

**THE STEVENS/SCALIA PRINCIPLE AND WHY IT MATTERS:  
STATUTORY CONVERSATIONS AND A CULTURAL CRITICAL CRITIQUE OF THE STRICT PLAIN  
MEANING APPROACH**

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INTRODUCTION

When one reviews a number of Supreme Court statutory interpretation decisions in environmental and natural resources law with an awareness of how the statutes involved have changed over time, a Stevens/Scalia principle emerges: If Justice Stevens and Justice Scalia end up on opposite sides of the statutory interpretation decision, something interesting happened in the history of that statute that affects the meaning of the statutory provision at issue. This principle probably works in other areas of federal statutory law as well, and it is not important so much for its existence but for what it reveals about the Supreme Court Justices' statutory interpretation methodologies and how those methodologies can affect Congress's intended meaning.

In particular, an examination of the Stevens/Scalia principle forces recognition that federal statutes *evolve*, often becoming more complex and more specialized in the process. Under the competing methodologies of statutory interpretation in the current Supreme Court, the Justices have a choice whether to acknowledge this evolution of federal statutes when construing Congress's most current pronouncements, and the choices they make can have significant

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consequences not just for the meaning of a particular statute, but also for the balance of power between the Legislative and Judicial branches of the federal government.

In the federal courts, and especially in the Supreme Court, statutory construction – courts’ interpretation of legislative acts in the context of specific factual disputes – represents a balancing of the essential powers of three branches of the federal government. It is, manifestly, the duty and power of Congress to enact federal law and policy. At the same time, ever since *Marbury v. Madison*,<sup>1</sup> the Supreme Court has reserved to itself and the other federal courts the power to say what that law means. Finally, with the rise of the administrative state and doctrines of deference to administrative agencies, most prominent in the federal Administrative Procedure Act (APA)<sup>2</sup> and in the Court’s creation *Chevron* deference,<sup>3</sup> the Executive Branch, acting through its administrative agencies pursuant to congressional grants of authority, has also acquired a substantial role in statutory interpretation. Therefore, although rarely described as such, statutory construction in the federal courts is at least potentially an arena for power struggle among the branches of government.

Earlier Courts were acutely aware the any time that the federal courts construe statutory language, they risk undermining Congress’s policy choices:

The interpretation of the meaning of statutes, as applied to judicial controversies,

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<sup>1</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>2</sup> See 5 U.S.C. § 706 (detailing standards of review for federal agency actions).

<sup>3</sup> The Court described this two-step analysis as follows:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

*Chevron, U.S.A, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

is exclusively a judicial function. This duty requires one body of public servants, the judges, to construe the meaning of what another body, the legislators, has said. Obviously there is danger that the courts' conclusion as to the legislative purpose will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body. A lively appreciation of the danger is the best assurance of escape from its threat . . . .<sup>4</sup>

To balance judicial and congressional power in statutory interpretation, the Court has traditionally worked with a presumption in favor of the “plain meaning” of federal statutes.<sup>5</sup>

According to the Supreme Court, “[t]here is . . . no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislature. In such cases we have followed their plain meaning.”<sup>6</sup> As a starting point for statutory interpretation, the plain meaning rule is hardly controversial: When attempting to construe a federal statute and to determine how it should apply to the facts before it, *of course* a federal court should start with the words of the statute at issue. The words Congress chose in drafting the enacted version of a statute *are*, in a literal and reified sense, the law. Moreover, the plain meaning rule appropriately recognizes that both constitutional due process and practical considerations in the day-to-day administration of federal statutes demand that Congress effectively communicate its regulatory intent, using the only medium available to it: language. Congress's constitutional primacy as lawmaker does not give it *carte blanche* authority to adopt idiosyncratic and eccentric uses of language. As one example of this practical constraint on Congress, if Congress wishes to create legal terms of art in statutes – that is, terms that have

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<sup>4</sup> United States v. American Trucking Ass'ns, 310 U.S. 534, 544 (1940).

<sup>5</sup> Of course, this traditional plain meaning approach also gave judges opportunities to seize interpretive power; hence the Supreme Court's need for cautioning statements like the one quoted. Professors Jonathan Macey and Geoffrey Miller, for example, have noted that tools of statutory construction like the canons of construction “can be used to serve judicial interests – sometimes at the expense of social welfare.” Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 649 (April 1992).

<sup>6</sup> United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (1940); *see also* Bradley C. Karkkainen, “Plain Meaning”: Justice Scalia's Jurisprudence of Strict Statutory Construction, 17 HARV. J.L. & PUB. POL'Y 401, 432-37 (Spring 1994) (tracing a history of the traditional plain meaning rule).

precise legal meanings that are different than the terms' ordinary usage – Congress generally must include definitions of those terms within the statute itself.

Traditionally, however, the Supreme Court has double-checked its “plain meaning” interpretation with other tools of statutory construction, such as the overall statutory structure, statutory goals and purposes, and legislative history – another means of balancing the courts' and Congress's roles in lawmaking by ensuring that the *Court's* view of the statute's plain meaning actually comports with *Congress's* purposes. As the Court recognized in 1940, an awareness of the danger that judges can thwart congressional policy “hardly justifies an acceptance of a literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion.”<sup>7</sup> This comprehensive approach to statutory interpretation has been referred to as the purposivist<sup>8</sup> or traditional<sup>9</sup> approach; this article will refer to it as the traditional plain meaning approach.

The ultimate goal of statutory construction under the traditional plain meaning approach is to effectuate congressional intent,<sup>10</sup> a goal that preserves the balance of power between the

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<sup>7</sup> *American Trucking Ass'ns*, 310 U.S. at 544.

<sup>8</sup> John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUMBIA L. REV. 1, 3-4 (2001); Jeffrey O. Cooper, *Interpreting the Americans with Disabilities Act: The Trials of Textualism and the Practical Limits of Reason*, 74 TULANE L. REV. 1207, 1207, 1211 (March 2000); 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, 688 (April 1992). See also Margaret Gilhooley, *Plain Meaning, Absurd Results and the Legislative Purpose: The Interpretation of the Delaney Clause*, 40 ADMIN. L. REV. 267, 269 (Spring 1988) (writing about an approach to statutory interpretation “that emphasizes the legislative purpose as the principal guide to statutory interpretation.”).

<sup>9</sup> Robert J. Gregory, *Overcoming Text in an Age of Textualism: A Practitioner's Guide to Arguing Cases of Statutory Interpretation*, 35 AKRON L. REV. 451, 454 (2002); Karkkainen, *supra* note 6, at 437; William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 621 (1990).

<sup>10</sup> See, e.g., *United States v. N.E. Rosenblum Truck Lines*, 315 U.S. 50, 53 (1942) (“The question here, as in any problem of statutory construction, is the intention of the enacting body.”); *American Trucking Ass'ns*, 310 U.S. at 542-43 (“In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress.”); *United States v. Morris*, 39 U.S. 464, 469-70 (1840) (noting that the rule requiring a more rigid interpretation of penal laws “does not authorize or contemplate a merely literal interpretation, at the expense of an evident intent, so expressed as to be well known to a person violating [that statute].”); *United States v. Wittberger*, 18 U.S. 76, 95 (1820) (holding that even penal laws “are not to be construed so strictly as to defeat the obvious intention of the legislature.”); *United States v. Palmer*, 16 U.S. 610, 629 (1818) (looking to what was “in the mind of congress” in construing a federal piracy statute).

legislative and judicial branches.<sup>11</sup> However, the notion of “congressional intent” has come under considerable criticism from legal realists, historicist critics, and formalists, especially with respect to the use of legislative history in statutory interpretation.<sup>12</sup> Such criticisms, coupled with the elevation of Justice Antonin Scalia to the Supreme Court in 1986, have led, over the last two decades, to a decidedly more textualist approach to statutory interpretation in the Court – what Professor William Eskridge has called the “new textualism”<sup>13</sup> and what this article will refer to as the strict plain meaning approach.

While criticisms of the traditional approach to statutory interpretation rightly recognize “that the collective intent of a legislature is only a construction of the interpreter, because legislatures usually have no determinate collective expectations about many (if any) of the concrete issues posed by their statutes”<sup>14</sup> and that “an historically situated collective intent cannot be completely ‘reconstructed’ by even the most ‘imaginative’ jurist,”<sup>15</sup> they also tend to ignore the benefits of a more contextualizing mode of statutory interpretation – and the violence that a strictly textualist approach can do to a statute that has evolved over several decades in response to scientific and technological developments, judicial decisions, and administrative

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<sup>11</sup> See 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, 281-82 (Winter 1990) (noting that “the near universal view among federal judges is that when we are called upon to interpret statutes, it is our primary responsibility, within constitutional limits, to subordinate our wishes to the will of Congress, because the legislators’ collective intention, however discerned, trumps the will of the court” and arguing that the real issue is “how do courts best fulfill their duty to effectuate the will of Congress?”).

<sup>12</sup> See Karkkainen, *supra* note 6, at 415-17, and Eskridge, *supra* note 9, at 642-50 (summarizing these schools’ criticisms).

<sup>13</sup> Eskridge, *supra* note 9, at 623; see also Clark D. Cunningham, *et al.*, *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561, 1565 (April 1994) (using Eskridge’s terminology); Karkkainen, *supra* note 6, at 401 (using Eskridge’s terminology); Gilhooley, *supra* note 8, at 269 (discussing an approach to statutory interpretation “that emphasizes the text of the statute”).

<sup>14</sup> Eskridge, *supra* note 9, at 642.

<sup>15</sup> *Id.* at 644. But see David A. Strauss, *Why Plain Meaning?*, 72 NOTRE DAME L. REV. 1565, 1567 (July 1997) (“We can meaningfully say, in many contexts, that a collective body has reached a decision.”).

regulations.<sup>16</sup> Indeed, somewhat paradoxically, such textualist criticisms arose despite the large amount of ink that has been spilled explaining the inherent indeterminacy of language and the importance of context to any act of interpretation, including statutory interpretation.<sup>17</sup>

One can dwell too long and too nihilistically on linguistic indeterminacy and ignore the fact that when the users involved share basic cultural understandings, language manages, most of the time, to adequately convey meaning from one user to another.<sup>18</sup> Nevertheless, it is always worth remembering that context matters in interpretation. To use one classic example, an exclamatory “Duck!” on the battlefield probably conveys a much different meaning than an exclamatory “Duck!” during a National Audubon Society wetlands outing.

At the largely unexamined<sup>19</sup> crux of these two functionally opposing contemporary

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<sup>16</sup> This violence has been felt in other contexts besides environmental law, on which this article will concentrate. Writing about *West Virginia University Hospitals, Inc. v. Casey*, 111 S. Ct. 1138 (1991), in which the Court interpreted the Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C. § 1988 (1988), Professors Aleinikoff and Shaw argued that

the Court’s reliance on ‘plain meaning’ left it wholly uninterested in the legal context in which the statute must operate. The result, at least in this case, is a Court-imposed incoherence, blind both to the manifest congressional purpose and to the real-world consequences of the literalistic reading.

Aleinikoff & Shaw, *supra* note 8, at 689; *see also id.* at 693-96 (providing evidence of what this article refers to as a statutory conversation between Congress and the Supreme Court regarding the scope of section 1988). *See also* Gary W. Hawes, *Fort Howard Corporation v. Commissioner: The Implications of a Plain Meaning Interpretation of Statutory Language*, 28 CONN. L. REV. 847, 872 (Spring 1996) (describing an overly literal interpretation in *Fort Howard Corp. v. Commissioner*, 103 T.C. 345 (1994)).

<sup>17</sup> *See, e.g.*, Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 VAND. L. REV. 715, 737-38 (April 1992) (discussing linguistic indeterminacy); Anthony D’Amato, *Counterintuitive Consequences of “Plain Meaning,”* 33 ARIZ. L. REV. 529, 530-34 (1991) (discussing linguistic indeterminacy); Wald, *supra* note 11, at 301-02 (discussing linguistic indeterminacy). *See also* Eskridge, *supra* note 9, at 621 (identifying the “analytical conundrum” resulting from the fact that “[t]he statute’s text is the most important consideration in statutory interpretation, and a clear text ought to be given effect. Yet the meaning of a text critically depends on its surrounding context. Sometimes that context will suggest a meaning at war with the apparently acontextual meaning suggested by the statute’s language.”); Hawes, *supra* note 16, at 847 (noting that “the inherent problems of language are imported into the legal arena: its imprecision, its development and changes over time, its dependence upon two or more beings to give it life – the creator/writer and the interpreter/reader” and noting the need for a balance between formalistic plain meaning and nihilistic uncertainty).

<sup>18</sup> *See, e.g.*, Aleinikoff & Shaw, *supra* note 8, at 699-700 (“We do regularly communicate with fair precision.”); D’Amato, *supra* note 17, at 534 (noting that, “as a practical matter, in ordinary circumstances when nothing too much turns upon it, indeterminate words can be used as if they are determinate.”).

<sup>19</sup> Two exceptions to this lack of examination are found in the work of Edward L. Rubin and Stephen F. Ross (who builds upon Professor Rubin’s work). *See generally* Stephen F. Ross, *The Limited Relevance of Plain Meaning*, 73 WASH. U.L.Q. 1057 (1995); Edward L. Rubin, *Modern Statutes, Loose Canons, and the Limits of*

threads of statutory interpretation – the textualist critique of the traditional approach and the postmodernist recognition that meaning is always indeterminate and contextual – is the conception of a statute’s “audience.” In particular, two assumptions about audience influence contemporary statutory interpretation and make the strict plain meaning approach’s reconciliation with linguistic indeterminacy possible. First, most court interpretations of statutes and most commentaries on such statutory interpretation assume a model of statutes as commands – that is, of Congress directly ordering a regulated community to do something.<sup>20</sup>

Second, an oft-stated but rarely examined premise of the strict plain meaning approach is that the presumed audience of these statutory commands is a relatively generalized, relatively unsophisticated reader – “the ordinary, reasonable reader,” according to Professor Eskridge;<sup>21</sup> the “general public,” according to *Black’s Law Dictionary*;<sup>22</sup> a “reasonably literate audience,” according to Professor Anthony D’Amato;<sup>23</sup> or even, for purposes of this article, Professor Frederick Schauer’s “nonspecialist lawyer.”<sup>24</sup> Given this presumption of audience, the “plain

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*Practical Reason: A Response to Farber and Ross*, 45 VAND. L. REV. 579 (April 1992). This article builds upon, extends, and provides a theoretical foundation for the insights these authors have already provided, as should become clear.

<sup>20</sup> See Aleinikoff & Shaw, *supra* note 8, at 700 (describing statute drafters as “reasonable people interested in ordering others about”); Rubin, *supra* note 19, at 579 (emphasizing that a statute “is a directive issued by the legislature”); D’Amato, *supra* note 17, at 567 (“From the earliest codes of Hammurabi and the Romans, through the Napoleonic codes and the codification movement in the late 19<sup>th</sup> century in the United States, to the Internal Revenue Code and the Federal Register, people have thought that the more specific the rule, the more guidance there would be over public activities. *Intuitively, specific commands channel public conduct in a way that general commands fail to channel that conduct.*” (emphasis added)). See also Strauss, *supra* note 15, at 1566-67 (“No one would seriously say . . . that the words of the controlling statute or ordinance are merely recommendations, a starting point for a discussion about whether it makes sense to [for example] allow people to drive faster on that stretch of road than the speed limit permits.”). Professor Strauss emphasizes, moreover, that the plain meaning approach necessarily “assume[s] that the legislature will express its decision by speaking in a certain way, a way that makes an ordinary meaning approach appropriate” – for example, *not* ironically and *not* in parables. *Id.* at 1567-68.

<sup>21</sup> Eskridge, *supra* note 9, at 667. See also Ross, *supra* note 19, at 1058 (noting that “ordinary meaning is so heavily emphasized by interpreters of all the leading schools of statutory interpretation”).

<sup>22</sup> BLACK’S LAW DICTIONARY 796 (abridged 6<sup>th</sup> ed. 1991); see also Eric S. Lasky, *Perplexing Problems with Plain Meaning*, 27 HOFSTRA L. REV. 891, 893 (Summer 1999) (adopting this definition of audience for a “plain meaning” analysis).

<sup>23</sup> D’Amato, *supra* note 17, at 536. Professor D’Amato also refers to the “community of literate persons.” *Id.* at 538.

<sup>24</sup> Schauer, *supra* note 17, at 738-39.

meaning” of a statute is the meaning that an ordinary reader would take from a cold reading of the words Congress used. This presumed audience has no particular relationship with Congress or the regulating agency, did not participate in the drafting of the statute, and, presumably, had no idea that it was about to be regulated regarding the statute’s particular subject before Congress passed the relevant bill. In other words, there is no link between Congress and this regulated entity *except* the words of the statute itself – no shared culture except the general American, 20th- or 21<sup>st</sup>-century, high-school level cultural understanding of those words’ meaning<sup>25</sup> – an assumption that apparently justifies Justice Scalia’s and, increasingly, the Court’s use of dictionaries in statutory interpretation.<sup>26</sup> Not insignificantly, moreover, this “ordinary” reader is in no better position than Supreme Court Justices to understand what Congress meant.<sup>27</sup>

The command model, strict plain meaning approach to statutory interpretation may be appropriate for certain kinds of federal statutes, such as federal criminal statutes.<sup>28</sup> First, this approach’s presumed audience may often be fairly accurate for criminal statutes. Second, for due process reasons, entities regulated by such statutes already benefit from the rule of lenity

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<sup>25</sup> See, e.g., Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 S. CT. REV. 231, 250 (1990) (arguing that “plain meaning” allows him to “converse with an English speaker with whom I have nothing in common but our shared language.”) *But see* Rubin, *supra* note 19, at 585-86 (contesting this premise for administrative statutes).

<sup>26</sup> See, e.g., Karkkainen, *supra* note 6, at 440 (discussing Justice Scalia’s use of dictionaries in interpreting statutes); Cunningham *et al.*, *supra* note 13, at 1591 (“Recourse to dictionaries is a notable feature of the ‘new textualism’ . . .”). Linguists and other commentators have criticized this reliance on dictionaries as too limiting. See, e.g., Cunningham *et al.*, *supra* note 13, at 1614-16 (criticizing the Court’s use of dictionaries); A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 71, 72 (noting that “citing to dictionaries creates a sort of optical illusion, conveying the existence of a certainty – or ‘plainness’ – when appearance may be all there is.”), 73-74 (“A statute cannot be understood merely by understanding the words in it.”) (Winter 1994).

<sup>27</sup> *But see* Rubin, *supra* note 19, at 579-80 (“Courts are not the audience for a statute . . . Rather, they are mechanisms for implementing statutes, and thus active participants in our modern scheme of statutory governance. The critical questions in statutory interpretation is how courts should fulfill this role, a questions that can be answered only by a comprehensive theory of policymaking and implementation in the modern administrative state.”).

<sup>28</sup> See Ross, *supra* note 19, at 1063 (“The one area where . . . plain meaning does matter involves penal and criminal statutes.”); Schauer, *supra* note 17, at 739 (noting that “ordinary meaning, rather than technical meaning, governs when penal statutes are construed strictly for reasons of notice to their addressees.”).

when a statute is ambiguous,<sup>29</sup> which embodies a judicial recognition that Congress should be clear about what it is criminalizing before citizens are convicted and thrown in jail. The strict plain meaning approach serves the same principles of fairness and due process and thus could similarly work to reduce arbitrariness in federal criminal law enforcement.

However, few other kinds of federal statutes comfortably fit a model of legislation directly commanding the general American public in “ordinary” language. Questioning the validity of the two premises about audience in the strict plain meaning approach leads to the central questions of this article: Should the Court assume that Congress is commanding the same “ordinary reader” in every statute, and what violence to statutory meaning and congressional policy can occur when it does?<sup>30</sup>

This article is not the first to question the wisdom of a unitary assumption of audience in statutory interpretation. Professor Edward Rubin, for example, has argued that, in an administrative state:

Far from being in the position of two people who share nothing but language, a legislature and the administrative agencies within the same jurisdiction are linked by an incredibly dense networks of relationships and shared activities. A much better analogy than two English-speaking strangers would be two members of a single family. The legislature and the agencies spend their entire lives supporting, attacking, cajoling, commanding, resisting, annoying, deceiving, upsetting, consoling, protecting, correcting, and wounding each other. Like family members, they develop a shared and specialized set of linguistic understandings based on this continuous, intense relationship. To restrict them to the discourse of strangers would distort and constrain modern governmental processes.<sup>31</sup>

In this administrative arena, Congress is far more likely to draft statutes that either speak directly to an administrative agency or that it expects an administrative agency to implement, mediating

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<sup>29</sup> McNally v. United States, 483 U.S. 350, 359-60 (1987); Ross, *supra* note 19, at 1063.

<sup>30</sup> See Schauer, *supra* note 17, at 720 (noting that the dispute regarding the use of the strict plain meaning approach is “not just about the primacy of plain meaning, but about the far more pervasive question of the entrenchment of some comparatively narrow legal rule in the face of comparatively broader considerations leading to the opposite result.”).

<sup>31</sup> Rubin, *supra* note 19, at 586.

the public’s interaction with that statute – in Professor Rubin’s terminology, Congress is most likely to draft *intransitive* statutes.<sup>32</sup> Moreover, representatives of the Executive Branch and the relevant agencies themselves are likely to have been in direct communication with the congressional committees that drafted these statutes about problems and issues of continuing concern.<sup>33</sup> Similarly, coalitions of the regulated entities, particularly when such regulated entities are significant industrial, commercial, or agricultural enterprises, and coalitions of public interest organizations are likely to have formed political action committees and lobbying groups to present their views to Congress, and individual regulated entities may even be invited to testify before the relevant drafting committees.<sup>34</sup> It is not unusual for either the administrative agency or the regulated entities to draft proposed statutory language for Congress, nor for the administrative agencies, the regulated entities, and the public interest organizations to have communicated regarding prominent issues.

In other words, for a statute implemented by an administrative agency, it is entirely likely that Congress, the implementing agency, the regulated entities, and relevant public interest groups already share a more specialized culture before the statute is ever drafted, and that meanings particular to that culture will become part of the statute itself. Such considerations have led Professor Stephen Ross, following Professor Rubin’s observations, to conclude that specialized, administratively implemented statutes “are not directed at ordinary citizen speakers of English, but at a small community of lawyers, regulators, and people subject to their specific regulations” and thus that, “[a]lthough linguistic techniques might still aid in understanding their meaning, . . . extrinsic evidence that is known and accessible to this small sub-community – such as legislative history, established norms of construction, and other evidence about the context in

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<sup>32</sup> *Id.* at 584-86.

<sup>33</sup> Eskridge, *supra* note 9, at 633.

