U.S. 522, 525–26 (1987))); Hallstrom v. Tillamook County, 493 U.S. 20, 29 (1989) (O'Connor, J.) ("Giving full effect to the words of the statute preserves the compromise struck by Congress."); Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 748 n.14 (1989) (Marshall, J.) ("Strict adherence to the language and structure of the Act is particularly appropriate where, as here, a statute is the result of a series of carefully crafted compromises.").

This Court, of course, has not been fully consistent in its new emphasis. On rare occasion, the modern Court still invokes the traditional form of strongly purposive interpretation. *See, e.g.*, Johnson v. United States, 529 U.S. 694, 706 n.9 (2000) (Souter, J.) ("[I]n relying on an uncommon sense of the word, we are departing from the rule of construction that prefers ordinary meaning. But this is exactly what ought to happen when the ordinary meaning fails to fit the text and when the realization of clear congressional policy (here, favoring the ability to impose supervised release) is in tension with the result that customary interpretive rules would deliver." (citations omitted)); Clinton v. City of New York, 524 U.S. 417, 428–29 (1998) (Stevens, J.) (broadening an expedited review provision because the literal meaning undermined the statutory purpose to provide "a prompt and authoritative judicial determination of the constitutionality of the Act"); Lewis v. United States, 523 U.S. 155, 160 (1998) (Breyer, J.) (refusing to enforce a statute's conventional meaning when "a literal reading of the words . . . would dramatically separate the statute from its intended purpose"). As Professor Meltzer has noted, moreover, the Court's approach to implied federal preemption of state law reflects premises more akin to those practiced by traditional purposivists. *See* Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 364–68 (arguing that contrary to its default approach to statutory interpretation, the Court engages in significant interpretive lawmaking in implied preemption cases). Nonetheless, it is safe to conclude that the Rehnquist Court's *general* approach to statutory interpretation became considerably more textually oriented than in the past. *See, e.g.*, Merrill, *supra* note 34, at 356–63 (discussing the Rehnquist Court's shift toward textualism); Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 444–45 (same); Samuel A.

are beginning to internalize these lessons in much the same way that my generation internalized the lessons of Hart and Sacks. When I recently told the students in my legislation seminar at Harvard that judges used to prefer the spirit over the letter of the law, they looked at me the way, I expect, my young daughters will look at me when I someday tell them that we did not have cell phones when I was growing up. That change in attitude, I submit, is largely because of Justice Scalia.

Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 252–60 (1999) (noting the Court's increasing reliance on dictionaries).