<sup>34</sup> *Id.* at 633-34.

which the legislation arose – is more likely than linguistic analysis to help an outside judge shed light on what Congress meant and how the statute is to be understood.”<sup>35</sup>

Professor Ross did not take his thesis much farther than this statement, but he implicitly recognized that, in some areas of law involving many administratively implemented statutes, specialized subcultures have developed.<sup>36</sup> Far less discernible in Professor Ross’s or Professor Rubin’s discussions, however, is any emphasis on the equally important fact that these specialized legal subcultures have *evolved* for decades. Nevertheless, the progress of that evolution is part of the “extrinsic evidence” that courts should consider.

The argument of this article, therefore, is that Professors Rubin and Ross did not take their insights far enough. First, this article argues not only that Congress “now speak[s] to different kinds of government actors in a variety of different voices,”<sup>37</sup> but more broadly that Congress speaks within entirely different legal subcultures, consisting not just of Congress (especially the congressional committees that draft specialized statutes) and the highly specialized administrative agencies that implement those statutes, but also of the highly sophisticated regulated entities and their related industry and trade political action groups and the equally sophisticated and often opposing public interest organizations. Federal courts should acknowledge these subcultures when interpreting federal statutes.

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<sup>35</sup> Ross, *supra* note 19, at 1057.

<sup>36</sup> Professor Rubin, while not speaking specifically in terms of legal subcultures, has noted that in the administrative state, “[a]s the instrumental, regulatory aspect of a statute becomes more pronounced, the decontextualized, linguistic approach that characterizes canons [of statutory construction] becomes increasingly irrelevant.” Rubin, *supra* note 19, at 580. Moreover, he has argued persuasively that statutes function differently in different contexts as a result of their relative transitivity or intransitivity. *Id.* at 581-82. As a result, Professor Rubin has recognized at least two relevant statutory audiences, and he has stressed that statutory interpretation must acknowledge their differences: “It is one thing for the court to interpret a statute that states transitive rules applicable in terms to private persons. It is quite another thing for the court to interpret a statute that instructs an administrative agency to formulate the applicable rules.” *Id.* at 582. Professor Rubin does not go further, however, and recognize the dialogic nature of statutory evolution; for him, even intransitive statutes remain “instructive.” *Id.* See also Schauer, *supra* note 17, at 724 (suggesting that, given “the increasing necessity of specializing in an increasingly technical legal world,” “one possible explanation for the use of formal and thus comparatively acontextual decisionmaking devices is that they may reduce the amount of required decisionmaker attention.”).

<sup>37</sup> Rubin, *supra* note 19, at 586.

Second, this article argues that the interpretive significance of such legal subcultures is two-fold: participants in the subculture not only use a more specialized language than the general public, as both Professors Rubin and Ross have argued, but the evolving nature of the statutes within that subculture often require outside interpreters (and this article, like Professor Ross, figures the Supreme Court as an outsider) to engage in a dialogic mode of interpretation. In effect, the relevant subcultural participants have been *conversing* over decades through statutory provisions, amendments, and regulations at least as often as Congress has unilaterally commanded new regulatory programs. As a result, not only the relevant audience but also *the prior statements* in the ongoing conversation should contextualize Congress's current statutory pronouncements.

Ordinary experience teaches us that it is dangerous to walk in late on a conversation, because of the real risk that we will misapprehend the common understanding of the other participants. Indeed, popular culture exploits this experiential truism to generate humor. For example, in one episode of the popular TV show "Friends," Rachel (Jennifer Aniston) returns to a conversation between Ross (David Schwimmer) and the father of his current girlfriend (Bruce Willis), misinterprets to which of Ross's three failed marriages the two of them are referring, and commits the *faux pas* of revealing the fact that she and Ross had been married – a fact that the father did not yet know.

While occasionally participants in statutory conversations, the federal courts are also almost always latecomers to them. Rather than risk, like Rachel, misinterpreting the references in ongoing statutory conversations (with far less amusing results), the late-comer Court should be cautious about issuing interpretations without a full understanding of the dialogic and subcultural context in which the statute – and the relevant community's understanding of its meaning – has

evolved. Instead, however, the Court’s increasing allegiance to the strict plain meaning approach discounts the very tools of statutory interpretation that would allow the Court to appreciate the subcultural context of long-enduring, much-amended, and much-interpreted federal statutes. These tools include: legislative history, which includes the commentaries that various congressional committees provide as a bill wends its way through Congress, as well as committee and floor debates about the bill<sup>38</sup>; administrative history, the progressive administrative interpretations and applications of a given statute, including administrative agency interactions with Congress; and statutory history, the series of prior versions of the statute and its predecessors that Congress deliberately changed (or refused to change), including the events that prompted those changes, and the resulting amendments.<sup>39</sup>

Finally, this article argues that whether the Court chooses to acknowledge the full subcultural dialogic content of statutory pronouncements can make – and has made – a significant difference to the outcome of its statutory interpretation decisions. In the traditional plain meaning approach, use of the context-revealing tools of statutory construction implicitly reflects an understanding that federal statutes can be evolving products of reflection and interaction – *i.e.*, in this article’s terminology, ongoing conversations between sessions of

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<sup>38</sup> Legislative history has been subject to the most criticism of the three contextualizing tools listed, both in the Supreme Court and in the academic literature. *See, e.g.*, Karkkainen, *supra* note 6, at 403 (discussing Justice Scalia’s treatment of legislative history); Wald, *supra* note 11, at 279-86 (discussing the Court’s decreasing reliance on legislative history). However, Professor Rubin argues persuasively that the objections to legislative history wither for intransitive, administrative statutes. Rubin, *supra* note 19, at 587.

<sup>39</sup> Professor Eskridge posited in 1990 that, under the new textualists’ approach, “[t]he only context not normally considered is legislative history, and most of the new textualists will consider legislative history if other aids still leave the statutory meaning truly unclear.” Eskridge, *supra* note 9, at 669; *see also* Karkkainen, *supra* note 6, at 403, 405-14, 417-25 (arguing that Justice Scalia uses context in statutory interpretation and that he really only rejects legislative history). From the perspective of 2004, however, it has become clear that the Court’s textualist decisions discount far more than legislative history. Besides the cases discussed in this article, *infra*, *see* Cunningham, *et al.*, *supra* note 13, at 1565 (“For Justice Scalia, and quite possibly for a number of his fellow Justices, invocation of ‘plain meaning’ represents a decision to give greater weight to the text as compared to legislative history and policy considerations.”); Schauer, *supra* note 17, at 739-40 (the plain meaning approach takes “legislative intent, regulatory context, and interpreter conceptions of optimality (on whatever basis) as relatively unavailable compared to what appeared within the four corners of the document.”).

Congress, between Congress and the implementing agency, among Congress and the regulated communities and public interest communities, and/or between Congress and the courts. In contrast, the undermining, if not elimination, of these tools in the strict plain meaning approach privileges the uninformed understanding of an outsider, a state of statutory interpretation roughly parallel to early European anthropologists' unthinking willingness to judge other cultures by European values rather than appreciating such cultures on their own terms.

Anthropologists finally acknowledged that they did not occupy the position of neutral observer and that their Eurocentric upbringing colored their interpretations of the cultures they participated in and observer – especially when their biases went unacknowledged. The Court, likewise, should acknowledge that its imposition of an “acontextual” textualist reading of a statute is in fact itself a choice of context that privileges the Justices’ own understandings.<sup>40</sup> It should also acknowledge that because the strict plain meaning approach discourages federal judges from acknowledging the complete dialogic subcultural context of many statutes, it effects a shift in lawmaking and interpretive power from Congress to the federal courts. This shift is particularly pronounced when statutes are evolving – specifically, when (a) Congress relies on a dialogic context to supply meaning to textually imprecise language; and (b) when Congress tries to change the meaning of established legal language to suit new statutory purposes.

To make these arguments, this article will examine some of the Supreme Court’s

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<sup>40</sup> As Professor Manning has observed:

the Court’s “purposivists” (or, more precisely, its “strong purposivists”) emphasize the statute’s *policy context*; when a specific text does not correspond to its spirit or purpose, the letter of the law must yield. The Court’s “textualists,” by contrast, give precedence to *semantic context*; judges must enforce the conventional meaning of a clear text, even if it does not appear to make perfect sense of the statute’s overall policy.

Manning, *supra* note 8, at 3-4.

interpretations of federal environmental law,<sup>41</sup> a field of law based upon complex, highly technical statutes administered by specialized expert federal agencies, which have existed for decades. Congress began regulating water pollution in 1948,<sup>42</sup> air pollution in 1955,<sup>43</sup> and endangered species in 1966.<sup>44</sup> As important for statutory interpretation purposes as the age of such legislation, however, is its continuing evolution. For example, Congress has amended its water pollution legislation 34 times,<sup>45</sup> its air pollution legislation 24 times,<sup>46</sup> and its endangered

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<sup>41</sup> Professor Ross, too, chose environmental law as his first example of why the strict plain meaning approach's presumption of audience would not work. Ross, *supra* note 19, at 1060-61 (discussing *Train v. Colorado Public Interest Research Group*, 426 U.S. 1 (1976)).

<sup>42</sup> Federal Water Pollution Control Act of 1948, 62 Stat. 1155 (June 30, 1948).

<sup>43</sup> Air Pollution Control Act, 69 Stat. 322 (July 14, 1955).

<sup>44</sup> Endangered Species Act of 1966, Pub. L. No. 89-669, 80 Stat. 926 (1966) (repealed 1973).

<sup>45</sup> Alternative Water Sources Act of 2000, Pub. L. No. 106-457, 114 Stat. 1975 (Nov. 7, 2000); Beaches Environmental Assessment and Coastal Health Act of 2000, Pub. L. No. 106-284, 114 Stat. 870 (Oct. 10, 2000); Pub. L. No. 106-53, 113 Stat. 297 (Aug. 17, 1999); Pub. L. No. 105-362, 112 Stat. 3283 (Nov. 10, 1998); Pub. L. No. 104-182, 110 Stat. 1683 (Aug. 6, 1996); Pub. L. 104-66, 109 Stat. 726 (Dec. 21, 1995); Ocean Pollution Reduction Act, Pub. L. No. 103-431, 108 Stat. 4396 (Oct. 31, 1994); Pub. L. No. 102-285, 106 Stat. 171 (May 18, 1992); Pub. L. No. 102-154, 105 Stat. 1000 (Nov. 13, 1991); Great Lakes Critical Programs Act of 1990, Pub. L. No. 101-596, 104 Stat. 3000 (Nov. 16, 1990); Massachusetts Bay Protection Act of 1988, Pub. L. No. 100-653, 102 Stat. 3835 (Nov. 14, 1988); Pub. L. No. 105-244, 112 Stat. 1581 (Oct. 7, 1988); Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 76 (Feb. 4, 1987); Municipal Wastewater Treatment Construction Grant Amendments of 1981, Pub. L. No. 97-117, 95 Stat. 1623 (Dec. 29, 1981); Pub. L. No. 96-483, 94 Stat. 2360 (Oct. 21, 1980); Pub. L. No. 96-88, 93 Stat. 695 (Oct. 17, 1979); Pub. L. No. 95-576, 92 Stat. 2467 (Nov. 2, 1978); Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (Dec. 27, 1977); Pub. L. No. 95-91, 91 Stat. 583 (Aug. 4, 1977); Pub. L. No. 93-592, 88 Stat. 1924 (Jan. 2, 1975); Pub. L. No. 93-207, 87 Stat. 906 (Dec. 28, 1973); Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 896 (Oct. 18, 1972); Pub. L. No. 92-240, 86 Stat. 47 (March 1, 1972); Pub. L. No. 92-137, 85 Stat. 379 (Oct. 13, 1971); Pub. L. 92-50, 85 Stat. 124 (July 9, 1971); Pub. L. No. 91-611, 84 Stat. 1818 (Dec. 31, 1970); Pub. L. No. 91-224, 84 Stat. 91 (April 3, 1970); Pub. L. 89-753, 80 Stat. 1246 (Nov. 3, 1966); Pub. L. 89-234, 79 Stat. 903 (Oct. 2, 1965); Pub. L. No. 87-88, 75 Stat. 204 (July 20, 1961); Pub. L. No. 86-624, 74 Stat. 411 (July 12, 1960); Pub. L. No. 86-70, 73 Stat. 141 (June 25, 1959); Act of July 9, 1956, 70 Stat. 498 (July 9, 1956); Act of July 17, 1952, 66 Stat. 755 (July 17, 1952).

<sup>46</sup> Chemical Safety Information, Site Security, and Fuels Regulatory Relief Act, Pub. L. No. 106-40, 113 Stat. 207 (Aug. 5, 1999); Pub. L. No. 105-326, 112 Stat. 3294 (Nov. 10, 1998); Border Smog Reduction Act of 1998, Pub. L. No. 105-286, 112 Stat. 2773 (Oct. 27, 1998); Pub. L. No. 105-277, 112 Stat. 2681 (Oct. 21, 1998); Pub. L. No. 104-264, 110 Stat. 3257 (Oct. 9, 1996); Pub. L. No. 104-70, 109 Stat. 773 (Dec. 23, 1995); Pub. L. 102-187, 105 Stat. 1285 (Dec. 4, 1991); Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (Nov. 15, 1990); Pub. L. No. 98-213, 97 Stat. 1461 (Dec. 8, 1983); Pub. L. No. 97-258, 96 Stat. 1067 (Sept. 13, 1982); Steel Industry Compliance Act of 1981, Pub. L. No. 97-23, 95 Stat. 139 (July 17, 1981); Pub. L. No. 96-300, 94 Stat. 831 (July 2, 1980); Pub. L. No. 95-263, 92 Stat. 3457 (Nov. 9, 1978); Pub. L. No. 95-190, 91 Stat. 1405 (Nov. 16, 1977); Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (Aug. 7, 1977); Pub. L. No. 93-319, 88 Stat. 265 (June 23, 1974); Pub. L. No. 93-15, 87 Stat. 11 (April 9, 1973); Pub. L. No. 92-157, 85 Stat. 464 (Nov. 18, 1971); Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (Dec. 31, 1970); Pub. L. 91-137, 83 Stat. 283 (Dec. 5, 1969); Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485 (Nov. 21, 1967); Clean Air Act Amendments of 1966, Pub. L. No. 89-675, 80 Stat. 954 (Oct. 15, 1966); Motor Vehicle Air Pollution Control Acts, Pub. L. No. 89-272, 79 Stat. 992 (Oct. 20, 1965); Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (Dec. 17, 1963).

species legislation 14 times<sup>47</sup> since initially entering these fields. The amendments have ranged from simple renumbering of statutory provisions to complete overhauls of regulatory programs, and they have come in response to congressional recognition of new problems, to agency regulations, and to court opinions. As a result, the participants in the federal environmental law subculture have been conversing for decades in language not immediately accessible to the textualists’ “ordinary reader,” as most any law student taking an Environmental Law course for the first time will readily confirm. Environmental law thus provides an excellent proving ground for the theory that the Supreme Court’s willingness to acknowledge subcultural statutory conversations affects its statutory interpretation.

First, however, this article will begin with an overview of the traditional and the strict plain meaning approaches to statutory interpretation.

## I. A BRIEF HISTORY OF THE PLAIN MEANING APPROACHES TO STATUTORY INTERPRETATION IN THE SUPREME COURT

### A. The Plain Meaning Approach Prior to the Scalia Court

Until relatively recently, the Supreme Court has described the plain meaning rule as one tool – albeit, a very important tool – that allows the federal courts to discern and then apply to particular facts Congress’s intent regarding the purposes and goals of a particular statute. Under the plain meaning rule, “[t]he words of a statute are to be taken in their natural sense, and

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<sup>47</sup> Pub. L. 106-201, 114 Stat. 307 (May 18, 2000); Pub. L. 102-650, 104 Stat. 5117 (Dec. 1, 1990); Pub. L. 101-707, 102 Stat. 4709 (Nov. 23, 1988); Pub. L. No. 101-478, 102 Stat. 2315 (Oct. 7, 1988); Pub. L. No. 99-659, 100 Stat. 3741 (Nov. 14, 1986); Pub. L. No. 98-327, 98 Stat. 271 (June 25, 1984); Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, 96 Stat. 1426 (Oct. 13, 1982); Pub. L. No. 97-79, 95 Stat. 1079 (Nov. 16, 1981); Pub. L. No. 96-246, 94 Stat. 348 (May 23, 1980); Pub. L. No. 96-159, 93 Stat. 1225 (Dec. 28, 1979); Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (Nov. 10, 1978); Pub. L. No. 95-212, 91 Stat. 1493 (Dec. 19, 1977); Pub. L. No. 94-359, 90 Stat. 913 (July 12, 1976); Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (Dec. 28, 1973); Endangered Species Conservation Act, Pub. L. No. 91-135, 83 Stat. 275 (1969) (repealed 1973).

ordinary signification and import.”<sup>48</sup> As generally applied, the rule operates (functionally if not denominationally) as a presumption, limiting the arguments available to promote any meaning other than the statute’s plain meaning.<sup>49</sup> Thus, for example, “the title of an act cannot limit the plain meaning of its text, although it may be looked to to aid in construction in cases of doubt.”<sup>50</sup> More generally, “where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed to justify a Court in departing from the plain meaning of the words ....”<sup>51</sup>

The Court uses the traditional plain meaning approach to restrict federal courts’ impulses to construe statutes to serve policy goals other than the ones Congress articulated within the statute itself. Thus, when a petitioner argued that immigration acts should be construed to provide a right to a hearing before deportation to ensure constitutional due process and because

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<sup>48</sup> United States v. Morris, 39 U.S. 464, 471 (1840).

<sup>49</sup> See, e.g., Browden v. United States, 312 U.S. 335, 398 (1941) (“The plain meaning of the words of the act covers this case. No single argument has more weight in statutory interpretation than this. Nothing in the legislative history is brought to our attention which indicates any other purpose in Congress than that expressed by the words of the act.”).

<sup>50</sup> Strathearn S.S. Co. v. Dillon, 252 U.S. 348, 351-52 (1920) (citing Cornell v. Coyne, 192 U.S. 418, 430 (1904), and the cases cited therein); see also FTC v. Mandel Bros., Inc., 359 U.S. 385, 388-89 (1959) (referring to the title of the Fur Products Labeling Act to help resolve an ambiguity within the statute); United States v. Minker, 350 U.S. 179, 185-86 (1956) (quoting Brotherhood of Railroad Trainmen v. Baltimore & Ohio R. Co., 331 U.S. 519, 528-29 (1947) for the rule that “the title of a statute and a heading of a section cannot limit the plain meaning”); Maguire v. Commissioner of Internal Revenue, 313 U.S. 1, 794 (1941) (noting that the title of an act will not limit its plain meaning, but it can aid in resolving an ambiguity). More expansively, the Court explained in 1947 that:

headings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or synopsis. Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner; to attempt to refer to each specific provision would often be ungainly as well as useless. As a result, matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles. Factors of this type have led to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text. . . . For interpretive purposes, there are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of doubt. But they cannot undo or limit what the text makes plain.

Brotherhood of R.R. Trainmen v. Baltimore & Ohio R. Co. 331 U.S. 519, 528-29 (1947) (citing United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805); Cornell v. Coyne, 192 U.S. at 430; Strathearn S.S. Co. v. Dillon, 252 U.S. 348, 354 (1920)).

<sup>51</sup> United States v. Morris, 39 U.S. 464, 471-72 (1840).

“such a construction would be consistent with the ‘tradition and principles of free government,’” the Court resisted, emphasizing that “we must adopt the plain meaning of a statute, however severe the consequences.”<sup>52</sup> Relatedly, due process considerations underscore the premise that statutes must give “fair warning” that conduct is illegal, and hence “[t]he case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves do not suggest.”<sup>53</sup>

The plain meaning approach also restricts federal administrative agencies in their implementation of federal statutes and did so long before the Court enunciated the *Chevron* doctrine in 1984. As early as 1840, the Court denounced the “expanding and enlarging of statutes by [agency] construction; this adaptation of statutes to varying facts and circumstances of each case, rather than applying the varying facts to the immutable statute, is wholly inadmissible ....”<sup>54</sup> Nor will the courts defer to an agency construction that “flies in the face of the purposes of the statute and the plain meaning of its words,” especially when no administrative or governmental convenience devolves from the agency’s construction, the agency has been inconsistent in its own interpretation, and the proposed interpretation does not depend on specialized agency knowledge or expertise.<sup>55</sup> In contrast, an administrative agency can change its longstanding interpretation of a statute if the new interpretation “comports with the plain meaning of the statute.”<sup>56</sup>

At the same time, however, the traditional plain meaning approach forbids federal courts from *undermining* congressional intent and purposes in particular statutes – that is, from limiting

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<sup>52</sup> *Jay v. Boyd*, 351 U.S. 345, 357 & n.21 (1956) (citing *United States v. Sullivan*, 332 U.S. 689, 693 (1944); *Hopkins Federal Savings & Loan Ass’n v. Cleary*, 296 U.S. 315, 334-35 (1935)).

<sup>53</sup> *Bouie v. City of Columbia*, 378 U.S. 347, 349 & 350 n.2, 362-63 (1964) (quoting *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 96 (1820)).

<sup>54</sup> *United States v. Morris*, 39 U.S. 464, 471 (1840).

<sup>55</sup> *Haggan Co. v. Helvering*, 308 U.S. 389, 398 (1940).

<sup>56</sup> *American Chicle Co. v. United States*, 316 U.S. 450, 454-55 (1942).

or changing congressionally set policies. Most basically, for truly ambiguous statutes, it is “the well-settled doctrine of this Court to read a statute, assuming that it is susceptible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen.”<sup>57</sup> Even when construing criminal statutes, which are subject to “a more rigid rule of construction” than civil statutes, federal courts cannot “authorize or contemplate a merely literal interpretation, at the expense of an evident intent, so expressed as to be well-known to a person violating it”<sup>58</sup>; “the evident intention of the legislature ought not be defeated by a forced and overstrict construction.”<sup>59</sup> Similarly, “[t]o take a few words from their context and with them thus isolated to attempt to discover their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation.”<sup>60</sup>

Beyond these overly literal interpretations – what might be called simply the “bad readings” of a statute – the Court traditionally has also acknowledged that statutory constructions that contradict or actually change the statute’s plain meaning might still be acceptable in order to effectuate congressional intent and statutory purposes. Thus, under the traditional plain meaning approach, federal courts can vary from the plain meaning of a statute if strong evidence of congressional intent indicates a different meaning, because “[t]here is no invariable rule for the

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<sup>57</sup> *Shapiro v. United States*, 335 U.S. 1, 31 (1948); *see also* *Perry v. Commerce Loan Co.*, 383 U.S. 392, 399-400 (1966) (construing a statutory provision with no literal reading so as to effectuate the “clear policy” of the provision).

<sup>58</sup> *United States v. Morris*, 39 U.S. 464, 469-70 (1840).

<sup>59</sup> *Id.* at 475; *see also* *United States v. Wittberger*, 18 U.S. 76, 95 (1820) (holding that penal statutes should not be construed “so as to narrow the words of the statute to the exclusion of cases in which those words, in their ordinary acceptance, or in that sense in which the legislature has obviously used them, would comprehend.”); *United States v. Palmer*, 16 U.S. 610, 629 (1818) (holding an arguably unenumerated act of piracy liable for the death penalty because “when the words of a statute, in their most obvious sense, comprehend an offence, which offence is apparently placed by the legislature in the highest class of crimes, it furnishes an additional motive for rejecting a construction, narrowing the plain meaning of the words, that such construction would leave the crime entirely unpunished.”).

<sup>60</sup> *American Trucking Ass’n*, 310 U.S. at 542-43.

discovery of that intention.”<sup>61</sup> Specifically, while the courts cannot unilaterally change a statute, even to avoid harsh results,<sup>62</sup> and should not sustain an interpretation that is “repugnant to the plain meaning *and spirit* of the law under consideration,”<sup>63</sup> the Court has advised that:

When [the plain] meaning has led to absurd or futile results, . . . this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one “plainly at variance with the policy of the legislation as a whole” this Court has followed that purpose, rather than the literal words.<sup>64</sup>

As this description suggests, federal courts using the traditional plain meaning approach can discern congressional purposes from sources other than the words of the statute itself. “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 to be on ‘superficial examination.’”<sup>65</sup> Historically, the most important evidence of such contradictory congressional purposes has come from a statute’s legislative history.<sup>66</sup> The Supreme Court once devoted numerous pages of its statutory construction opinions to statutes’ legislative history in attempts to discern or clarify congressional intent and purposes. For example, in 1948, when evaluating the status of compulsory testimony immunity with respect to tie-in sales under the Emergency Price Control Act, the Court devoted one-quarter of its analysis to legislative history

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<sup>61</sup> *Id.* at 542.

<sup>62</sup> *Jay v. Boyd*, 351 U.S. 345, 357 (1956); *Helvering v. Ohio Leather Co.*, 317 U.S. 102, 108-09 (1942).

<sup>63</sup> *Pierce v. Turner*, 9 U.S. 154, 167 (1809) (emphasis added).

<sup>64</sup> *American Trucking Ass’ns*, 310 U.S. at 543; *see also Perry v. Commerce Loan Co.* 383 U.S. 392, 399-400 (1966) (“Even if a literal reading of these provisions [of the Bankruptcy Act, 11 U.S.C. § 321(c)(5),] suggested the application of [§ 321(c)(5)] to extension plans, we would have little hesitation in construing the Act [against this literal meaning] to give effect to the clear policy underlying Chapter XIII.” (quoting *American Trucking Ass’ns*, 310 U.S. at 543)); *Shapiro v. United States*, 335 U.S. 1, 31 (1948) (quoting *American Trucking Ass’ns*); *United States v. N.E. Rosenblum Truck Lines*, 315 U.S. 50, 55-56 (1942) (“Where the plain meaning of words used in a statute produces an unreasonable result, ‘plainly at variance with the policy of the legislation as a whole’, we may follow the purpose of the statute rather than the literal words.” (quoting *American Trucking Ass’ns*, 310 U.S. at 543, and cases cited therein)).

<sup>65</sup> *Id.* at 543-44.

<sup>66</sup> *See, e.g., Maguire v. Commissioner of Internal Revenue*, 313 U.S. 1, 794 (1941) (examining the legislative history); *Browden v. United States*, 312 U.S. 335, 398 (1941) (finding nothing in the legislative history to contradict the statute’s plain meaning).

before concluding that “the construction put forward by the petitioner frustrates the congressional intent as manifested by the legislative history . . . .”<sup>67</sup> Similarly, in 1959 the Court invested substantial analysis into identifying the purpose of the Fur Products Labeling Act,<sup>68</sup> including a thorough investigation of its legislative history, in order to resolve interpretive ambiguities over statutory “invoicing.”<sup>69</sup>

Less academic attention has been paid to the role of *statutory history* – the sometimes convoluted series of amendments, adjustments, and judicial interpretations of a long-lived statute – in statutory construction. Nevertheless, the Court presumes “that Congress, in reenacting [statutory provisions in later amendments], was aware of the settled judicial construction of the statut[e].”<sup>70</sup> Conversely, “[w]hen Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.”<sup>71</sup> Moreover, the Court has traditionally regarded the history of statutory amendments and incorporations to be very revealing of current congressional understanding and purpose. Thus, for example, the Court rejected a proposed interpretation of the Emergency Price Control Act in part because that interpretation “shuts out the illumination that emanates from key words and phrases in the section when considered . . . in the context of the history of the Compulsory Testimony Act of 1893, and the construction that had been placed upon it and similar provisions, prior to its incorporation into the Price Control Act.”<sup>72</sup> More recently, the Court viewed a 1996 amendment to 28 U.S.C. § 1782, which extended district court discovery jurisdiction to criminal investigations, as confirmation that

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<sup>67</sup> *Shapiro*, 335 U.S. at 8-16, 31.

<sup>68</sup> 15 U.S.C. § 69a.

<sup>69</sup> *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 388-89 (1959).

<sup>70</sup> *Shapiro*, 335 U.S. at 16.

<sup>71</sup> *Intel Corp. v. Advanced Micro Devices, Inc.*, \_\_\_ U.S. \_\_\_, 124 S. Ct. 2466, 2479-80 (2004) (quoting *Stone v. INS*, 514 U.S. 386, 397 (1995)).

<sup>72</sup> *Shapiro*, 335 U.S. at 31 (1948).

Congress had authorized a “broad range of discovery” in the original 1964 enactment.<sup>73</sup>

A prominent example of the traditional plain meaning approach in environmental law is the Supreme Court’s 1978 decision in *Tennessee Valley Authority v. Hill* (*TVA v. Hill*),<sup>74</sup> in which the Court resolved the issue of whether section 7 of the Endangered Species Act of 1973 (ESA)<sup>75</sup> “requires a court to enjoin the operation of a virtually completed federal dam – which had been authorized prior to 1973 – when, pursuant to the authority vested in him by Congress, the Secretary of the Interior has determined that the operation of the dam would eradicate an endangered species . . . .”<sup>76</sup> Section 7 requires all federal agencies to take all actions “necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence” of species listed as endangered or threatened species under the Act “or result in the destruction or modification of habitat of such species” determined by the Secretary of the Interior to be critical habitat.<sup>77</sup> The Secretary had determined that completion and operation of the Tellico Dam in Tennessee, which the Tennessee Valley Authority (TVA) had begun constructing in 1967, would jeopardize the continued existence of the snail darter, a small fish listed as an endangered species under the Act in 1976.<sup>78</sup> In a 6-3 decision, in an opinion authored by Chief Justice Burger, the Court held that completion of the dam had to be enjoined.<sup>79</sup>

In reaching this conclusion, the majority started with the plain meaning of section 7, noting that “[o]ne would be hard pressed to find a statutory provision whose terms were any

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<sup>73</sup> *Intel Corp.*, 124 S. Ct. at 2480.

<sup>74</sup> 437 U.S. 153 (1978). *See* Strauss, *supra* note 15, at 1568-69 (describing *TVA v. Hill* as “one of the most celebrated plain meaning cases” for a non-simple statute; Eskridge, *supra* note 9, at 627 (“The leading plain meaning case of the Burger Court, *TVA v. Hill*, illustrates the operation of the soft plain meaning rule.”)).

<sup>75</sup> 16 U.S.C. §§ 1531-1544.

<sup>76</sup> *TVA v. Hill*, 437 U.S. at 156.

<sup>77</sup> 16 U.S.C. § 1536(a)(2).

<sup>78</sup> *TVA v. Hill*, 437 U.S. at 157, 160-61.

<sup>79</sup> *Id.* at 193-95.

plainer than those in § 7 of the Endangered Species Act.”<sup>80</sup> In requiring *all* federal agencies to *insure* that no jeopardy occurred or that no critical habitat was destroyed or modified, the language of section 7 “admits of no exception.”<sup>81</sup> Interpreting the statute so that it did not apply to projects already under construction in 1973 would force the Court “to ignore the ordinary meaning of the plain language.”<sup>82</sup>

Nevertheless, despite the asserted plainness of section 7’s plain meaning, the majority examined both the statutory and legislative history of the 1973 ESA. It noted that Congress had enacted endangered species legislation in both 1966 and 1969<sup>83</sup> and that in 1973 Congress had purposely changed language in these prior acts, which had required federal agencies “to preserve endangered species only ‘*insofar as is practicable and consistent with the[ir] primary purposes . . .*’”<sup>84</sup> Moreover, in the legislative history of the 1973 ESA, Congress noted the increasing rate of species extinction, especially from habitat loss, the “incalculable” value of species’ genetic heritage, and its approach of “institutionalized caution.”<sup>85</sup> Statutory structure also supported a broad reading: according to the Court, every section of the 1973 ESA reflected Congress’s determination to enact “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”<sup>86</sup> Finally, statements during the congressional debates and in the House Committee Report indicated that members of Congress anticipated that section 7 would apply to existing federal agency activities.<sup>87</sup> As a result, the majority concluded that “Congress has spoken in the plainest of words, making it abundantly clear that the balance

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<sup>80</sup> *Id.* at 173.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 174-76.

<sup>84</sup> *Id.* at 181 (quoting the Endangered Species Act of 1966, § 1(b), 80 Stat. 926 (1966), repealed, 87 Stat. 903 (1973)).

<sup>85</sup> *Id.* at 176-79 (quoting H.R. REP. NO. 93-412, at 4-5 (1973)).

<sup>86</sup> *Id.* at 180.

<sup>87</sup> *Id.* at 183-84 (quoting 119 Cong. Rec. 42913 (1973) (remarks of Representative Dingell), 187 (quoting H.R. REP. NO. 93-412, p. 14 (1973))).

has been struck in favor of affording endangered species the highest of priorities . . . .”<sup>88</sup>

Justice Rehnquist dissented from the majority’s opinion primarily on the ground that the district court retained authority to refuse to enjoin the dam’s completion.<sup>89</sup> More expansively, Justice Powell, writing for himself and Justice Blackmun, disagreed with the majority on the importance of Congress’s continuing appropriations to complete the Tellico Dam. While the majority conceded that the Appropriations Committees evidently “believed that the Act simply was not applicable in this situation,”<sup>90</sup> it denied the appropriation acts power to implicitly amend or repeal the ESA.<sup>91</sup> In contrast, Justice Powell argued that “§ 7 cannot reasonably be interpreted as applying to a project that is completed or substantially completed when its threat to an endangered species is discovered,”<sup>92</sup> primarily because “[i]n 1975, 1976, and 1977, Congress, will full knowledge of the Tellico Project’s effect on the snail darter and the alleged violation of the Endangered Species Act, continued to appropriate money for the completion of the Project.”<sup>93</sup> In Justice Powell’s view, the majority “adopts a reading of § 7 of the Act that gives it a retroactive effect and disregards 12 years of consistently expressed congressional intent to complete the Tellico Project,” and he characterized that “result as an extreme example of a literalist construction, not required by the language of the Act and adopted without regard to its manifest purpose”<sup>94</sup> and leading to “absurd results”: “The only precondition . . . to [] destroying the usefulness of even the most important federal project in our country would be a finding by the Secretary of the Interior that a continuation of the project would threaten the survival or

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<sup>88</sup> *Id.* at 194.

<sup>89</sup> *Id.* at 211 (J. Rehnquist, dissenting).

<sup>90</sup> *Id.* at 189.

<sup>91</sup> *Id.* at 189, 190 (quoting *Morton v. Mancari*, 417 U.S. 535, 549 (1974) (quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936))).

<sup>92</sup> *Id.* at 196 (J. Powell, dissenting).

<sup>93</sup> *Id.* at 200 (J. Powell, dissenting).

<sup>94</sup> *Id.* at 202 (J. Powell, dissenting).

critical habitat of a newly discovered species of water spider or amoeba.”<sup>95</sup>

Given the relatively recent enactment of the 1973 ESA, the 1978 *TVA v. Hill* Court had no subsequent statutory amendments and very little agency implementation to examine. As a result, the Court was in the position of being the primary interpreter of the ESA, a position that might have inclined it to use a more text-centered approach. Instead, despite the debate between Justice Powell and the majority, all of the Justices agreed that the context and purposes of the ESA were critically important to their interpretations of its provisions. Both the majority and Justice Powell acknowledged the disjunction between the language of section 7 and the continuing appropriations for the Tellico Dam. Both examined legislative history, statutory history, and congressional intent and purposes. Both were fully aware that the litigation asked the Court to choose between a multi-million-dollar dam that had been under construction for over a decade and a tiny fish that had been known to science for less than five years. While their examinations of context led to different conclusions regarding congressional purpose with respect to the Tellico Dam – a disagreement, as noted, that depended primarily on the different weights they assigned to the continuing appropriations measures and their willingness to accept Congress’s “extreme” prioritization of species protection – their *approach to* statutory construction was remarkably similar.<sup>96</sup>

As *TVA v. Hill* thus demonstrates, the traditional plain meaning approach employs a plain

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<sup>95</sup> *Id.* at 203-04.

<sup>96</sup> Interestingly, Congress *did* amend the ESA to address the majority’s decision in *TVA v. Hill*. Rather than eliminate the Act’s applicability to existing projects, however, Congress merely added an exemption procedure that federal agencies could use. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3757 (1978) (amending 16 U.S.C. § 1536); *see also* H.R. REP. NO. 95-1625, at 10 (Sept. 25, 1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9460 (discussing *TVA v. Hill* and the need for the exemption procedure). The Committees’ views of that exemption, moreover, suggest that the *TVA v. Hill* majority interpreted the ESA basically correctly. In particular, the Conference Committee emphasized that it “intends that only in those instances where the consultation process has been exhausted and a conflict still exists should the Endangered Species Committee consider granting an exemption for a Federal action.” H.R. CONF. REP. NO. 95-1804, at 18 (Oct. 15, 1978), *reprinted in* 1978 U.S.C.C.A.N. 9484, 9486.

meaning rule that is a fairly flexible presumption. Its primary purpose is to keep congressional policies and purposes at the center of statutory construction, by having courts focus first on the words that Congress actually used but also by allowing courts to examine other sources to help determine what Congress’s words should mean and how they should apply. By allowing courts to consult statutory history, legislative history, and administrative history, the traditional plain meaning approach allows courts to contextualize statutory language. This contextualization, moreover, implicitly acknowledges that the nine Justices are not necessarily the proper audience – that, at the very least, the Court on an initial reading might not understand the statute the same way that the congressional drafters and the implementing agencies did. It also acknowledges the importance of statutory evolution and continual congressional activity to statutory interpretation. In sum, by limiting court and federal agency discretion, the traditional approach effectively requires Congress to “talk normal” and to strive for clarity – but it also requires the federal courts to strive to understand how Congress, administrative agencies, and regulated entities would rationally understand, in context, the words Congress chose to use.

## **B. Statutory Construction in the Rehnquist/Scalia Court**

With the addition of Justice Scalia to the Court in 1986, the plain meaning rule has become a less contextualizing tool of statutory construction;<sup>97</sup> instead, the Court increasingly focuses only on the text of the statute it is construing. For example, many observers have noted that the textualist plain meaning approach has undermined courts’ uses of other tools of statutory interpretation, especially legislative history. Thus, in construing in 1980 the Securities Exchange Act of 1934<sup>98</sup> and the Securities Act of 1933,<sup>99</sup> the Court limited both its examination and use of legislative history, concluding that “[i]n the absence of a conflict between reasonably plain

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<sup>97</sup> Schauer, *supra* note 17, at 716.

<sup>98</sup> 15 U.S.C. § 78j.

<sup>99</sup> 15 U.S.C. § 77q.

meaning and legislative history, the words of the statute must prevail.”<sup>100</sup> Moreover, “[s]ince the language and legislative history . . . are dispositive, we have no occasion to address the ‘policy’ arguments advanced by the parties.”<sup>101</sup>

Of course, the Supreme Court has never absolutely rejected other tools of statutory construction. Indeed, in *Watt v. Alaska*,<sup>102</sup> a 1981 (and hence, pre-Justice Scalia) decision, the Court agreed with the Secretary of the Interior that the starting point of statutory interpretation is the statutory language but nevertheless emphasized that:

Ascertainment of the meaning apparent on the face of a single statute need not end the inquiry. *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 10 . . . (1976); *United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 543-44 . . . (1940). This is because the plain-meaning rule is “rather an axiom of experience rather than a rule of law, and does not preclude consideration of persuasive evidence if it exists.” *Boston Sand Co. v. United States*, 278 U.S. 41, 48 . . . (1928) (Holmes, J.). 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. *E.g.*, *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892); *United States v. Ryan*, 284 U.S. 167, 175 . . . (1931).<sup>103</sup>

The Court went on to note that congressional silence in the legislative history can be suggestive of the statute’s meaning<sup>104</sup> and that an agency’s contemporaneous construction of a statute, especially if adhered to for some time, “carries persuasive weight,” particularly when that agency “first proposed the amendment” to Congress.<sup>105</sup>

One of the noteworthy aspects of the passage quoted above, however, is the age of the precedents the Court reached for, suggesting that contextualization was not the Court’s most recent mode of statutory construction. Similarly, the Court reached to a 1945 Second Circuit

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<sup>100</sup> *Aaron v. Securities Exchange Comm’n*, 446 U.S. 680, 700 (1980).

<sup>101</sup> *Id.* at 700 n. 19 (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 n.33 (1976)).

<sup>102</sup> 451 U.S. 259 (1981).

<sup>103</sup> *Id.* at 265-66.

<sup>104</sup> *Id.* at 271 & n. 13.

<sup>105</sup> *Id.* at 272-73.

opinion by Judge Learned Hand for the assertion that “‘it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of a dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.’”<sup>106</sup>

Such reaching back only emphasizes that the Justices have become less interested in the historical context of statutes and more focused upon their purely facial plain meanings. For example, when in 1988 the Court reviewed a Customs Service regulation interpreting the Tariff Act of 1930 regarding property “owned by” corporations, as applied when foreign corporations own American subsidiaries, both the five-Justice majority and Justice Scalia in dissent took a fairly textualist approach to interpreting the statute. The majority emphasized that “[t]he traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress,”<sup>107</sup> and it asserted that “[i]n ascertaining the plain meaning of the statute,” it should look only “to the particular statutory language at issue, as well as the language and design of the statute as a whole.”<sup>108</sup> Justice Scalia argued in dissent, joined by Justices O’Connor, Rehnquist, and Blackmun, that “[t]he authority to clarify an ambiguity in a statute is not the authority to alter even its unambiguous applications” and that the majority “undermines even the core of the statute to save the regulation.”<sup>109</sup> Actual contextualization of the statute came primarily only when Justice Brennan concurred in part and dissented in part, joined by Justices Marshall, Stevens, and White, to emphasize that the statutory provision at issue “can be fully understood only in the context of the controversial judicial opinion that spawned it” and

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<sup>106</sup> *Id.* at 266 n.9 (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.) (L. Hand, J.), *aff’d*, 326 U.S. 404 (1945)).

<sup>107</sup> *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291-92 (1988) (quoting *Board of Governors, FRS v. Dimension Financial Corp.*, 474 U.S. 361, 368 (1986)).

<sup>108</sup> *Id.* (citing *Bethsok Hosp. Ass’n v. Bowen*, 485 U.S. 399, 403-05 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 220-21 (1986)).

<sup>109</sup> *Id.* at 319, 320 (J. Scalia, dissenting).

that “Congress’s sole goal” in the relevant amendments “was to overrule” that decision.<sup>110</sup>

The current Court is also more likely to treat the plain meaning of the statute’s words as a nearly irrebuttable presumption of what the statute itself means. Thus, in 1989, interpreting the Bankruptcy Code, a five-Justice majority, in an opinion authored by Justice Blackmun, stressed that “[t]he plain meaning of a statute should be conclusive, except in the ‘rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.’”<sup>111</sup>

Even the recent Court’s more expansive statements regarding statutory interpretation have elided statutory, legislative, and administrative history as relevant considerations. For example, in 1993 a unanimous Court refused to be bound by the strict dictates of punctuation but nevertheless promoted, through its silence about the role of extra-textual materials, a textualist approach to statutory interpretation:

A statute’s plain meaning must be enforced, of course, and the meaning of a statute will typically heed the commands of its punctuation. But a purported plain meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute’s true meaning. Along with punctuation, text consists of words living “a community existence,” in Judge Learned Hand’s phrase, the meaning of each word informing the others and “all in their aggregate tak[ing] their purport from the setting in which they are used.” *NLRB v. Federbush Co.*, 127 F.2d 954, 957 (CA2 1941). Over and over we have stressed that “[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.” *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 . . . (1849) (quoted in more than a dozen cases, most recently *Dole v. Steelworkers*, 494 U.S. 26, 35 . . . (1990); see also *King v. St. Vincent’s Hospital*, 502 U.S. 215, 221 . . . (1991)). No more than isolated words or sentences is punctuation alone a reliable guide for discovery of a statute’s meaning. Statutory

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<sup>110</sup> *Id.* at 300, 304 (J. Brennan, concurring in part and dissenting in part) (discussing *A. Bourjouis & Co. v. Katzel*, 275 F. 539 (2d Cir. 1921), *rev’d*, 260 U.S. 689 (1923)).

<sup>111</sup> *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242-43 (1989). In contrast, the four dissenters, in an opinion authored by Justice O’Connor, disagreed that the statute was unambiguous and questioned the value of facial plain meaning when taken out of context: “As Justice Frankfurter remarked some time ago, however: ‘The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification.’” *Id.* at 249 (J. O’Connor, dissenting) (quoting *United States v. Monia*, 317 U.S. 424, 431 (1943)).

construction “is a holistic endeavor,” *United Savings Assn. of Texas v. Timbers of Inwood Forest Associates Ltd.*, 484 U.S. 365, 371 . . . (1988), and, at a minimum, must account for a statute’s full text, language as well as punctuation, structure, and subject matter.<sup>112</sup>

Thus, despite the reference to a “community existence,” the relevant context of a statute in this passage is “the whole law, . . . its object and policy” – the “statute’s full text, language as well as punctuation, structure, and subject matter” – but, notably, nothing extraneous to the statute itself. Similarly, in 1991, the Court viewed arguments of congressional purpose in light of the Bankruptcy Amendments and Federal Judgeship Act of 1984’s amendments to the Bankruptcy Code as simply irrelevant.<sup>113</sup>

The Court’s 6-3 decision in *United States v. Locke*<sup>114</sup> in 1985 has arguably become the “poster case” for critics of the strict plain meaning approach. The main issue for the Court was “whether the Constitution prevents Congress from providing that holders of unpatented mining claims who fail to comply with the annual filing requirements of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744, shall forfeit their claims.”<sup>115</sup> Before reaching that constitutional question, however, the Court had to decide what it meant to comply with FLPMA’s filing requirements. FLPMA requires that “*prior to December 31*” of every year, the claimant of an unpatented mining claim “must file with state officials and with BLM [the federal Bureau of Land Management] a notice of intention to hold the claim, an affidavit of assessment of work performed on the claim, or a detailed reporting form.”<sup>116</sup> FLPMA further provides “that failure to comply with either of these requirements ‘shall be deemed conclusively

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<sup>112</sup> *United States Nat. Bank of Or. v. Ind. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454-55 (1993).

<sup>113</sup> *Union Bank v. Wolas*, 502 U.S. 151, 157-58 (1991) (citing *Toibb v. Radloff*, 501 U.S. 157, 164 (1991), interpreting 11 U.S.C. § 547, and discounting Pub. L. No. 98-353, 98 Stat. 378 (1984)).

<sup>114</sup> 471 U.S. 84 (1985).

<sup>115</sup> *Id.* at 86.

<sup>116</sup> *Id.* at 89 (citing 43 U.S.C. § 1744(a) (emphasis added)).

to constitute abandonment of the mining claim . . . by the owner.”<sup>117</sup> The four plaintiffs in the case, who owned unpatented mining claims in Nevada “valued at several million dollars,” filed their FLPMA notices with the BLM on December 31, 1980 – “one day too late.”<sup>118</sup> The BLM’s Nevada office informed the plaintiffs that their mining claims were considered abandoned, and, after an administrative appeal, the plaintiffs sued the United States in federal court, claiming that FLPMA had “effected an unconstitutional taking of their property without just compensation and denied them due process.”<sup>119</sup>

Although the lower courts had not addressed the statutory interpretation issue, the Supreme Court decided to consider whether FLPMA’s “requirement of filing ‘prior to December 31 of each year’ should be construed to require a filing ‘on or before December 31.’”<sup>120</sup> According to the majority, in an opinion authored by Justice Marshall, “[i]t is clear to us that the plain language of the statute simply cannot sustain the gloss appellees would put on it.”<sup>121</sup> The Court noted that “we will not allow a literal reading of a statute to produce a result ‘demonstrably at odds with the intentions of its drafters,’”<sup>122</sup> but it immediately emphasized that:

with respect to filing deadlines a literal reading of Congress’ words is generally the only proper reading of those words. To attempt to decide whether some date other than the one set out in the statute is the date actually “intended” by Congress is to set sail on an aimless journey, for the purpose of a filing deadline would just as well be served by nearly any date a court might choose as by the date Congress has in fact set out in the statute. “Actual purpose is sometimes unknown,” *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 180 . . . (1980) (STEVENS, J., concurring), and such is the case with filing deadlines; as might be expected, nothing in the legislative history suggests why Congress chose December 30 over December 31, or over September 1 (the end of the assessment year for mining claims, 30 U.S.C. § 28), as the last day on which the required filings could be made. But “[d]eadlines are inherently arbitrary,” while fixed

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<sup>117</sup> *Id.* (quoting 43 U.S.C. § 1744(c)).

<sup>118</sup> *Id.* at 89, 90.

<sup>119</sup> *Id.* at 91.

<sup>120</sup> *Id.* at 93.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

dates “are often essential to accomplish necessary results.” *United States v. Boyle*, 469 U.S. 241, 249 . . . (1984). Faced with the inherent arbitrariness of filing deadlines, we must, at least in a civil case, apply by its terms the date fixed by the statute. *Cf. United States Railroad Retirement Board v. Fritz, supra*, 449 U.S., at 179 . . . .<sup>123</sup>

Moreover, the BLM’s regulations had also interpreted FLPMA to require filings by December 30 of each year,<sup>124</sup> and sophisticated business people like the plaintiffs should have known better than to wait until the last minute to file their paperwork.<sup>125</sup>

The majority professed sensitivity “to the problems posed by congressional reliance on the words ‘prior to December 31.’”<sup>126</sup> Nevertheless, it emphasized that “the fact that Congress might have acted with greater clarity or foresight does not give courts *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do.”<sup>127</sup> “Nor is the Judiciary licensed to attempt to soften the clear import of Congress’ chosen words whenever a court believes those words lead to a harsh result.”<sup>128</sup> Instead:

On the contrary, deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that “the legislative purpose is expressed by the ordinary meaning of the words used.” *Richards v. United States*, 369 U.S. 1, 9 . . . (1962). “Going beyond the plain language of a statute in search of a possibly contrary congressional intent is ‘a step to be taken cautiously’ even under the best of circumstances.” *American Tobacco Co. v. Patterson*, 456 U.S. 63, 75 . . . (1982) (quoting *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 26 . . . (1977)). When even after taking this step nothing in the legislative history remotely suggests a congressional intent contrary to Congress’ chosen words, and neither appellees nor the dissenters have pointed to anything that so suggests, any further steps take the courts out of the realm of interpretation and place them in the domain of legislation. The phrase “prior to” may be clumsy, but its meaning is clear. Under these circumstances, we are obligated to apply the “prior to December 31” language by its terms. See, e.g., *American Tobacco Co. v. Patterson, supra*, 456 U.S., at 68 . . . ; *Consumer Product Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S.

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<sup>123</sup> *Id.* at 93-94.

<sup>124</sup> *Id.* at 90, 94-95.

<sup>125</sup> *Id.* at 95.

<sup>126</sup> *Id.* (referring to Justice Stevens’ dissenting opinion).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* (citing *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 98 (1981)).

102, 108 . . . (1980).<sup>129</sup>

As a result, the majority concluded, the plaintiffs had not filed the required reports on their mining claims on time.<sup>130</sup> Moreover, the Court upheld Congress' authority to "impose new regulatory restraints" on existing property rights "[a]s long as the constraint or duty imposed is a reasonable restriction designed to further legitimate legislative objectives,"<sup>131</sup> eliminating the plaintiffs' constitutional claims.<sup>132</sup>

What is interesting about the *Locke* case is three distinct differences in approach between the majority and the dissenters: (1) the majority's adherence to a strict plain meaning approach (regardless of its limited forays into the legislative history) despite the litigation's timing in terms of the development of federal mining law, contrasted to the dissenters' greater awareness of that statutory evolution; (2) the two sides' assumptions about the statute's audience; and (3) the two sides' willingness to acknowledge the role of the BLM as statutory intermediary. On the first two points, as the majority acknowledged but refused to consider deeply, Congress's enactment of FLPMA in 1976 represented a substantial procedural change in the federal law of mining. Federal mining laws had existed since the 19<sup>th</sup> century, and "[f]rom the enactment of the general mining laws in the 19<sup>th</sup> century until 1976, those who sought to make their living by locating and developing minerals on federal lands were virtually unconstrained by the fetters of federal control."<sup>133</sup> However, "[b]y the 1960's, it had become clear that this 19<sup>th</sup>-century *laissez-faire* regime had created virtual chaos with respect to the public lands."<sup>134</sup> After studying the problem for over a decade, Congress enacted FLPMA in 1976 specifically to provide a means of

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<sup>129</sup> *Id.* at 95-96.

<sup>130</sup> *Id.* at 96.

<sup>131</sup> *Id.* at 104.

<sup>132</sup> *Id.* at 104-10.

<sup>133</sup> *Id.* at 86.

<sup>134</sup> *Id.*

eliminating stale mining claims and clarifying property rights on the federal lands.<sup>135</sup>

The plaintiffs in *Locke*, who had purchased their 10 unpatented mining claims between 1960 and 1966,<sup>136</sup> were four of many miners coping with this transition of legal regimes. FLPMA's first filing requirement required these plaintiffs to file "a copy of the official record of the notice or certificate of location" with the BLM within three years of FLPMA's enactment, or by October 21, 1979.<sup>137</sup> The plaintiffs complied with this requirement, as they had "complied with annual state-law filing and assessment work requirements" for almost twenty years.<sup>138</sup> Nevertheless, the majority in *Locke* adhered to the literal meaning of "prior to December 31" despite this context of statutory transition. Perhaps as one suggestion of its discomfort with this reading, however, the majority went out of its way to characterize the plaintiffs as something other than "ordinary" people, specifically describing the plaintiffs as sophisticated business people capable of reading the statute itself, the regulations, and legal treatises – or at least of consulting a lawyer.<sup>139</sup>

In contrast, it was the dissenters who emphasized how this statutory language probably appeared to truly ordinary readers. Recognizing that the law was in transition, for example,<sup>140</sup> Justice Powell emphasized how the language would look to a miner acting with good-faith efforts to comply: "Given the natural tendency to interpret [the phrase 'prior to December 31'] as 'by the end of the calendar year,' rather than 'on or before the next-to-the-last day of the calendar year,' I believe this uncertainty violated the standard of certainty and definiteness that the Constitution requires."<sup>141</sup> Even accepting that FLPMA operated in a command mode, in other

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<sup>135</sup> *Id.* at 87.

<sup>136</sup> *Id.* at 89.

<sup>137</sup> *Id.* at 87-89 and 87 n.2.

<sup>138</sup> *Id.* at 89.

<sup>139</sup> *Id.* at 90, 94-95.

<sup>140</sup> *Id.* at 112-15 (J. Powell, dissenting).

<sup>141</sup> *Id.* at 115-16 (J. Powell, dissenting).

words, that statutory command, read from the perspective of the miners whose regulatory regime Congress was altering, seemed to impose an end-of-the-year filing requirement. Justice Stevens, writing in dissent for himself and for Justice Brennan, went further in contextualizing the significance of the express date, emphasizing that December 31 “has been recognized since the amendment of the Julian Calendar in 8 B.C.” as the end of the calendar year.<sup>142</sup>

Finally, the majority and the dissenters differed significantly in how they contextualized the plaintiffs’ interactions with the BLM. While the majority acknowledged that the plaintiffs had “allegedly receiv[ed] misleading information from a BLM employee”<sup>143</sup> regarding FLPMA’s filing deadline, it discounted those interactions in favor of the BLM’s “absolutely clear” regulations.<sup>144</sup> In contrast, the dissenters emphasized that both miners and the BLM were working out an understanding of the new filing deadline. Thus, when the plaintiffs went to comply with the annual filing requirements *for the first time* in 1980, both the plaintiffs *and* the BLM detected some ambiguity in the statutory filing deadline, because “the Lockes sent their daughter, who worked in their business office, to the Ely, Nevada office of the BLM,” where BLM employees told her “that the documents should be filed at the Reno office ‘on or before December 31, 1980.’”<sup>145</sup> Moreover, the BLM had distributed a pamphlet to miners in 1978 telling them that FLPMA required filing “on or before December 31.”<sup>146</sup>

These facts led Justice O’Connor, in her concurring opinion, to suggest that the plaintiffs might have a successful estoppel claim against the BLM on remand.<sup>147</sup> The dissenters were similarly incensed by the fairness issues that the facts raised, but they more consciously situated

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<sup>142</sup> *Locke*, 471 U.S. at 119 (J. Stevens, dissenting).

<sup>143</sup> *Id.* at 89.

<sup>144</sup> *Id.* at 94.

<sup>145</sup> *Id.* at 114 (J. Powell, dissenting) (citing *United States v. Locke*, 573 F. Supp. 472, 474 (D. Nev. 1983)).

<sup>146</sup> *Id.* at 115.

<sup>147</sup> *Id.* at 111-12 (J. O’Connor, concurring).

that fairness argument within the evolution of mining law and with a recognition that interactions between miners and the BLM are part of the implementation of FLPMA. Justice Stevens in particular emphasized that the very fact that the BLM’s regulations required filing “on or before December 30 of each year” – a change from the statutory language that underscored “December 30” – indicated that the BLM found the statutory language misleading,<sup>148</sup> an inference made stronger by the BLM’s pamphlet for miners<sup>149</sup> and the in-person advice that the plaintiffs had received from the BLM. Moreover, Justice Stevens argued, the statute required claimants to file their notices “in the office of the Bureau” prior to December 31, but the BLM’s regulations allowed for *mailed* notices to reach the office by January 19 of the next year, suggesting that the December 30 deadline was not absolute.<sup>150</sup>

Given these disjunctions in the BLM’s actual implementation of the notice deadline, Justice Stevens viewed the “prior to December 31” language as a scrivener’s error that should not “be given the literal reading the Court adopts today,”<sup>151</sup> preferring to acknowledge a small drafting mistake rather than impose an interpretation that implied “that Congress deliberately created a trap for the unwary . . . .”<sup>152</sup> In his view, under the majority’s interpretation,

appellees lost their entire livelihood for no practical reason, contrary to the intent of Congress, and because of the hypertechnical construction of a poorly drafted statute, which an agency interprets to allow ‘filings’ far beyond December 30 in some circumstances, but then interprets inflexibly in others. . . . I have no doubt that Congress would have chosen to adopt a construction of the statute that filing take place by the end of the calendar year if its attention had been focused on this precise issue.<sup>153</sup>

The arbitrariness of the deadline thus should have cut in favor of the plaintiffs’ reading,

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<sup>148</sup> *Id.* at 122 (J. Stevens, dissenting).

<sup>149</sup> *Id.* (J. Stevens, dissenting)

<sup>150</sup> *Id.* at 121, 123 (J. Stevens, dissenting).

<sup>151</sup> *Id.* at 123 (J. Stevens, dissenting)

<sup>152</sup> *Id.* at 123 (J. Stevens, dissenting).

<sup>153</sup> *Id.* at 125 (J. Stevens, dissenting).

especially when viewed in light of the statutory context of that deadline, the BLM's ambiguous mediation, and Congress's purposes in imposing it.

According to Professor Frederick Schauer, *Locke* is “one of the modern Supreme Court’s most academically excoriated decisions, especially in the context of statutory interpretation”<sup>154</sup>: “I know of few cases in which the plain meaning was so at odds with the result that would have been indicated by recourse to virtually every other interpretive source or principle . . . .”<sup>155</sup> It certainly demonstrates the dangers – well recognized under the traditional plain meaning approach – of pursuing literal readings at the expense of common sense and statutory purpose, a recurrent problem of the strict plain meaning approach in dealing with statutory imprecision. It also demonstrates, however, the violence that can be wrought to both Congress’s probable intended meaning and its discernible statutory purposes when the Supreme Court discounts statutory history, administrative history, and appropriate considerations of audience. In cultural critical terms, the strict plain meaning approach ignores or elides the relevant interpretive context.

## II. CULTURAL CRITICISM, THE CULTURES OF LAW, AND STATUTORY INTERPRETATION

### A. An Introduction to Cultural Criticism

Cultural criticism (also referred to as cultural studies) is a broad discipline, incorporating a variety of philosophies and approaches to cultural events.<sup>156</sup> Most basically, “[c]ultural studies

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<sup>154</sup> See, e.g. Schauer, *supra* note 17, at 729-34 (referring to *Locke* as “one of the modern Supreme Court’s most academically excoriated decisions, especially in the context of statutory interpretation” and noting that “I know of few cases in which the plain meaning was so at odds with the result that would have been indicated by recourse to virtually every other interpretive source or principle – overwhelmingly likely legislative intent, avoidance of absurdity, and justice, to name just three”); Strauss, *supra* note 15, at 1576-77 (discussing *Locke* as an example of the strict plain meaning approach working as a “penalty default” rule and noting that “[t]he problem, of course, is that Congress was not the principal party who suffered because of the (probable) sloppy drafting.”); D’Amato, *supra* note 17, at 535-38 (describing *Locke* as “a clear example of runaway formalism”); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1314-16 (1990); Richard Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE WESTERN RES. L. REV. 179 (1986).

<sup>155</sup> Schauer, *supra* note 17, at 729.

<sup>156</sup> See ARTHUR ASA BERGER, *CULTURAL CRITICISM: A PRIMER OF KEY CONCEPTS 2* (Thousand Oaks, CA: SAGE Publications, 1995) (“Cultural criticism is an activity, not a discipline *per se*, as I interpret things. That is,

is . . . the study of culture, or more particularly, the study of *contemporary* culture.”<sup>157</sup> As such, much cultural criticism has its roots in cultural anthropology, the scientific study of human cultures. Cultural critics view “culture” as essentially semiotic<sup>158</sup> and view cultural events (which can be anything) as “texts” to be interpreted. In the words of one of the most influential anthropologists for this school of criticism, Clifford Geertz:

Believing, with Max Weber, that man is an animal suspended in webs of significance he himself has spun, I take culture to be those webs, and the analysis of it to be therefore not an experimental science in search of law but an interpretive one in search of meaning. It is explication I am after, construing social expressions on their surface enigmatical.<sup>159</sup>

In anthropology, this view of culture leads the anthropologist to view human behavior as “symbolic action”<sup>160</sup> and anthropological studies as “interpretations” of cultures. Moreover, no person is culture-free,<sup>161</sup> and thus the meaning not just of language but also a particular cultural event – in Geertz’s most famous example, a Balinese cockfight<sup>162</sup> – is deeply dependent on their specific cultural context:

If anthropological interpretation is constructing a reading of what happened, then to divorce it from what happens – from what, in this time or that place, specific people say, what they do, what is done to them, from the whole vast business of the world – is to divorce it from its applications and render it vacant. A good interpretation of anything – a poem, a person, a history, a ritual, an institution, a society – takes us into the heart of that which it is the interpretation. When it does

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cultural critics apply the concepts and theories addressed in this book, in varying combinations and permutations, to the elite arts, popular culture, everyday life, and a host of related topics. Cultural criticism is, I suggest, a multidisciplinary, interdisciplinary, pandisciplinary, or metadisciplinary undertaking, and cultural critics come from, and use ideas from, a variety of disciplines.”); Simon During, *Introduction*, in SIMON DURING, ED., *THE CULTURAL STUDIES READER 1* (London & New York: Routledge, 1993) (emphasizing that “cultural studies is not an academic discipline quite like others. It possessed neither a well-defined methodology nor clearly demarcated fields for investigation.”).

<sup>157</sup> During, *supra* note 158, at 1.

<sup>158</sup> CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 5 (New York, N.Y.: Basic Books, Inc., 1973).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 10.

<sup>161</sup> *Id.* at 35-36; *see also* JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING* 20 (Chicago & London: University of Chicago Press, 1984) (“In a sense we literally are the language we speak, for the particular culture that makes us ‘we’ – that differentiates and connects us, that differentiates use from others – is enacted and embedded in our language.”).

<sup>162</sup> GEERTZ, *supra* note 160, at 412-453.

not do that but leads us instead somewhere else – into an admiration of its own elegance, of its author’s cleverness, or of the beauties of Euclidean order – it may have its intrinsic charms; but it is something else than what the task at hand . . . calls for.<sup>163</sup>

This view of cultural interpretation, moreover, emphasizes that the interpreter is an outsider who must try to understand the culture being studied on its own terms. In Geertz’s words, “[t]he culture of a people is an ensemble of texts, themselves ensembles, which the anthropologist strains to read over the shoulders of those to whom they properly belong.”<sup>164</sup>

## **B. Cultural Criticism of Law and Legal Subcultures**

Cultural criticism of law, like cultural criticism generally, recognizes “that the relationship between law and the larger community is at heart reciprocal . . . .”<sup>165</sup> As James Boyd White has articulated, such criticism posits that “law can be properly understood – properly interpreted and properly criticized – only as part of a larger cultural and social matrix.”<sup>166</sup> Given this premise, cultural critics of law argue that legal formalism of any type – and this article agrees with those commentators who view the textualists’ strict plain meaning approach as a form of legal formalism<sup>167</sup> – at least potentially distorts legal meaning and/or

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<sup>163</sup> *Id.* at 18; see also Elizabeth Walker Mechling & Jay Mechling, *American Cultural Criticism in the Pragmatic Attitude*, in THOMAS ROSTOCK, ED., *AT THE INTERSECTION: CULTURAL STUDIES AND RHETORICAL STUDIES* 137, 143 (New York & London: The Guilford Press, 1999) (describing cultures as “connected webs of signification in which all texts are connected”); BERGER, *supra* note 158, at 36 (noting that cultural criticism “points out how important the cultural context is for creators, because the creators of artistic texts, whether they realize it or not, are profoundly affected by the social and cultural milieu in which they find themselves and by the texts and other creative works that already exist and that cast a shadow on, or provide a frame of reference (when not providing models) for, all works being created at a given moment.”); Renato Rosaldo, *After Objectivism*, in DURING, *supra* note 158, at 104, 107-07.

<sup>164</sup> GEERTZ, *supra* note 160, at 452.

<sup>165</sup> James Boyd White, *Introduction: Is Cultural Criticism Possible?*, 84 MICH. L. REV. 1373, 1374 (June 1986).

<sup>166</sup> *Id.* See also LAURA NADER, *THE LIFE OF THE LAW: ANTHROPOLOGICAL PROJECTS* 27-28 (Berkeley: University of California Press, 2002) (noting that “as viewed from anthropology, the law cannot usefully be isolated from other social and cultural systems of control.”); D. KAIRYS, ED., *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 6 (3<sup>rd</sup> ed.) (New York: Basic Books, 1998) (challenging the view of law as being “unaffected by social and economic relations, political forces, and cultural phenomena”).

<sup>167</sup> Cooper, *supra* note 8, at 1207, 1211; Theodore W. Jones, *Textualism and Legal Process Theory: Alternative Approaches to Statutory Interpretation*, 26 J. LEGIS. 45, 48 (2000); Lasky, *supra* note 22, at 896; Schauer, *supra* note 17, at 724; D’Amato, *supra* note 17, at 567.

goals.<sup>168</sup> Moreover, cultural critics of law, like most cultural critics generally,<sup>169</sup> try to identify such distortions and other forces and trends in the law not just to discern what the law is, *per se*, but also to identify what social effects and distributions of power result from particular legal regimes, choices, and/or interpretations.<sup>170</sup> In other words, cultural criticism is “an engaged form of analysis.”<sup>171</sup>

The tendency of cultural critics of law, however, has been to assume the largest, most general “culture” – in James Boyd White’s terminology, the “larger community and social matrix”<sup>172</sup> or the entire legal “rhetorical community.”<sup>173</sup> As with the strict plain meaning approach’s assumption of an “ordinary reader,” this assumption is appropriate for certain kinds of analysis – although it is probably not entirely coincidental that these critics also often choose

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<sup>168</sup> Gilyora Binder & Robert Weisberg, *Cultural Criticism of Law*, 49 STAN. L. REV. 1149, 1151 (May 1997) (“By blinding legal decision-makers to nuances of social context, rule formalism achieves results that popular will would reject as irrational; it distorts or ignores the preferences of affected parties and presents this indifference to human consequences as a virtue.”).

Professor D’Amato has suggested that the plain meaning rule does in fact result in such distortion:

A consequence of insisting on plain meaning . . . is that it can induce a state of mind that thrives on arbitrariness . . . . Only in those cases where the literal construction of a statute coincides with its reasonable interpretation in the context of a given case, can the plain meaning rule be harmless – and even then, not because the plain meaning rule led to the right result, but because the plain meaning happened to coincide with what we determined, by other means, to be the right result. When the plain meaning rule leads to absurd and unjust results – again, determined outside the four corners of the statutory language – we should think twice before postulating plain meaning as our initial axiom.

D’Amato, *supra* note 17, at 538. See also Rubin, *supra* note 19, at 583 (arguing that “the standard canons of statutory construction are generally useless and occasionally harmful” in interpreting administrative statutes).

<sup>169</sup> See GEERTZ, *supra* note 160, at 412-53 (discussing the reflections of alliances and social status in a Balinese cockfight); During, *supra* note 158, at 1-2 (describing cultural studies as an “engaged form of analysis”).

<sup>170</sup> See NADER, *supra* note 168, at 10-17, 27-28, 71 (discussing the effects of legal hegemonies and civil litigation and contrasting views of law “as a tool for domination” and “for democratic empowerment”).

<sup>171</sup> During, *supra* note 158, at 1-2 (“Early cultural studies did not flinch from the fact that societies are structured unequally, that individuals are not all born with the same access to education, money, health care, etc., and it worked in the interests of those who have the fewest resources. In this it differed not only from the (apparently) objective social sciences but from the older forms of cultural criticism, especially literary criticism, which considered political questions as being of peripheral relevance to the appreciation of culture.”).

<sup>172</sup> White, *supra* note 167, at 1374.

<sup>173</sup> WHITE, *supra* note 163, at 266.

criminal or tort litigation<sup>174</sup> as their archetypal model of “the law.”

In terms of advancing the academic discussion regarding statutory interpretation methodology, however, this assumption of a general legal community adds little to the ongoing textualist/traditional plain meaning debate. Instead, the potential power of a cultural critical approach to law, and to statutory interpretation in particular, is its anthropological roots in identifying and describing *different* cultures. Such recognitions of difference have already led to several kinds of valuable analyses of law. For example, apprehensions of cultural difference can lead to broader understandings of what happens when different disciplines, such as law and science, collide.<sup>175</sup> Perhaps more commonly, cultural critical exposition of difference can illuminate how differing legal systems constitute differing meanings for common concepts, such as “property.”<sup>176</sup> Such expositions of difference then allow for more nuanced evaluations of legal rules and methodologies – what legal anthropologist Tim Murphy has referred to as “regularities in, rather than rules of, decision-making . . . .”<sup>177</sup>

For purposes of this article, however, the value of a cultural critical awareness of difference comes from the acknowledgement that American law consists of many legal subcultures, with practitioners in one specialty following different rules and procedures and addressing substantially different issues than practitioners in other specialties. As two obvious

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<sup>174</sup> *Id.* at 265; NADER, *supra* note 168, at 4-5.

<sup>175</sup> See, e.g., Bruno Latour, *Scientific Objects and Legal Objectivity*, in ALAIN POTTAGE & MARTHA MUNDY, EDS., *LAW, ANTHROPOLOGY, AND THE CONSTITUTION OF THE SOCIAL: MAKING PERSONS AND THINGS* 73, 73-114 (Cambridge: Cambridge University Press, 2004).

<sup>176</sup> See, e.g., Tim Murphy, *Legal Fabrications and the Case of “Cultural Property*, in POTTAGE & MUNDY, *supra* note 177, at 115, 127-38 (comparing legal recognition of property rights various cultures); Martha Mundy, *Ownership or Office? A Debate in Islamic Haanfite Jurisprudence over the Nature of the Military “Fief”, from the Mamluks to the Ottomans*, in POTTAGE & MUNDY, *supra* note 177, at 142, 142-47 (comparing European/American and Islamic traditions of “property”), 147-61 (describing the constitution of the *iqta* (administrative grant) in Islamic law); Engin Deniz-Akarli, *Gedik: A Bundle of Rights and Obligations for Istanbul Artisans and Traders, 1750-1840*, in POTTAGE & MUNDY, *supra* note 177, at 166, 167-96 (comparing Western and Islamic property relationships in the context of the Ottoman Istanbul concept of *gedik*); Marilyn Strathern, *Losing (Out on) Intellectual Resources*, in POTTAGE & MUNDY, *supra* note 177, at 201, 201-03, 209-23 (exploring the concept of body ownership in various legal traditions in light of a Papau New Guinean ruling denying compensation for a man’s death).

<sup>177</sup> Murphy, *supra* note 178, at 116.

examples of the recognition of these legal subcultures, the American Bar Association and most state bar associations subdivide their memberships into topic-related sections and committees, and courts sometimes enhance attorney fee awards in recognition that some legal specialties require more expertise.<sup>178</sup>

Of course, one can press the concept of legal subcultures too far, and no one would suggest that specialties create rigid divisions among practicing attorneys. Nevertheless, to ignore the existence of these subcultures in statutory interpretation is to ignore the reality that practitioners in some areas of law, particularly regulatory law, “speak a different language” than lawyers in general. Environmental law, for example, is perhaps most notoriously a subculture of “acronym speak”<sup>179</sup> – of BACT,<sup>180</sup> BAT,<sup>181</sup> BCT,<sup>182</sup> BDAT,<sup>183</sup> BPT,<sup>184</sup> LAER,<sup>185</sup> MACT,<sup>186</sup> and RACT.<sup>187</sup> However, it is also a legal subculture in which seemingly simple phrases like “major

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<sup>178</sup> See, e.g., *Consolidation Coal Co. v. Swinger*, 98 Fed. Appx. 227, 238-39 (4<sup>th</sup> Cir.2004) (upholding enhanced attorneys fees for expertise in black lung cases); *Glassroth v. Moore*, 347 F.3d 916, 919-20 (11<sup>th</sup> Cir. 2003) (advising the district court on remand to consider the attorney’s expertise in Establishment Clause cases); *International Woodworkers of America, AFL-CIO, Local 3-98 v. Donovan*, 769 F.2d 1388, 1391-92 (9<sup>th</sup> Cir. 1985) (upholding an enhanced attorney fees award for labor law expertise).

<sup>179</sup> For example, the author was once assigned the task of evaluating the EPA/DEQ CAFO MOU – that is, the Memorandum of Understanding between the U.S. Environmental Protection Agency and the Oregon Department of Environmental Quality regarding Confined Animal Feeding Operations, which both agencies regulate pursuant to the federal Clean Water Act.

<sup>180</sup> Best Available Control Technology, the federal Clean Air Act’s technology-based emission requirement for new major emitting facilities discharging criteria pollutants in attainment areas. 42 U.S.C. § 7479(3).

<sup>181</sup> Best Available Technology, the federal Clean Water Act’s technology based standard for discharges of toxic and nonconventional pollutants. 33 U.S.C. § 1311(b)(2)(A).

<sup>182</sup> Best Convention Technology, the federal Clean Water Act’s technology-based standard for discharges of the conventional pollutions. 33 U.S.C. § 1311(b)(2)(E).

<sup>183</sup> Best Demonstrated Available Technology, the federal Clean Air Act’s technology-based emission standard for new major stationary sources discharging criteria pollutants in attainment areas. 42 U.S.C. § 7411(a)(1).

<sup>184</sup> Best Practicable Technology, the federal Clean Water Act’s original technology-based standard for discharges of conventional pollutants. 33 U.S.C. § 1311(b)(1)(A).

<sup>185</sup> Lowest Achievable Emission Rate, the federal Clean Air Act’s the technology-based emission limitation for new stationary sources discharging criteria air pollutants in nonattainment areas. 42 U.S.C. § 7501(3).

<sup>186</sup> Maximum Achievable Control Technology, the federal Clean Air Act’s technology-based emissions limitation for major sources of toxic air pollutants. 42 U.S.C. § 7412(d).

<sup>187</sup> Reasonably Achievable Control Technology, the federal Clean Air Act’s technology-based emissions limitation for existing major stationary sources discharging criteria pollutants in nonattainment areas. 42 U.S.C. § 7502(c)(1).

stationary source” change meaning *within the relevant statute itself*<sup>188</sup> and most every term of art has numerous exceptions,<sup>189</sup> where pages of complex, often industry-, technology-, and process-specific regulations supplement statutory definitions of terms like “solid waste”<sup>190</sup> and “hazardous waste”<sup>191</sup> and set regulatory standards such as effluent limitations<sup>192</sup> and NAAQS,<sup>193</sup> and where Congress, agencies, and regulated entities (and all of their lawyers) must be able to understand what qualifies as “best scientific and commercial data available”<sup>194</sup> or standards “requisite to protect the public health”<sup>195</sup> as well as the scope of the “arbitrary and capricious” standard of review.<sup>196</sup> This is not a vocabulary that a non-environmental lawyer – and certainly not a generic “ordinary person” – would readily understand. Other fields of law are similarly opaque to outsiders, and if recent law review articles are any indication, clashes in meaning for the “ordinary reader” and knowledgeable subcultural insiders have been occurring in bankruptcy,<sup>197</sup> employment,<sup>198</sup> and tax<sup>199</sup> law. That opacity, however, is exactly what creates

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<sup>188</sup> Compare 42 U.S.C. § 7412 (defining “major stationary source” for purposes of emissions of hazardous air pollutants) with § 7479(1) (defining “major emitting facility” for purposes of the Prevention of Significant Deterioration Program) with § 7602(j) (defining “major stationary source” for general purposes) with § 7661 (acknowledging the different definitions and considering them all “major sources” for purposes of permitting).

<sup>189</sup> See, e.g., 33 U.S.C. § 1362(6) (defining “pollutant” for purposes of the Clean Water Act with two exceptions); 42 U.S.C. § 9601(14) (defining “hazardous substance” for purposes of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) with two exceptions).

<sup>190</sup> 40 C.F.R. §§ 261.2, 266.202.

<sup>191</sup> 40 C.F.R. §§ 261.3, 261.4 to 261.8.

<sup>192</sup> See, e.g., 40 C.F.R. Part 405 (setting Clean Water Act effluent limitations based on BPT, BCT, and BAT for the Dairy Products Processing point source category); Part 406 (doing the same for the Grain Mills point source category); Part 407 (doing the same for the Canned and Preserved Fruits and Vegetables Processing point source category); Part 408 (doing the same for the Canned and Preserved Seafood point source category); Part 409 (doing the same for the Sugar Processing point source category); and so on.

<sup>193</sup> 40 C.F.R. §§ 50.4 to 50.12.

<sup>194</sup> This is the scientific standard for listing species for protection under the federal Endangered Species Act. 16 U.S.C. § 1533(b)(1)(A).

<sup>195</sup> This is the health-based standard for setting primary National Ambient Air Quality Standards (NAAQS) under the Clean Air Act. 42 U.S.C. § 7409(b)(1).

<sup>196</sup> Administrative Procedures Act, 5 U.S.C. § 706(2)(A).

<sup>197</sup> Roger M. Whelan, *Should the “Plain Meaning” Always Prevail? Supreme Court Hears Oral Argument on the Omission of “Debtor’s Attorney” in §330(a)(1)*, 23 AM. BANKR. INST. J. 6 (Feb. 2004); Nancy Haller, *Cybergenics II: Precedent and Policy vs. Plain Meaning*, 56 MAINE L. REV. 365 (2004); Alan R. Lepene & Sean A. Gordon, *The Case for Derivative Standing in Chapter 11: “It’s the Plain Meaning, Stupid,”* 11 AM. BANKR. INST. L. REV. 313 (Winter 2003); Sushell Kirpalani, *The Importance of Being Plain: A Textual Response to Cybergenics II*, 21 AM. BANKR. INST. J. 1 (Nov. 2002); Alan Schwartz, *The New Textualism and the Rule of Law Subtext in the*

each legal subculture, as the relevant statutes and regulations establish “a community among [their] reader[s].”<sup>200</sup>

Given that meaning is contextually determined, the Supreme Court, in its statutory interpretation methodology, should take account of these legal subcultures. In the words of James Boyd White,

Instead of asking what a statute . . . “means,” as if we expected a one-sentence response, we can ask what it means in a different way: How would the ideal reader contemplated by this document, indeed, constituted by it, understand its bearing in the present circumstances? This requires an understanding of the text in its cultural and political context, in light of the accepted meanings of words and with an understanding of the major purposes of the text, of its types and examples. It thus requires one to become an expert reader of the [sub-]culture itself.<sup>201</sup>

Construing statutes from the perspective of White’s “ideal reader” or, more appropriately, the specialist lawyer, the Court should accept its position as semi-outsider and “read over the shoulder” of a person who understands not just the textual words but also the evolving context of those words – the new problems that Congress and administrative agencies discovered and tried

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*Supreme Court’s Bankruptcy Jurisprudence*, 45 N.Y. L. SCHOOL L. REV. 149 (2000-2001); Daniel J. Bussel, “Plain Meaning” Cases Lead to Costly and Flawed Amendments to the Bankruptcy Code, 19 AM. BANKR. INST. J. 1 (July-Aug. 2000); Daniel J. Bussel, *Textualism’s Failures: A Study of Overruled Bankruptcy Decisions*, 53 VAND. L. REV. 887 (April 2000); Michael D. DeFrank, *An Ineffective Escape Hatch: The Textualist Mistake in Geiger*, 16 BANKR. DEV. J. 467 (2000).

<sup>198</sup> Larry J. Pittman, *A Plain Meaning Interpretation of ERISA’s Preemption and Saving Clauses: In Support of a State Law Preemptions of Section 1132(A) of ERISA’s Civil Enforcement Provisions*, 41 SAN DIEGO L. REV. 593 (May-June 2004); Kathryn E. Diaz, *There Is No Plain Meaning: The Jurisprudence of ERISA and the “Exclusive Benefit” Rule*, 4 U. PA. J. LABOR & EMP. L. 71 (Fall 2001); Cooper, *supra* note 8; Wendy E. Parnet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, 21 BERKELEY J. EMP. & LABOR L. 53 (2000); H. Drewry Gores, *Sutton v. United Air Lines, Inc.: Textualism, Intentionalism, the Chevron Doctrine, and Judicial Policy-Making*, 27 N. KY. L. REV. 853 (2000); Edward A. Zelinsky, *Travelers, Reasoned Textualism, and the New Jurisprudence of ERISA Preemption*, 21 CARDOZO L. REV. 807 (Dec. 1999); Catherine J. Lanctot, *The Plain Meaning of Oreale*, 7 WM. & MARY L. BILL RTS. J. 913 (April 1999).

<sup>199</sup> Allen D. Madison, *The Tension Between Textualism and Substance-over-Form Doctrines in Tax Law*, 43 SANTA CLARA L. REV. 699 (2003); Laurielle C. Lo, *Debating the “Plain Meaning” of Section 355’s Active Business Requirement: McLaulin v. Commissioner*, 56 TAX LAW. 311 (Fall 2002); Alexandra M. Walsh, *Formally Legal, Probably Wrong: Corporate Tax Shelters, Practical Reason, and the New Textualism*, 53 STAN. L. REV. 1541 (July 2001).

<sup>200</sup> White, *supra* note 167, at 271 (“a legal text speaks directly to its reader, as other texts do, but the textual community it establishes with the individual reader is always a way of making another community as well, a community among its readers.”)

<sup>201</sup> *Id.* at 271-72.

to address, and the resulting evolution of the statutory and regulatory regimes over time.

However, a cultural critical analysis of the Court's environmental law decisions reveals instead that Justices following the strict plain meaning approach do just the opposite, decontextualizing the statute and reading it from the perspective of a generic "ordinary reader" whose only relevant context is the statute itself.

### **C. Cultural Criticism, Dialogism, and Statutory Interpretation**

Recognition of legal subcultures is an important first step in improving the Court's statutory interpretation methodology for complex statutes in regulatory specialties. When such statutes have also been evolving over time, however, the Court should also read such statutes dialogically, appreciating not just the intended audience but also that audience's conversational awareness of the statute's development.

Dialogism is a form of cultural criticism most strongly associated with Mikhail M. Bakhtin and literary criticism.<sup>202</sup> This approach to interpretation of cultural texts views all "communication as essentially 'dialogical'":

When we write or speak, according to this theory, we always do so with an audience in mind, and our writing or speech is always connected to ideas and thoughts that have been communicated in the past. Thus, the concept of dialogue is given importance and, it is argued, is a more useful and correct way of understanding communication than monologue, which gives primacy to the person doing the writing and thinking.<sup>203</sup>

The dialogical approach thus emphasizes two particular kinds of context in discerning meaning: past statements and communications, which inform both what we say and how we say it; and the

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<sup>202</sup> BERGER, *supra* note 158, at 35; *see also generally* MIKHAIL M. BAKHTIN, *THE DIALOGIC IMAGINATION: FOUR ESSAYS* (Austin: University of Texas Press, 1981).

<sup>203</sup> BERGER, *supra* note 158, at 35.

projected audience.<sup>204</sup> Like other forms of cultural criticism, therefore, dialogism points out that the creators of texts “are profoundly affected by the social and cultural milieu in which they find themselves and by the texts and other creative works that already exist and that cast a shadow on, or provide a frame for” those texts.<sup>205</sup>

As complex as this explanation may sound, dialogic interpretation is somewhat commonsensical for life – and for evolving statutes. In a conversation, the meaning of a particular comment depends on the participants’ shared understanding of particular words and phrases – the subcultural context. It also depends on the evolution of the conversation – statements that would have no meaning (“Yes”) or uncertain meaning (“Do it tomorrow”) taken alone become perfectly intelligible in the context of prior questions (“Do you want to have lunch now?”) or statements (“Andrea wants me to fax those papers today”). A dialogic mode of interpreting statutes, therefore, would not only pay attention to audience (the legal subcultures discussed above), but also to what that audience *has already heard* – *i.e.*, to what Congress, administrative agencies, and courts have already said about what the statutory language at issue means and, in the case of evolving statutes, how those prior pronouncements relate to the most recent amendments or agency interpretations of that statutory language.

At the same time, a dialogic mode of statutory interpretation should encourage the Court to expect, rather than to stumble over, imprecisions in amended statutes, particularly when such amendments are direct responses to previously articulated interpretations. In the context of prior statements and interpretations, such imprecisions often become clearly intelligible. Ignoring the dialogic context, in contrast, often leads the Court to infuse linguistic imprecisions with

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<sup>204</sup> See *id.* at 35-36 (“There are two important phenomena to keep in mind, then. First, there is the past, which has an impact on our ideas and what we created. Second, there is the future and the responses we anticipate from our audience (real or imagined) which affect what we do.”).

<sup>205</sup> *Id.* at 36.

overdetermined textualist meaning, distorting statutory purpose, as the next section will discuss.

### III. THE CULTURAL CRITICAL CRITIQUE OF THE SUPREME COURT'S ENVIRONMENTAL LAW INTERPRETATIONS: TWO CONSEQUENCES OF THE STRICT PLAIN MEANING APPROACH'S DECONTEXTUALIZATION OF STATUTORY CONVERSATIONS

#### A. The Strict Plain Meaning Approach Leads to Over-Emphasis on Statutory Imprecision at the Expense of Statutory Purpose

As in *Locke*, Congress' use of statutory language is often imprecise. The reasons for such imprecision vary. Repeated amendments to a complex statute may inadvertently create discontinuities among the final provisions,<sup>206</sup> and scrivener's errors do occur.<sup>207</sup> Sometimes Congress drafts a statute hurriedly and without careful attention to meet some deadline, resulting in statutes that could have used one or two more revisions. For example, outgoing Congress of the Carter Administration drafted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980<sup>208</sup> "hastily" to enact it before President Ronald Reagan took office in January 1981, and several federal courts have adjusted their constructions of the Act to acknowledge that drafting reality.<sup>209</sup> Sometimes, as Justice Stevens suggested in his dissent to *Locke*, congressional attention was simply focused elsewhere than on a relatively

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<sup>206</sup> For an example of such slippage, see Cunningham, *et al.*, *supra* note 13, at 1577-82 (discussing *United States v. Granderson*, 969 F.2d 980 (11<sup>th</sup> Cir. 1992), "the case of the missing referent," which interpreted 18 U.S.C. § 3565(a) (1988)).

<sup>207</sup> See, e.g., *United States Nat. Bank of Oregon v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 462 (1993) (construing the Act of Sept. 7, 1916, 39 Stat. 753); *Renteria-Gonzalez v. Immigration & Naturalization Serv.*, 322 F.3d 804, 819 (5<sup>th</sup> Cir. 2002) (construing the Immigration and Nationality Act); *Appalachian Power Co. v. Env'tl. Protection Agency*, 249 F.3d 1032, 1043-44 (D.C. Cir. 2001) (construing the Clean Air Act); *Tax Analysts v. Internal Revenue Serv.*, 214 F.3d 179, 182 n.1 (D.C. Cir. 2000) (construing the Internal Revenue Code); *United States v. Gibson*, 770 F.2d 306, 308 (2d Cir. 1985) (construing the Higher Education Act of 1965).

<sup>208</sup> 42 U.S.C. §§ 9601-9675.

<sup>209</sup> *Carson Harbor Village, Ltd. V. Unocal Corp.*, 270 F.3d 863,885 n.13 (9<sup>th</sup> Cir. 2001) (*en banc*); *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1554 n.3 (11<sup>th</sup> Cir. 1990); *Redwing Carriers, Inc. v. Saraland Apartments, Ltd.*, 875 F. Supp. 1545, 1555 (S.D. Ala. 1995); *United States v. Kramer*, 757 F. Supp. 397, 430 N. 56 (D.N.J. 1991); *Coastal Casting Serv. V. Aron*, 1988 WL 35012, at \*3 (S.D. Tex. 1988); *United States v. Maryland Bank & Trust Co.*, 732 F. Supp. 573, 577-78 (D. Md. 1986); *Bulk Distribution Ctrs., Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1441 (D. Fla. 1984).

innocuous-seeming provision.<sup>210</sup>

And, sometimes, Congress was engaged in an ongoing conversation about a particular topic and amended legislation in the context of that give-and-take, with statutory results that need to be construed with a sensitivity to the entire drafting history. In such cases, a better sense of the subcultural conversations leading to amendments to complex statutes can provide the Court with a fuller perspective on what to do with imprecise statutory language. Two examples from environmental law demonstrate the dangers in *not* reading statutes dialogically.

### **1. Waiving Federal Facilities' Sovereign Immunity from Environmental Laws: Congress's Conversation with the Supreme Court**

Congress and the Executive have long recognized that federal facilities – enterprises owned or operated by the United States itself – are some of the nation's worst polluters.<sup>211</sup> Federal facilities provisions now exist in all major federal pollution-control statutes.<sup>212</sup> The Clean Water Act, for example, originally provided that:

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<sup>210</sup> *United States v. Locke*, 471 U.S. at 125 (J. Stevens, dissenting). As Professor Strauss has noted:

But litigation seldom arises [when “a legislative body deliberately drafted language with a specific problem in mind”]. If the members of a legislature foresaw an issue and specifically drafted the language of a statute to resolve that precise issue, the chances are good that there will be no reasonable grounds for dispute over how the statute should be interpreted when that issue arises. Litigation comes about either because of a failure of foresight by the legislature, or a dispute over just how to characterize the issue that the legislature did foresee, or because the legislature, while perhaps foreseeing the issue, inadvertently or advertently did not draft language with sufficient clarity to foreclose further dispute.

Strauss, *supra* note 15, at 1570-71.

<sup>211</sup> In 1966, for instance, President Lyndon Johnson issued an executive order to try to bring federal facilities' water pollution under control. Exec. Order No. 11288: Prevention, Control, and Abatement of Water Pollution by Federal Activities, 31 Fed. Reg. 9261 (July 2, 1966). Congress first implemented this Order in the Water and Environmental Quality Improvement Act of 1970 by subjecting federal facilities to the Federal Water Pollution Control Act's (FWPCA's) regulatory regime, just like private polluters. Pub. L. No. 91-224, § 103, 84 Stat. 91, 107-10 (April 3, 1970) (amending § 21 of the FWPCA). According to the U.S. Environmental Protection Agency (EPA), “as of April 1, 2003, there were 7,853 federal facilities that engaged in some type of activity affected by requirements” under those statutes. U.S. ENVIRONMENTAL PROTECTION AGENCY, THE STATE OF FEDERAL FACILITIES: AN OVERVIEW OF ENVIRONMENTAL COMPLIANCE AT FEDERAL FACILITIES FY 2001-2002, at 3 (2004) (EPA 300-R-04-001), available at <http://www.epa.gov/compliance/resources/reports/accomplishments/federal/soff0102.pdf>.

<sup>212</sup> See, e.g., Clean Water Act, 33 U.S.C. § 1323; Noise Control Act, 42 U.S.C. § 4903; Resource Conservation and Recovery Act, 42 U.S.C. § 6961; Clean Air Act, 42 U.S.C. § 7418; Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9620.

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility; or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges.<sup>213</sup>

Nevertheless, such relatively straightforward attempts to subject federal facilities to environmental regulation propelled Congress into a decades-long conversation with the Supreme Court on how to waive federal facilities' sovereign immunity from enforcement.

Sovereign immunity is a penumbral constitutional right of the federal government to be free from suit unless it expressly consents to being sued through Congress's unequivocal waiver of that immunity.<sup>214</sup> The Supreme Court construes any purported waiver of sovereign immunity strictly and in favor of the federal government.<sup>215</sup>

Over the 35 years that federal environmental statutes have existed, sovereign immunity disputes regarding regulation of federal facilities arose primarily because of the ability of *states* to acquire permitting and enforcement authority. For example, the Clean Water Act, enacted in 1972,<sup>216</sup> allows states to acquire the authority to issue the National Pollutant Discharge Elimination System (NPDES) permits that any "discharger of pollutants" must have.<sup>217</sup> More obliquely, the Clean Air Act of 1970<sup>218</sup> requires states to create State Implementation Plans (SIPs)

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<sup>213</sup> 33 U.S.C. § 1323(a).

<sup>214</sup> U.S. Dept. of Energy v. Ohio, 503 U.S. 607, 612 (1992) (citing *United States v. Mitchell*, 445 U.S. 535, 538-39 (1980)); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992); *Block v. North Dakota*, 461 U.S. 273, 280 (1983); *Dalehite v. United States*, 346 U.S. 15, 30 (1953); *United States v. Sherwood*, 312 U.S. 584, 586 (1941); *Price v. United States*, 174 U.S. 373, 375-76 (1899); *Schillinger v. United States*, 155 U.S. 163, 166 (1894); *United States v. Clarke*, 33 U.S. 436, 444 (1834).

<sup>215</sup> *Department of Energy*, 503 U.S. at 612 (citing *McMahon v. United States*, 342 U.S. 25, 27 (1951)); *Nordic Village*, 503 U.S. at 34; *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983); *Block*, 461 U.S. at 287.

<sup>216</sup> 33 U.S.C. §§ 1251-1387.

<sup>217</sup> 33 U.S.C. §§ 1342(b), 1344(g).

<sup>218</sup> 42 U.S.C. §§ 7401-7671q.

to implement the Act's emissions reduction requirements,<sup>219</sup> and many such state plans included permit requirements.

The issues of whether the Clean Air Act and Clean Water Act waived federal facilities' sovereign immunity reached the Supreme Court in two 1976 companion cases, *Hancock v. Train*,<sup>220</sup> which dealt with the Clean Air Act, and *California ex rel. State Water Resources Control Board v. U.S. Environmental Protection Agency*,<sup>221</sup> which dealt with the Clean Water Act. *Hancock* addressed the scope of the Clean Air Act's federal facilities provision, section 118, which in 1976 provided that:

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirement.<sup>222</sup>

The question for the Court was whether the operating permit requirement in Kentucky's SIP was a "requirement respecting control and abatement of air pollution" for which Congress had clearly waived federal facilities' sovereign immunity.<sup>223</sup>

The Court, in an opinion authored by Justice White, concluded that it was not. "We are unable to find in § 118, on its face or in relation to the Clean Air Act as a whole, or to derive from the legislative history of the Amendments any clear and unambiguous declaration by Congress that federal installations may not perform their activities unless a state official issues a permit."<sup>224</sup> Specifically, section 118:

does not provide that federal installations "shall comply with all federal, state,

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<sup>219</sup> *Id.* § 7410.

<sup>220</sup> 426 U.S. 167 (1976).

<sup>221</sup> 426 U.S. 200 (1976).

<sup>222</sup> 42 U.S.C. § 1857 (1976). The Clean Air Act sections were renumbered in later amendments.

<sup>223</sup> *Hancock*, 426 U.S. at 168-69.

<sup>224</sup> *Id.* at 180.

interstate, and local requirements to the same extent as any other person.” Nor does it state that “federal installations shall comply with all requirements of the applicable State implementation plan.” Section 118 states only to what extent [--] the same as any person [--] federal installations must comply with applicable state requirements; it does not identify those requirements.<sup>225</sup>

In addition, the Clean Air Act itself did not require operating permits (although, as the Court acknowledged, almost every state had required them in their SIPs<sup>226</sup>), and the structure of the Act gave evidence that “Congress intended to treat emission standards and compliance schedules [--] those requirements which when met work the actual reduction of air pollutant discharges [--] differently from administrative and enforcement methods and devices [--] those provisions by which the States were to establish and enforce emission standards, compliance schedules, and the like.”<sup>227</sup> Because the state-required permits were an enforcement mechanism rather than a “requirement” that would reduce air pollution, section 118 did *not* waive federal facilities’ sovereign immunity from Kentucky’s permit requirement.

Although the Clean Water Act *did* expressly require permits, expressly allow states to take over the permit program, and provide in section 313, its federal facilities provision (quoted above), that federal facilities had to comply “in the same manner, and to the same extent as any nongovernmental entity,” the Court again found no waiver of sovereign immunity. As in *Hancock*, the Court in *California Water Resources Control Board* emphasized that section 313:

states only to what extent – the same as any person – federal installations must comply with applicable state requirements. Section 313 does not expressly provide that federal dischargers must obtain state NPDES permits. Nor does § 313 or any other section of the Amendments expressly state that obtaining a state NPDES permit is a “requirement respecting control and abatement of pollution.”<sup>228</sup>

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<sup>225</sup> *Id.* at 182.

<sup>226</sup> *Id.* at 184-85.

<sup>227</sup> *Id.* at 185-86.

<sup>228</sup> *California Water Resources Control Board*, 426 U.S. at 212-13.

Noting that the EPA could issue permits to federal facilities,<sup>229</sup> the Court deferred to the EPA's consistent position that state permit programs did not extend to federal facilities.<sup>230</sup> It invited Congress, if Congress disagreed, to amend the federal facilities provisions.<sup>231</sup>

Within a year, Congress accepted that invitation.<sup>232</sup> As amended, the Clean Water Act's federal facilities provision stated:

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent and any nongovernmental entity including the payment of reasonable service charges. *The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner.* This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. \*\*\* No officer, agent, or employee of the United States shall be personally liable for any civil penalty arising from the performance of his official duties, for which he is not otherwise liable, and the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court.<sup>233</sup>

Congress amended section 118 of the Clean Air Act to include language similar to the italicized language above,<sup>234</sup> and it included similar language in the federal facilities provisions of new environmental statutes, such as section 6961 of the Resource Conservation and Recovery Act of

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<sup>229</sup> *Id.* at 219-21.

<sup>230</sup> *Id.* at 226-27.

<sup>231</sup> *Id.* at 227-28.

<sup>232</sup> Pub. L. No. 95-95, Title I, § 116, 91 Stat. 711 (Aug. 7, 1977) (amending section 118 of the Clean Air Act, 42 U.S.C. § 7418(a)); Pub. L. No. 95-217, §§ 60, 61(a), 91 Stat. 1597, 1598 (Dec. 27, 1977) (amending section 313 of the Clean Water Act, 33 U.S.C. § 1323).

<sup>233</sup> 33 U.S.C. § 1323(a) (2000).

<sup>234</sup> *See* 42 U.S.C. § 7418(a) (2000) (the current version of § 118).

1976 (RCRA).<sup>235</sup>

Read dialogically, with awareness of the federal sovereign immunity conversation between Congress and the Supreme Court, these amendments should constitute a complete waiver of federal facilities' sovereign immunity. Nevertheless, Congress's language in these amendments was not as precise as it might have been, and federal facilities subject to Clean Water Act and RCRA requirements next argued that they were immune, on sovereign immunity grounds, from imposition of civil penalties in state enforcement actions. State enforcement actions raised sovereign immunity issues because section 6961 of RCRA explicitly mentioned only injunctive relief, while the amended section 313 of the Clean Water Act stated that "the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State of local court to enforce an order or process of such court," leaving the status of punitive civil penalties imposed through state regulatory programs in doubt. Lower courts split on the waiver issue for both statutes.<sup>236</sup>

In 1992, the Supreme Court addressed both statutes in *U.S. Department of Energy v. Ohio*,<sup>237</sup> concluding that neither waived federal facilities' sovereign immunity from punitive civil penalties. All of the Justices agreed that section 6961 of RCRA, which referred only to injunctive relief, could not waive federal facilities' sovereign immunity from civil penalties.<sup>238</sup>

As for section 313 of the Clean Water Act, the majority distinguished coercive "process and

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<sup>235</sup> 42 U.S.C. § 6961 (1982).

<sup>236</sup> For the Clean Water Act, *compare* *California v. U.S. Dept. of the Navy*, 845 F.2d 222, 225 (9<sup>th</sup> Cir. 1988) (holding that civil penalties imposed under California's Clean Water Act program did not "arise under federal law" and hence that section 313 did not waive federal facilities' immunity from those penalties); *with* *Ohio v. U.S. Dept. of Energy*, 904 F.2d 1058, 1059-61 (6<sup>th</sup> Cir. 1990) (holding that section 313 *did* waive federal facilities' sovereign immunity from penalties imposed under Ohio's program). For RCRA, *compare* *Maine v. U.S. Dept. of the Navy*, 702 F. Supp. 322, 330 (D. Me. 1988) (holding that civil penalties could be imposed against federal facilities pursuant to section 6961); *with* *McClellan Ecological Seepage Situation v. Weinberger*, 655 F. Supp. 601, 603 (E.D. Cal. 1986) (holding that section 6961 did *not* waive federal facilities' sovereign immunity from civil penalties); *Meijer v. U.S. Coast Guard*, 644 F. Supp. 221, 222-23 (E.D.N.C. 1980) (same).

<sup>237</sup> 503 U.S. 607 (1992).

<sup>238</sup> *Id.* at 628 (majority opinion), 636 (J. White, concurring in part and dissenting in part).

sanctions” from punitive civil penalties, emphasizing that “sanction” always appears in section 313 in the phrase “process and sanctions,” implying “that Congress was using ‘sanction’ in its coercive sense, to the exclusion of punitive fines.”<sup>239</sup> In addition, the majority emphasized that section 313 subjects federal facilities only to civil penalties “arising under Federal law,” and it concluded that penalties assessed pursuant to delegated state programs did not “arise under” federal law.<sup>240</sup> The only civil penalties that *could* “arise under Federal law” were those assessed pursuant to section 309(d) – which did not apply to federal facilities.

The majority’s interpretation thus left Congress’s express subjection of federal facilities to civil penalties “arising under Federal law” without meaning. Contrary to normal principles of statutory interpretation, which stress that every word in a statute must be given effect, the majority both acknowledged and immediately dismissed this problem:

The question is still what Congress could have meant in using a seemingly expansive phrase like “civil penalties arising under Federal law.” Perhaps it used it just in case some later amendment might waive the Government’s immunity from punitive sanctions. Perhaps a drafter mistakenly thought that liability for such sanctions had someone been waived already. Perhaps someone was careless. The question has no satisfactory answer.

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[Nevertheless,] under our rule that tension is resolved by the requirement that any statement of waiver be unequivocal: as against the clear waiver for coercive fines the indication of a waiver as to those that are punitive is less certain. The rule of narrow construction therefore takes the waiver no further than the coercive variety.<sup>241</sup>

In other words, the majority acknowledged that the statutory language was imprecise and yet still chose to give it *no* meaning rather than interpret it dialogically and allow it to function as Congress discernibly intended it to function.

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<sup>239</sup> *Id.* at 623.

<sup>240</sup> *Id.* at 624-26.

<sup>241</sup> *Id.* at 626-27.

Justice White – the author of *Hancock* and *California Water Resources Control Board* – dissented from the majority’s conclusions regarding section 313, joined by Justices Blackmun and Stevens. Given the state programs’ status as a delegation of federal law that had to meet federal standards and that the EPA oversaw, these Justices were willing to conclude that civil penalties assessed pursuant to state programs were civil penalties “arising under Federal law” for purposes of section 313 of the Clean Water Act.<sup>242</sup> More generally, however, these Justices took issue with the majority’s willingness to leave the civil penalties language in section 313 meaningless,<sup>243</sup> arguing that the Court had to read the statute as a whole and that “[w]hen the federal facilities . . . provision[] of the [Clean Water Act] [is] so read, the conclusion becomes inescapable that Congress intended to waive sovereign immunity for civil penalties.”<sup>244</sup> They saw the Court’s role in the face of statutory imprecision as being much more deferential to Congress: “The job of this Court is to determine what a statute says, not whether it could have been drafted more artfully. In these cases, the federal facilities . . . provision[] of the [Clean Water Act] . . . unambiguously waive[s] the Federal Government’s immunity from civil penalties. That is all the law requires.”<sup>245</sup>

Congress gave indication that it agreed with Justice White when it amended RCRA (but not the Clean Water Act), within the year, to more clearly waive federal facilities’ sovereign immunity.<sup>246</sup> In its current form, RCRA defines “persons” subject to civil penalties to “include each department, agency, and instrumentality of the United States.”<sup>247</sup> Moreover, RCRA’s federal

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<sup>242</sup> *Id.* at 632 (J. White, concurring in part and dissenting in part).

<sup>243</sup> *Id.* at 635-36 (J. White, concurring in part and dissenting in part).

<sup>244</sup> *Id.* at 630-31 (J. White, concurring in part and dissenting in part).

<sup>245</sup> *Id.* at 636-37 (J. White, concurring in part and dissenting in part). *See also* Strauss, *supra* note 15, at 1572 (discussing the disjunctions in interpretive incentives between lawyers arguing “plain meaning” in litigation and legislative drafters).

<sup>246</sup> Federal Facilities Compliance Act, Pub. L. No. 102-386, Title I, §§ 102, 103, 105(b), 106 Stat. 1505-07, 1512 (Oct. 6, 1992).

<sup>247</sup> 42 U.S.C. § 6903 (15) (2000).

facilities provision now states that:

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal and management in the same manner, and to the same extent, as any person subject to such requirements, including the payment of reasonable service charges. The Federal, State, interstate, and local substantive and procedural requirements referred to in this section include, but are not limited to, all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations. The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative order or civil or administrative penalty or fine referred to in the preceding sentence, or reasonable service charge. . . . Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief. No agent, employee, or officer of the United States shall be personally liable for any civil penalty under any Federal, State, interstate, or local solid or hazardous waste law with respect to any act or omission within the scope of the official duties of the agent, employee, or officer. An agent, employee, or officer of the United States shall be subject to any criminal sanction (including, but not limited to, any fine or imprisonment) under any Federal or State solid or hazardous waste law, but no department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal Government shall be subject to any such sanction. . . .<sup>248</sup>

Federal facilities' sovereign immunity challenges under this provision have been limited, suggesting that Congress may finally have been clear and unequivocal enough. As Justice White suggested, however, by ignoring the ongoing evolution of these statutes and Congress's specific responses to the Court's 1976 decisions – by refusing to read the statutory language dialogically – the Court accomplished little except to force Congress to speak in ever more precise language

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<sup>248</sup> 42 U.S.C. § 6961(a) (2000).

(and ever longer statutory provisions).<sup>249</sup>

## 2. RCRA's Household Waste Exclusion: Congress's Conversation with the EPA

Sovereign immunity jurisprudence is an area of statutory construction where, given the constitutional underpinnings of sovereign immunity, Congress has little choice but to accept the Supreme Court as its most relevant audience. However, those Justices that follow the strict plain meaning approach have been similarly intolerant of statutory imprecision in other, non-constitutional contexts as well. For example, in *Environmental Defense Fund v. City of Chicago*,<sup>250</sup> the Court's task was to define the scope of Congress' "Clarification of the Household Waste Exclusion" in its 1984 amendments<sup>251</sup> to RCRA. Specifically, the Court had to decide whether Chicago's Northwest Waste-to-Energy Facility, a municipal incinerator "that burns solid waste and recovers energy, leaving a residue of municipal waste combustion (MWC) ash," was exempt from RCRA's regulation of hazardous waste generators, even if the ash it generated qualified as hazardous waste under the EPA's RCRA regulations.<sup>252</sup> The 1984 amendments provided that such facilities "shall not be deemed to be *treating, storing, disposing of, or otherwise managing hazardous wastes*" if they burn only household waste and other nonhazardous wastes and do not accept hazardous wastes into the facility<sup>253</sup> – an apparently complete "waste stream" exemption. The interpretive issue nevertheless arose because RCRA's statutory definitions of "treatment," "storage," "disposal," and "solid waste management" do not

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<sup>249</sup> Judge Randolph has argued more generally that, "Some may believe that if there is a problem with construing statutes by looking only at the text, the fault lies with Congress. All Congress has to do is be precise. But greater precision in the use of language may not lead to greater clarity. It can lead to longer and longer statutes, and less clarity. Read the Clean Air Act." Randolph, *supra* note 26, at 78.

<sup>250</sup> 511 U.S. 328 (1994).

<sup>251</sup> Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, § 223, 98 Stat. 3221, 3252 (Nov. 8, 1984) (adding § 3001(i) to RCRA, 42 U.S.C. § 6921(i)).

<sup>252</sup> *City of Chicago*, 511 U.S. at 330.

<sup>253</sup> 42 U.S.C. § 6921(i) (emphasis added).

include, individually or collectively, waste “generation.”<sup>254</sup> As a result, Congress’s seemingly expansive exemption left open the possibility that household waste incinerators could be hazardous waste generators if the *ash* that they generated qualified as a hazardous waste.

The seven-Justice majority decided that such incineration facilities *could* be regulated as generators. In an opinion authored by Justice Scalia, the majority concluded that:

The plain meaning of this language is that so long as a facility recovers energy by incineration of the appropriate wastes, *it* (the *facility*) is not subject to [RCRA] Subtitle C regulation as a facility that treats, stores, disposes of, or manages hazardous waste. The provision quite clearly does *not* contain any exclusion for the *ash itself*. Indeed, the waste the facility produces (as opposed to that which it receives) is not even mentioned. There is thus no support for petitioners’ claim of a waste-stream exemption.<sup>255</sup>

Moreover, although the amendment’s legislative history did explicitly refer to generation, the Court emphasized that “it is the statute, and not the Committee Report, which is the authoritative expression of the law, and the statute prominently *omits* reference to generation.”<sup>256</sup> The omission was particularly significant in light of the 1986 amendments to RCRA, in which Congress created a different waste stream exemption,<sup>257</sup> this time providing that an “owner or operator of equipment used to recover methane from a landfill shall not be deemed to be managing, *generating*, transporting, treating, storing, or disposing of hazardous or liquid wastes,”<sup>258</sup> “show[ing] that Congress knew how to draft a waste stream exemption in RCRA when it wanted to.”<sup>259</sup>

On its face, very little in the majority’s opinion in *City of Chicago* gives one pause, except perhaps its quick rejection of the legislative history indicating that Congress really did

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<sup>254</sup> See 42 U.S.C. § 6903(3) (defining “disposal”), 6903(6) (defining “hazardous waste generation”), 6903(7) (defining “hazardous waste management”), 6903(29) (defining “solid waste management”), 6903(33) (defining “storage”), 6903(34) (defining “treatment”).

<sup>255</sup> *City of Chicago*, 511 U.S. at 334-35.

<sup>256</sup> *Id.* at 337.

<sup>257</sup> Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499, § 124(b), 100 Stat. 1689 (1986).

<sup>258</sup> 42 U.S.C. § 6921 (emphasis added).

<sup>259</sup> *City of Chicago*, 511 U.S. at 338 (quoting Brief for Respondents 18).

intend a full waste stream exemption. That legislative history, however, gains increased force when one reads the 1984 amendments dialogically.

As the majority acknowledged, Congress's 1984 amendments were a response to the EPA's 1980 regulations implementing RCRA, which created a complete "waste stream" exemption for facilities that burned only household waste.<sup>260</sup> Moreover, again as the majority acknowledged, the EPA continued to implement RCRA as though a waste stream exemption existed even *after* Congress enacted the 1984 amendments,<sup>261</sup> despite the fact that, as the majority emphasized, "[u]nlike the preamble to the 1980 regulations, . . . § 3001(i) does not explicitly exempt MWC ash generated by a resource recovery facility from regulation as a hazardous waste."<sup>262</sup> Because of that difference and because Congress omitted the word "generate" from § 3001(i), the Court refused to accord *Chevron* deference to the EPA's post-1984 interpretation.<sup>263</sup>

Writing in dissent for himself and Justice O'Connor, Justice Stevens presented evidence that, in fact, the EPA and Chicago better understood the conversation that they were having with Congress than the majority did. As Justice Stevens emphasized, "[t]he statutory provision in question is a 1984 amendment entitled 'Clarification of Household Waste Exclusion.' To understand that clarification, we must first examine the 'waste exclusion' that the amendment clarified and, more particularly, the ambiguity that needed clarification."<sup>264</sup> He then traced the history of the EPA's creation of the household waste exclusion in its 1980 regulations, noting that the exclusion applied only to the burning of household waste. The regulation also specified

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<sup>260</sup> *Id.* at 333 (referencing 40 C.F.R. §§ 261.3, 261.24 (1993)).

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 335.

<sup>263</sup> *Id.* at 339.

<sup>264</sup> *Id.* at 340 (J. Stevens, dissenting) (citing Hazardous and Solid Waste Amendments of 1984, § 223, 98 Stat. 3252 (amending RCRA § 3001, 42 U.S.C. § 6921(i))).

that “[i]f household waste was ‘mixed with other hazardous wastes,’ the entire mixture would be deemed hazardous.”<sup>265</sup> However, the EPA did not specify what would happen if the incinerator burned household waste mixed with non-household, *nonhazardous* waste.<sup>266</sup>

It was this ambiguity, Justice Stevens emphasized, that Congress sought to clarify in the 1984 amendments. Specifically, the statutory amendment made it clear “that the addition of *non* hazardous waste derived from other sources does not extinguish the household waste exclusion.”<sup>267</sup> In all other respects, the 1984 amendment was parallel to the 1980 regulation, and the Senate Committee’s Report, which referred to “‘waste streams,’” stated explicitly that “[a]ll waste management activities” of incineration facilities, “including the generation . . . of waste shall be covered by the exclusion.”<sup>268</sup> In light of this regulatory conversation between the EPA and Congress, Justice Stevens concluded that “[a] common-sense reading of the statutory text in the light of the Committee Report and against the background of the 1980 regulation reveals an obvious intention to *preserve*, not to change, the existing rule.”<sup>269</sup>

In other words, the dialogical context of the 1984 amendments mattered intensely to the meaning of the statutory text, and that context was not available to an “ordinary reader” taking a strict plain meaning approach to interpreting section 3001(i). Significantly, Justice Stevens figured the Supreme Court as an outside observer of this statutory conversation, noting that his interpretation of the household waste exclusion both “avoids the Court’s rather surprising (and uninvited) decision to invalidate the household waste exclusion that the EPA adopted in 1980, on which municipalities throughout the Nation have reasonably relied for over a decade” and

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<sup>265</sup> *Id.* at 342 (J. Stevens, dissenting) (quoting 45 Fed. Reg. 33099 (1980)).

<sup>266</sup> *Id.* (J. Stevens, dissenting).

<sup>267</sup> *Id.* at 343 (J. Stevens, dissenting).

<sup>268</sup> *Id.* at 343-44 (J. Stevens, dissenting) (quoting S. REP. NO. 98-284, p. 61 (1983)).

<sup>269</sup> *Id.* at 345 (J. Stevens, dissenting).

respects “the construction that the EPA has adopted and that reasonable jurists have accepted.”<sup>270</sup>

As scholars have noted, in *City of Chicago*, Justice Scalia garnered a majority for his strict textualist approach to federal statutes, enforcing his belief “that Congress should make an ‘exact pronouncement’ of the law.”<sup>271</sup> Supporters of the majority’s decision emphasize that “cities and citizens must ‘look to the words of the statutes to determine their legal rights and obligations’” and that “[e]ven in simpler times uncertainty has been regarded as incompatible with the Rule of Law.”<sup>272</sup> Like Justice Scalia himself, however, these reviewers assume that RCRA’s relevant audience consists of unsophisticated readers coming “cold” to the current version of the statutory text – *i.e.*, readers who, like the Court itself, had not been participating in the ongoing statutory/regulatory dialogue.

As Justice Stevens recognized, however, this conception of the statutory audience is generally not an accurate characterization for complex statutes implemented by federal administrative agencies through, if anything, even more complex regulations. Interestingly, moreover, *neither* the majority nor the dissent in *City of Chicago* referenced the 1992 amendments to RCRA’s federal facilities provision, quoted *supra*, which, like section 3001(i), referred to “household waste disposal and management” in a phrase obviously intended to waive federal facilities’ sovereign immunity from RCRA requirements for *all* relevant hazardous waste activities, including hazardous waste generation. Given *City of Chicago* and *Ohio v. U.S. Department of Energy*, one can only assume that another sovereign immunity challenge is coming for RCRA. A better interpretation of both sections 3001(i) and 6961, however, would be that, despite the 1986 amendments, Congress (admittedly sloppily) sometimes uses

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<sup>270</sup> *Id.* at 347-48 (J. Stevens, dissenting).

<sup>271</sup> Paul T. Lawless, Note, *City of Chicago v. Environmental Defense Fund: Justice Scalia’s Evolution of the Plain Meaning Approach as Applied to RCRA’s Household Exemption*, 22 N. KY. L. REV. 115, 137 (Winter 1995).

<sup>272</sup> *Id.* at 137, 138 (quoting Earl M. Maltz, *Statutory Interpretation and Legislative Power: A Case for a Modified Approach*, 63 TUL. L. REV. 1, 22 (1988)).

“management” to encompass all RCRA-relevant activities, including generation.

Instead, the *City of Chicago* majority’s decision in pursuit of “certainty” disrupted a decade-long understanding among the EPA, the regulated community, Congress, and even the lower federal courts of how the household waste exclusion functioned. Professor Richard J. Lazarus and attorney Claudia M. Newman noted soon after the *City of Chicago* decision that “most persons following the case had expected the City of Chicago to prevail” and “virtually every law review article on the issue had concluded that the City of Chicago’s view *should* prevail.”<sup>273</sup> Like Justice Stevens, they emphasized the disparity between the exclusion’s “plain meaning” under a strict textualist approach and its meaning to anyone indoctrinated into the gory details of RCRA regulation.<sup>274</sup>

It is true, as Lazarus and Newman ultimately conclude, that the *City of Chicago* decision “compelled policymakers, including EPA, to address difficult issues that had formerly been answered through regulatory default and inattention” and that the decision functioned as the “leverage needed to trigger a candid and thoughtful dialogue with EPA and Congress on how

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<sup>273</sup> Richard J. Lazarus & Claudia M. Newman, *City of Chicago v. Environmental Defense Fund: Searching for Plain Meaning in Unambiguous Ambiguity*, 4 N.Y.U. ENVTL. L.J. 1, 2, 3 (1995) (emphasis added; citations omitted).

<sup>274</sup> The authors noted:

For those uninitiated in environmental law, the City’s legal argument should seem strange, if not bordering on the lunatic. Chicago contended that Congress intended to allow an admittedly hazardous waste to avoid regulation designed to protect the public against its hazards. . . .

Perhaps, unfortunately, for those battle-scarred in environmental law, there is nothing facially absurd about the City’s contention. This nation’s environmental laws reach far, wide, and deep in their efforts to strike a new relationship between human activity and the natural environment. Many of those who find their activities sharply restricted by those laws claim that their reach is too broad. But, in all events, the political price for their legislative enactment is frequently a multiplicity of exemptions more or less hidden in the statutes’ otherwise aspirational and uncompromising rhetoric and surrounding legislative history.

*Id.* at 7. See also Emily Abbott, *When the Plain Meaning of a Statute Is Not So Plain: The Supreme Court’s Interpretation of RCRA’s Clarification of the Household Waste Exclusion: City of Chicago v. Environmental Defense Fund*, 6 VILL. ENVTL. L.J. 345, 368 (1995) (“The *Chicago* Court erred in treating the language of the clarification provision as unambiguous.”); Strauss, *supra* note 15, at 1581-82 (arguing that the Court should not lightly overturn collective understandings of how a statute works).

this important environmental issue should be redressed.”<sup>275</sup> At the same time, by refusing to more deeply investigate contradictory legislative history or the regulated industry’s and EPA’s understanding of the 1984 amendments, or to give deference to the EPA’s interpretation of an amendment that the EPA’s own exemptions prompted Congress to enact, the Court in fact imposed a policy choice on all involved that forced cities like Chicago to incur significant expense (\$4 to \$5 million for the City of Chicago’s incinerator alone<sup>276</sup>) when the subcultural evidence strongly indicated that that was not the policy choice that Congress had in fact made.

**B. The Strict Plain Meaning Approach’s Decontextualization Impedes Evolution of Legal Language**

In 1984, James Boyd White recognized that “[t]he ways we have of claiming, establishing, and modifying meaning are furnished for us by our culture, and we cannot simply remake to suit ourselves the sets of significance that constitute our world.”<sup>277</sup> In his view, nevertheless, litigation “is always an invitation to the reconstruction of the language in light of new circumstances and new tractabilities.”<sup>278</sup> Theoretically, legislation should also be a means through which legal language can evolve, because Congress can change the meaning of the words it uses in statutes by explicitly defining those words, creating specialized terms that do not necessarily signify their “ordinary plain meaning” or even their traditional legal meaning, at least within the context of the defining statute. Environmental law gives several examples of evolving statutory terminology and, most important for this discussion, of Congress’s purposeful attempts to alter existing legal terms of art. Such attempts are in fact statutory conversations between Congress and the common law or between one session of Congress and prior sessions, and the Court should thus interpret the resulting changes dialogically.

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<sup>275</sup> Lazarus & Newman, *supra* note 275, at 29.

<sup>276</sup> *Id.* at 28.

<sup>277</sup> WHITE, *supra* note 163, at 6.

<sup>278</sup> *Id.* at 265.

One of the less-commented-on aspects of Justice Scalia’s textualist approach to statutory interpretation, however, is its tendency to entomb the meanings of words, especially legal terms of art, preserving unchanged one particular historical meaning at the expense of the evolution of legal language and, ultimately, of the law itself. Indeed, Professor Eskridge once opined that Justice Scalia’s new textualism “frees formalism from the mortmain of archeology and invites dynamic statutory interpretation . . . . Once the statutory text is unencumbered by evidence of original legislative expectations, it is free to evolve dynamically, especially where the statute is open-textured.”<sup>279</sup> Instead, Justice Scalia in practice has proven unwilling to let statutory language evolve, and he achieves this result (or argues for it, when he is in the dissent) by decontextualizing statutory language from Congress’s attempts to *change* its meaning and consciously recontextualizing it as a *continuation* of prior usage. The strict plain meaning approach supports such interpretations – arguably, even demands them – by discounting dialogical evidence of purposeful change in favor of “ordinary” connotations and dictionaries. As such, the strict plain meaning approach effectively privileges the non-specialist’s view of a statute over the specialist’s, ignoring any understandings that may dominate in the relevant legal subcultural context.

### **1. A Non-Environmental Example: “Falsely Made”**

Justice Scalia’s tendency to paralyze legal meaning is not limited to his environmental law decisions, and the methodology of his approach is perhaps more obvious in a less specialized area of law, such as in the Court’s 1990 decision in *Moskal v. United States*,<sup>280</sup> where the issue was “whether a person who knowing procures genuine vehicle titles that incorporate fraudulently tendered odometer readings receives those titles ‘knowing [them] to have been *falsely made*’” in

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<sup>279</sup> Eskridge, *supra* note 9, at 667-68.

<sup>280</sup> 498 U.S. 103 (1990).

criminal violation of 18 U.S.C. § 2314.<sup>281</sup> The majority concluded that the “washed titles” “are ‘falsely made’ in the sense that they are made to contain false, or incorrect, information.”<sup>282</sup> It relied on the principle that courts should give meaning to every word in a statute, noting that “[s]hort of construing ‘falsely made’ in this way, we are at a loss to give *any* meaning to this phrase independent of the other terms in § 2314, such as ‘forged’ or ‘counterfeited.’”<sup>283</sup> In addition, Congress’s purpose in enacting § 2314 – “to curb the type of trafficking in fraudulent securities that often depends for its success on the exploitation of interstate commerce” – supported this broader reading.<sup>284</sup> Finally, the majority concluded (probably incorrectly) that there was no fixed common-law meaning for “falsely made,” allowing the Court to discount the presumption that Congress intended the common-law meanings for undefined terms, especially because, “as this Court has previously recognized, Congress’ general purpose in enacting a law may prevail over this rule of statutory construction.”<sup>285</sup>

Justice Scalia dissented, joined by Justices O’Connor and Kennedy, to argue that both the ordinary and the legal meanings of “falsely made” precluded the majority’s interpretation.<sup>286</sup> First, Justice Scalia challenged the majority’s “ordinary meaning,” arguing that “[s]urely the adverb preceding the word ‘made’ naturally refers to the manner of making, rather than to the nature of the product made. An inexpensively made painting is not the same as an inexpensive painting. A forged memorandum is ‘falsely made’; a memorandum that contains erroneous information is simply ‘false.’”<sup>287</sup> Ordinary dictionaries also supported this meaning.<sup>288</sup>

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<sup>281</sup> *Id.* at 105.

<sup>282</sup> *Id.* at 108-09.

<sup>283</sup> *Id.* at 109.

<sup>284</sup> *Id.* at 110.

<sup>285</sup> *Id.* at 115-17, 117.

<sup>286</sup> *See also* Karkkainen, *supra* note 6, at 441 (discussing Justice Scalia’s dissent in this case as an example of Justice Scalia’s preference for narrow interpretations).

<sup>287</sup> *Moskal*, 498 U.S. at 119 (J. Scalia, dissenting).

<sup>288</sup> *Id.* at 119 (J. Scalia, dissenting).

Moreover, Justice Scalia emphasized that the canon of giving each word independent meaning “should not be used to distort ordinary meaning” and must be applied with sensitivity to lawyers’ penchant for iteration.<sup>289</sup>

More important, however, was the phrase’s long pedigree as a legal term of art. “In declaring [the layman’s] understanding to be the governing criterion, rather than the specialized meaning that the term ‘falsely made’ has long possessed, the Court makes a mistake of greater consequence.”<sup>290</sup> Justice Scalia used law dictionaries to trace a consistent meaning for “falsely made” back to at least 1769,<sup>291</sup> then pointed out that when Congress enacted § 2314 in 1939, “the States and the Federal Government had been using the ‘falsely made’ terminology for more than a century in their forgery statutes.”<sup>292</sup> “Commentators in 1939,” he emphasized, “were apparently unanimous in their understanding that ‘false making’ was an element of the crime of forgery, and that the term did not embrace false contents,”<sup>293</sup> and courts were uniform for over two decades in so interpreting the term for purposes of § 2314.<sup>294</sup> As a result, “I think it plain that ‘falsely made had a well-established common-law meaning at the time the relevant language of § 2314 was enacted . . . and that meaning does not support the present conviction.”<sup>295</sup> Justice Scalia thus in effect argued that “falsely made” had never *and could never* apply to genuine documents containing false information – only to documents false in the making.

There can be no doubt that Justice Scalia brought a certain sense of context to § 2314, but not one that could acknowledge the evolution of that statute or of the phrase “falsely made.”

Indeed, one would suppose from reading Justice Scalia’s opinion that Congress had enacted §

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<sup>289</sup> *Id.* at 120 (J. Scalia, dissenting).

<sup>290</sup> *Id.* at 121 (J. Scalia, dissenting).

<sup>291</sup> *Id.* at 121-22 (J. Scalia, dissenting).

<sup>292</sup> *Id.* at 123 (J. Scalia, dissenting).

<sup>293</sup> *Id.* at 125 (J. Scalia, dissenting).

<sup>294</sup> *Id.* at 126 (J. Scalia, dissenting).

<sup>295</sup> *Id.* (J. Scalia, dissenting).

2314 in 1939 and never touched it again. However, by the time the Court was deciding *Moskal*, Congress had amended § 2314 *six* times<sup>296</sup> – enough to make one curious, at least, why the unanimity in the lower courts’ interpretations of “falsely made” fell off after two decades.

While Congress never actually defined “falsely made” for purposes of § 2314, the thrust of these amendments was to repeatedly expand its application. Moreover, in the 1968 amendments in particular, Congress gave fairly convincing evidence that it was dissatisfied with the traditional meaning of “falsely made” when it validated the Department of Justice’s position that falsely countersigned traveler’s checks are “falsely made” within the meaning of § 2314, effectively overturning the Eighth Circuit’s opinion to the contrary. The interpretive issue was exactly parallel to the one that Justice Scalia seized upon:

Section 2311 of title 18 of the United States Code includes traveler’s checks under the definition of the term “securities” as used in an existing paragraph of section 2314. However, the Department of Justice points out in a letter dated January 31, 1968, that the words “falsely made, forged, altered, or counterfeited” have been construed to refer only to the making or execution of an instrument and not to cover a validly executed instrument bearing a forged countersignature (*Streett v. United States*, 331 F.2d 151 (C.A. 8, 1964)[]). Prior to the *Streett* decision, the Department of Justice had taken the position that the countersignature on a traveler’s check is within the proscription of section 2314.<sup>297</sup>

Moreover, the amendment adding falsely countersigned traveler’s checks to § 2314 prevailed over the minority view of Rep. Robert McClory, who argued that the Eighth Circuit in *Streett* “correctly interpreted the Congress’s intent by limiting the coverage of paragraph 3 of section 2314 [the paragraph at issue in *Moskal*] to forged or counterfeited traveler’s checks.”<sup>298</sup>

If nothing else, therefore, the 1968 amendments to § 2314 suggested that the Department

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<sup>296</sup> Act of June 25, 1948, c. 645, 62 Stat. 806; Act of May 24, 1949, c.139, § 45, 63 Stat. 96; Act of July 9, 1956, C. 519, 70 Stat. 507; Pub. L. No. 87-371, § 2, 75 Stat. 802 (Oct. 4, 1961); Pub. L. No. 90-535, 82 Stat. 885 (Sept. 28, 1968); Pub. L. No. 100-690, Title VII, §§ 7057, 7080, 102 Stat. 4181 (Nov. 18, 1988). Moreover, Congress was again amending section 2314 as the Court considered its decision in *Moskal*. See Pub. L. No. 101-647, Title XII, § 1208, 104 Stat. 4789 (Nov. 29, 1990).

<sup>297</sup> H.R. REP. NO. 90-1728, at 55 (July 18, 1968), *reprinted in* 1968 U.S.C.C.A.N. 3654, 3654-55.

<sup>298</sup> *Id.* at 56, *reprinted in* 1968 U.S.C.C.A.N. at 3655.

of Justice and Congress agreed that § 2314 needed to extend to activities that the traditional definition of “falsely made” did not encompass. In Justice Scalia’s view, however, “falsely made” had already acquired an unchangeable meaning by the time Congress enacted § 2314. His apparent position was that once a term acquires a specific legal meaning, Congress is no longer free to change or expand that meaning. Any ongoing dialogue between successive sessions of Congress, between Congress and the Executive, or between Congress and the courts regarding the meaning of a previously defined statutory term – elements of all of which were present in the 1968 amendments to § 2314 – was simply irrelevant.

## 2. “Take” in the Endangered Species Act (ESA)

Justice Scalia’s arguments in *Moskal* may be justifiable on the grounds that Congress never provided a statutory definition of “falsely made” and thus invited courts to limit its meaning to common-law usage. However, Justice Scalia’s willingness to paralyze legal language has also haunted at least two environmental provisions, *despite* statutory definitions that give evidence that Congress intentionally changed the meaning of a legal term of art, and *despite* long-term agency and judicial interpretations that Congress had not seen fit to change in any of several intervening amendments – obliterating the Court’s own presumption “that Congress, in reenacting [statutory provisions in later amendments,] was aware of the settled judicial construction of the statute . . . .”<sup>299</sup>

*Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*<sup>300</sup> (*Sweet Home*) required the Court, in 1995, to decide whether the Secretary of the Interior’s definition of “harm” for purposes of the federal ESA was facially invalid. The ESA prohibits any person from

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<sup>299</sup> Shapiro v. United States, 335 U.S. 1, 16 (1948).

<sup>300</sup> 515 U.S. 687 (1995).

“taking” a listed endangered species,<sup>301</sup> and the Act itself defines “take” to mean “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”<sup>302</sup> By regulation, the Secretary of the Interior had defined “harm” in this definition to mean “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.”<sup>303</sup>

In a 6-3 decision authored by Justice Stevens, a majority of the Court upheld the regulation, which had been in place since 1975.<sup>304</sup> Against arguments that every word in the “take” definition should be interpreted to refer to direct applications of force against an animal, the majority pointed out that dictionary definitions do not limit “harm” to direct applications of force, and, as in *Moskal*, it emphasized that every word in the definition of “take” should have independent meaning.<sup>305</sup> In addition, again as in *Moskal*, “the broad purpose of the ESA supports the Secretary’s decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid.”<sup>306</sup> As a result of the 1982 amendments to the Act,<sup>307</sup> Congress had allowed permits for certain actions that resulted in takings of protected species “if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity,”<sup>308</sup> indicating to the majority that Congress had otherwise prohibited indirect as well as direct takings. Similarly, “[t]he Committee Reports accompanying the bills that became the ESA do not specifically discuss the meaning of ‘harm,’ but they make clear that Congress

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<sup>301</sup> 16 U.S.C. § 1538(a)(1)(B).

<sup>302</sup> *Id.* § 1532(19).

<sup>303</sup> 50 C.F.R. § 17.3.

<sup>304</sup> *Sweet Home*, 515 U.S. at 691.

<sup>305</sup> *Id.* at 697-98.

<sup>306</sup> *Id.* at 698-99 (relying on *TVA v. Hill*, 437 U.S. 153, 175, 180 (1978)).

<sup>307</sup> *Id.* at 707-08.

<sup>308</sup> *Id.* at 700-01 (quoting 16 U.S.C. § 1539(a)(1)(B)).

intended ‘take’ to apply broadly to cover indirect as well as purposeful actions.”<sup>309</sup> The majority noted that Senator Tunney added “harm” to the definition of “take” through a floor amendment and concluded that “[a]n obviously broad word that the Senate went out of its way to add to an important statutory definition is precisely the sort of provision that deserves a respectful reading.”<sup>310</sup> As a result, the Secretary reasonably interpreted “harm” to include indirect injury to species, entitling the regulation to *Chevron* deference.<sup>311</sup>

Justice Scalia, joined in his dissent by Justices Rehnquist and Thomas, instead emphasized the pedigree of “take” as a term of art, noting that “[t]he term ‘harm’ in § 1532(19) has no legal force of its own”; “instead, the only *operative* term in the statute is to ‘take.’”<sup>312</sup> As in *Moskal*, Justice Scalia traced the common-law pedigree of “take” in wildlife law back to at least 1766, emphasizing that “[i]f ‘take’ were not elsewhere defined in the Act, none could dispute what it means, for the term is as old as the law itself. To ‘take,’ when applied to wild animals, means to reduce those animals, by killing or capturing, to human control.”<sup>313</sup> This ancient meaning, moreover, “fits neatly with the rest of § 1538(a)(1),” the ESA’s endangered species prohibitions, most of which deal with importation of, exportation of, and commerce in taken species.<sup>314</sup> Looking at section 1538, according to Justice Scalia, reveals that:

[t]he taking prohibition . . . is only part of the regulatory plan of § 1538(a)(1), which covers all the stages of the process by which protected wildlife is reduced to man’s dominion and made the object of profit. It is obvious that “take” in this sense – a term of art deeply embedded in the statutory and common law concerning wildlife – describes a class of acts (not omissions) done directly and intentionally (not indirectly and by accident) to particular animals (not

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<sup>309</sup> *Id.* at 704-05.

<sup>310</sup> *Id.* at 705.

<sup>311</sup> *Id.* at 703-04.

<sup>312</sup> *Id.* at 717 (J. Scalia, dissenting).

<sup>313</sup> *Id.* at 717 (citing 11 OXFORD ENGLISH DICTIONARY (1933); WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1949); *Geer v. Connecticut*, 161 U.S. 519, 523 (1896) (quoting DIGEST OF JUSTINIAN); 2 W. BLACKSTONE, COMMENTARIES 411 (1766)).

<sup>314</sup> *Id.* at 717-18.

populations of animals).<sup>315</sup>

Of course, as Justice Scalia had to acknowledge, Congress *did* define “take” in the ESA. Moreover, as the *Sweet Home* majority pointed out,<sup>316</sup> the statutory definition of “take” includes “harass,” “pursue,” “wound,” and attempts to “take” as well as “harm.” Thus, as any first-year Property student who had read *Pierson v. Post* should have noticed, “take” for purposes of the ESA is decidedly and obviously *not* the same limited “take” that had been used for centuries in wildlife law – a distinction from the common law that helps to differentiate federal endangered species regulation into a different subculture (biodiversity protection) from the more common forms of wildlife regulation, such as hunting and fishing licenses. According to Justice Scalia, however, this purposeful change of definition was relatively minor and unable to support the majority’s interpretation:

The Act’s definition of “take” does expand the word slightly (and not unusually), so as to make clear that it includes not just a completed taking, but the process of taking, and all of the acts that are customarily identified with or accompany that process . . . and so as to include attempts. § 1532(19). The tempting fallacy – which the Court commits with abandon . . . – is to assume that, *once defined*, “take” loses any significance, and it is only the definition that matters. The Court treats the statute as though Congress had directly enacted the § 1532(19) definition as a self-executing prohibition, and had not enacted § 1538(a)(1)(B) at all. But § 1538(a)(1)(B) *is* there, and if the terms contained in the definition section are susceptible of two readings, one of which comports with the standard meaning of “take” as used in application to wildlife, and one of which does not, an agency regulation that adopts the latter reading is necessarily unreasonable, for it reads the defined term “take” – the only operative term – out of the statute altogether.<sup>317</sup>

Read closely, Justice Scalia’s argument allows that if Congress had provided in section 1538(a)(1)(B) that “no person shall harass, harm, pursue, hunt, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct,” with respect to a listed species, section

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<sup>315</sup> *Id.* at 718.

<sup>316</sup> *Id.* at 697 n.10.

<sup>317</sup> *Id.*

1538(a)(1)(B) would do something different than prohibit takings, and “harm” could have independent meaning. However, by availing itself of the shortcut of so defining “take” once, and then prohibiting “takings,” Congress limited the potential meaning of the prohibition.

As in *Moskal*, therefore, the import of Justice Scalia’s argument is that Congress cannot rid itself of the meaning and limitations of a well-established term of art, *no matter how Congress defines the term in the statute*, because no definition can escape the historical baggage that accompanies the operative term. Legal terms of art, in Justice Scalia’s view, cannot evolve, no matter what the dialogic evidence that Congress was purposefully changing the common law. While, undoubtedly, statutory language would be more precise if legal terms did *not* evolve – if Congress and the courts were forced to create a new term of art every time they wanted to signal a new meaning – that is not how Congress, the courts, or language itself behaves. In the case of the ESA, moreover, the Secretary had promulgated its definition of “harm” two years after Congress enacted the ESA, a proximity to enactment that generally prompts the Court to defer to the agency’s interpretation.<sup>318</sup>

The most important difference between the majority’s opinion and Justice Scalia’s dissent was the majority’s implicit willingness to engage in a dialogic mode of interpretation – to recognize that the ESA was an evolving statute and that congressional amendments provided contexts within which to evaluate the meanings of specific operative words and phrases. By the time the Court decided *Sweet Home*, Congress had amended the ESA’s definition section five times, all subsequent to the Secretary’s regulation<sup>319</sup>; it had also amended section 1538 four

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<sup>318</sup> See, e.g., *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 168 (2001) (privileging the Army Corps of Engineers’ original regulatory interpretation of “waters of the United States”).

<sup>319</sup> Pub. L. No. 100-478, Title I, § 1001, 102 Stat. 2306 (Oct. 7, 1988); Pub. L. No. 97-304, § 4(b), 96 Stat. 1420 (Oct. 13, 1982); Pub. L. 95-159, § 2, 93 Stat. 1225 (Dec. 28, 1979); Pub. L. No. 95-632, § 2 (Nov. 10, 1978); Pub. L. No. 94-359, § 5, 90 Stat. 913 (July 12, 1976).

times.<sup>320</sup> More specifically, as the majority opinion rightly emphasizes, one of the main purposes of the 1982 amendments was to give the Secretary of the Interior authority to exempt incidental takings of listed species from the section 1538(a)(1)(B) prohibition. Congress gave the Secretary this authority primarily to protect (1) private entities engaged in lawful private projects on private lands that would incidentally affect listed species; and (2) private entities engaged in federally permitted projects that the federal agencies had signed off on because the project would not jeopardize the continued existence of listed species in violations of section 1536, but which could still result in incidental takings.<sup>321</sup> Nevertheless, the need for those amendments, their legislative history, and the language of the resulting statutory provisions clearly reveal Congress’s awareness that the Secretary of the Interior and the courts – if not Congress itself – understood the “takings” prohibition to include unintentional and indirect interference with the species.<sup>322</sup> Hence the amendments give evidence of, at the very least, Congress’s acquiescence in a far broader meaning of “take” for purposes of the ESA than Justice Scalia’s “hunting and killing prohibition”<sup>323</sup> from wildlife law would have allowed.

### 3. “Navigable Waters” in the Clean Water Act

Like “take,” “navigable waters” is a long-existing legal term of art. Unlike “take,” however, “navigable waters” does not have, and, since at least the beginning of the 19<sup>th</sup> century,

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<sup>320</sup> Pub. L. No. 100-653, Title IX, § 905, 102 Stat. 3835 (Nov. 14, 1988); Pub. L. No. 100-478, Title I, § 1006, Title II, § 2301, 102 Stat. 2308, 2321 (Oct. 7, 1988); Pub. L. No. 97-304, § 9(b), 96 Stat. 1426 (Oct. 13, 1982); Pub. L. No. 95-632, § 4, 92 Stat. 3760 (Nov. 10, 1978).

<sup>321</sup> H.R. CONF. REP. NO. 97-835, at 29-30, *reprinted in* 1982 U.S.C.C.A.N. 2860, 2870-71; H.R. REP. NO. 97-567, at 15, 17-18, *reprinted in* 1982 U.S.C.C.A.N. 2807, 2815, 2817-18.

<sup>322</sup> See 16 U.S.C. § 1536(b)(4)(B) (allowing incidental take statements for “the taking of an endangered species or threatened species incidental to the agency action); 16 U.S.C. § 1539(a)(1)(B) (allowing incidental take permits for “any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity); H.R. CONF. REP. NO. 97-835, at 29 (Sept. 17, 1982), *reprinted in* 1982 U.S.C.C.A.N. 2860, 2870 (discussing the need for the two incidental take exemptions); H.R. REP. NO. 97-567, 8, 15, 26-27 (May 17, 1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2808, 2815, 2826-27 (discussing the need for incidental take exemptions to protect private landowners in their conduct of otherwise lawful activities).

<sup>323</sup> *Sweet Home*, 515 U.S. at 714 (J. Scalia, dissenting).

has not had, a single legal meaning. Instead, the meaning of this legal term of art has always been context-dependent, both at common law and in federal statutes.

Federal common law, for example, recognizes at least three meanings of “navigable waters.” The “navigable waters of the United States” for purposes of the federal government’s traditional Commerce Clause authority over navigation – the waters which are subject to the federal navigation servitude and over which the Army Corps of Engineers has jurisdiction under the Rivers and Harbors Act of 1899 – are the waters that: (1) are subject to the ebb and flow of the tide or that are navigable-in-fact, meaning that “they are used, or are susceptible of being used . . . as highways for commerce . . . in the customary modes of trade and travel on water,”<sup>324</sup> whether navigable “in their ordinary condition”<sup>325</sup> or made navigable through artificial aids<sup>326</sup>; and (2) “form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries . . . .”<sup>327</sup> Admiralty jurisdiction, in contrast, is limited to “navigable waters” that are *presently* used, or *presently* capable of being used, as an interstate highway.<sup>328</sup> Different still are the “navigable waters of a State” for the federal public trust doctrine, which are the waters that, *at the time of the state’s admission*,<sup>329</sup> were affected by the tides or navigable-in-fact.<sup>330</sup>

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<sup>324</sup> The *Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870).

<sup>325</sup> *Id.*

<sup>326</sup> *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407 (1940).

<sup>327</sup> *The Daniel Ball*, 77 U.S. at 563. As the Army Corps has summarized for the Rivers and Harbors Act:

Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.

33 C.F.R. § 329.4.

<sup>328</sup> *Ex parte Garnett*, 141 U.S. 1, 14-15 (1891).

<sup>329</sup> *Utah v. United States*, 403 U.S. 9, 10 (1971); *Shiveley v. Bowlby*, 152 U.S. 1, 26-28 (1894); *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410, 416-17 (1842).

<sup>330</sup> *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 477 (1988).

Moreover, unlike “navigable waters of the United States” or “navigable waters” for purposes of admiralty jurisdiction, “navigable waters of a State” can be subject to the federal public trust doctrine even if the waters are not part of an interstate or international commercial highway.<sup>331</sup>

As if these varying common-law definitions were not complex enough, Congress has enacted more specialized definitions of “navigable waters” for particular statutes. Under the Federal Power Act, for example,

“navigable waters” means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition, notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority . . . .<sup>332</sup>

This definition is obviously based on the common law “navigable waters of the United States,” with additional specificity. In contrast, in the Alaska Native Claims Settlement Act, Congress specified that “the terms ‘navigable’ and ‘navigability’ means navigable for the purpose of determining title to lands beneath navigable waters, as between the United States and the several States pursuant to the Submerged Lands Act,”<sup>333</sup> more clearly referencing (as does the Submerged Lands Act) the common-law definition of “navigable waters of the States.”

Against this definitional complexity, Congress in 1972 defined “navigable waters” for purposes of the Clean Water Act as “the waters of the United States, including the territorial seas.”<sup>334</sup> Notably absent from this definition – especially in comparison to both common law and other statutory provisions – is any reference to *actual* navigability. Indeed, the Conference

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<sup>331</sup> Utah v. United States, 403 U.S. at 10.

<sup>332</sup> 16 U.S.C. § 796(8).

<sup>333</sup> 43 U.S.C. § 1631(d).

<sup>334</sup> 33 U.S.C. § 1362(7).

Committee noted that “[t]he conferees fully intend that the term ‘navigable waters’ be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes,”<sup>335</sup> such as the Army Corps’ definition of “navigable waters” for purposes of the Rivers and Harbors Act.<sup>336</sup> Moreover, Congress has since incorporated this non-traditional definition into other environmental statutes, including the Comprehensive Environmental Response, Compensation, and Liability Act of 1980<sup>337</sup> and the Oil Pollution Act of 1990.<sup>338</sup>

The two agencies that implement the Clean Water Act, the EPA and the Army Corps of Engineers – especially the EPA – have understood Congress to have intended a broad definition of “navigable waters” for purposes of the Clean Water Act. In their regulations defining “waters of the United States, which have remained essentially unchanged since 1977, the two agencies effectively extended Clean Water Act jurisdiction to the limits of the Commerce Clause, including not just waters subject to the ebb and flow of the tide, interstate waters, and traditional navigable waters, but also “[a]ll . . . waters such as intrastate lakes, rivers, streams,(including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which could affect interstate or foreign commerce . . . .”<sup>339</sup>

The Supreme Court has twice interpreted “navigable waters” for purposes of the Clean Water Act, illustrating profound differences between the traditional and strict plain meaning approaches to statutory interpretation. In 1985, in *United States v. Riverside Bayview Homes*,

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<sup>335</sup> CONF. REP. NO. 91-1236 (Sept. 28, 1972), *reprinted in* 1972 U.S.C.C.A.N. 3776, 3821.

<sup>336</sup> *See supra* note 334 (quoting this definition).

<sup>337</sup> 42 U.S.C. § 9601(15).

<sup>338</sup> 33 U.S.C. § 2701(12). For an example of how potentially complex definitions in this area of law can be, the Aquatic Nuisance Control Act inverts the Clean Water Act’s definition, defining “waters of the United States” to be “the navigable waters and the territorial sea of the United States.” 16 U.S.C. § 4702(16).

<sup>339</sup> 33 C.F.R. § 328.3(a) (Army Corps); 40 C.F.R. § 230.3(s) (EPA).

*Inc.*,<sup>340</sup> the Court used a traditional approach, sensitive to the entire context of the 1972 Clean Water Act, to uphold the Army Corps' (and by implication, the EPA's) inclusion of wetlands adjacent to other waters as "waters of the United States." The Court acknowledged that the border between lands and waters can be difficult to pinpoint<sup>341</sup> and that the Corps' interpretation effectuated the Act's purposes and goals.<sup>342</sup> Reviewing the Clean Water Act's legislative history, the Court concluded that "[p]rotection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and its is essential that discharge of pollutants be controlled at the source.'"<sup>343</sup>

Given these purposes, goals, and legislative history, the Court was willing to allow the term "navigable waters" to evolve beyond its common law meanings. "Congress chose to define the waters covered by the Act broadly,"<sup>344</sup> and the Act's definition of "navigable waters" as "the waters of the United States" made it clear that the term "navigable" was of "limited import":

In adopting this definition of "navigable waters," Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term.<sup>345</sup>

In sharp contrast to Justice Scalia's interpretation of "take" in *Sweet Home*, therefore, the *Riverside Bayview* Court was not only willing to accept Congress's intentional re-defining at face value, allowing the term "navigable waters" to evolve in meaning for purposes of the Clean Water Act, but also to interpret the 1972 Act dialogically, putting it in the context of earlier water pollution control statutes and hence recognizing that the Clean Water Act's definition was,

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<sup>340</sup> 474 U.S. 121 (1985).

<sup>341</sup> *Id.* at 132.

<sup>342</sup> *Id.* (quoting 33 U.S.C. § 1251(a) (1982)).

<sup>343</sup> *Id.* at 132-33 (citing H.R. REP. NO. 92-911, at 76 (1972), and quoting S. REP. NO. 92-414, at 77, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742).

<sup>344</sup> *Id.* at 133.

<sup>345</sup> *Id.* (citing S. CONF. REP. NO. 92-1236, at 144 (1972); 118 Cong. Rec. 33756-57 (1972) (statement of Rem. Dingell)).

in fact, a *change* in congressional approach.

The *Riverside Bayview* Court was also sensitive to post-1972 developments in the Clean Water Act and the context that those developments created for interpreting “navigable waters.” In particular, in response to the EPA’s and the Corps’ 1977 regulations, Congress seriously debated the extension of the Clean Water Act to wetlands as it drafted the 1977 amendments to the Act. In the end, the *Riverside Bayview* Court recognized, despite lively attempts in both the House and the Senate to limit the Act’s jurisdiction, “efforts to narrow the definition of ‘waters’ were abandoned,”<sup>346</sup> leading the Court to conclude that “Congress acquiesced in the administrative construction” of “waters of the United States.”<sup>347</sup> At the same time, Congress in the 1977 amendments added section 1344(g) to the Act, which allowed the states to administer the Act’s “dredge and fill” permit program for the navigable waters “other than those waters which are presently used, or are susceptible to use . . . as a means to transport interstate or foreign commerce . . . , including wetlands adjacent thereto . . . .”<sup>348</sup> In this “other than” provision, therefore, Congress had both indicated that Clean Water Act “navigable waters” included more types of waters than the traditional “navigable waters of the United States,” and that those additional waters expressly included adjacent wetlands.<sup>349</sup>

Given this overall context for the Clean Water Act’s “navigable waters,” both before and after 1972, the Court accorded the Corps’ regulation *Chevron* deference,<sup>350</sup> concluding “that the Corps has acted reasonably in interpreting the Act to require permits for the discharge of fill material into wetlands adjacent to ‘waters of the United States.’”<sup>351</sup> However, in a footnote, the

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<sup>346</sup> *Id.* at 137.

<sup>347</sup> *Id.* at 135-36.

<sup>348</sup> 33 U.S.C. § 1344(g)(1) (2000).

<sup>349</sup> *See Riverside Bayview Homes*, 474 U.S. at 137.

<sup>350</sup> *Id.* at 130-31 (referencing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

<sup>351</sup> *Id.* at 137.

Court emphasized that it did “not express any opinion on th[e] question” of non-adjacent wetlands.<sup>352</sup>

The Court did not address this isolated waters question until its 2001 decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*<sup>353</sup> (*SWANCC*), after Justice Scalia had joined the Court. In a 5-4 decision authored by Justice Rehnquist, the majority held, most precisely, that the Army Corps could not assert Clean Water Act jurisdiction over the Solid Waste Agency’s proposed landfill site on the basis of the Migratory Bird Rule,<sup>354</sup> the Army Corps’ and the EPA’s nonregulatory gloss on “navigable waters” through which they asserted Clean Water Act jurisdiction over isolated ponds and wetlands used by migratory birds.<sup>355</sup>

Eschewing most of the *Riverside Bayview* Court’s dialogic understanding of “navigable waters,” the *SWANCC* Court instead emphasized the constitutional dimensions of the case, pointing out that Congress intended not only “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” but also “to ‘recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution,’” a federalism concern.<sup>356</sup> The Court also recognized that the Corps’ assertion of jurisdiction over the isolated waters at issue raised a Commerce Clause issue – indeed, Solid Waste Agency argued that the Corps’ interpretation violated the Commerce Clause. Rather than decide that issue, however, it used the constitutional challenge as a reason not to accord *Chevron* deference to the Army Corps’ interpretation, noting that “[w]here an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress

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<sup>352</sup> *Id.* at 131 n.8.

<sup>353</sup> 531 U.S. 159 (2001).

<sup>354</sup> *Id.* at 174.

<sup>355</sup> *See* 51 Fed. Reg. 41,217 (1986).

<sup>356</sup> *SWANCC*, 531 U.S. at 166-67 (quoting 33 U.S.C. § 1251(a) and (b)).

intended that result”<sup>357</sup> and concluding that there “are significant constitutional questions raised by respondents’ application of their regulations, and yet we find nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit such as we have here.”<sup>358</sup> As a result, according to the majority, “[w]e thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents’ interpretation, and therefore reject the request for administrative deference.”<sup>359</sup>

“Reading the statute as written” meant not only acknowledging Congress’s federalism concerns but also resurrecting the traditional definition of “navigable waters,” despite *Riverside Bayview*. The *SWANCC* Court concluded that “[i]t was the significant nexus between the wetlands and ‘navigable waters’ that informed our reading of the [Clean Water Act] in *Riverside Bayview Homes*,”<sup>360</sup> already revealing a Scalia-like unwillingness to abandon traditional definitions. In *Riverside Bayview*, the Court decided that adjacent wetlands *are* “waters of the United States” – *i.e.*, “navigable waters” – for purposes of the Clean Water Act. In *SWANCC*, however, wetlands are always something *other than* “navigable waters,” allowing for there to be a nexus between them and the “real” “navigable waters.”

For evidence that this reading of the Court’s opinion is not too subtle, one need only note that the Court’s next consideration was the Army Corps’ 1974 regulations. According to the *SWANCC* majority,

the Corps’ *original* interpretation of the [Clean Water Act], promulgated two years after its enactment, is inconsistent with that which it espouses here. Its 1974 regulations defined § 404(a)’s “navigable waters” to mean “those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for

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<sup>357</sup> *Id.* at 172 (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

<sup>358</sup> *Id.* at 174.

<sup>359</sup> *Id.* at 174.

<sup>360</sup> *Id.* at 167.

purposes of interstate or foreign commerce.” 33 C.F.R. § 209,120(d)(1). The Corps emphasized that “[i]t is the water body’s capability of use by the public for purposes of transportation or commerce which is the determinative factor.” § 209.260(e)(1). Respondents put forth no persuasive evidence that the Corps mistook Congress’ intent in 1974.<sup>361</sup>

Completely missing from this discussion is any recognition on the part of the majority that: (1) the Army Corps cribbed this definition from its definition of “navigable waters” for the Rivers and Harbors Act of 1899<sup>362</sup>; (2) the Rivers and Harbors Act definition was one of the “administrative interpretations” of “navigable waters” that Congress was consciously trying to change in 1972<sup>363</sup>; (3) the Army Corps changed its regulatory definition in 1977 at the insistence of the EPA, which holds the ultimate interpretive authority under the Clean Water Act not just for the Act as a whole but also for section 404 in particular<sup>364</sup>; or (4) there are no “navigable waters” just for section 404, because the term “navigable waters” applies throughout the Act, including to the programs administered solely by the EPA.<sup>365</sup>

The majority’s analysis is similarly adialogical regarding subsequent statutory amendments. The EPA’s and Army Corps’ regulatory definitions extending Clean Water Act jurisdiction to isolated waters were part of the same 1977 regulations to which the *Riverside Bayview* Court determined that Congress had acquiesced through the 1977 amendment process. Nevertheless, the *SWANCC* Court concluded that “[t]he relationship between the actions and inactions of the 95<sup>th</sup> Congress and the intent of the 92d Congress in passing § 404(a) is . . .

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<sup>361</sup> *Id.* at 168.

<sup>362</sup> *See* 42 Fed. Reg. 37,123 (1974) (acknowledging that the Corps’ 1974 regulations “limited the Section 404 permit program to the same waters that were being regulated under the River and Harbor Act of 1899.”).

<sup>363</sup> S. CONF. REP. NO. 92-1236, at 144 (1972).

<sup>364</sup> *See* 33 U.S.C. §§ 1251(d) (specifying that the EPA implements the Clean Water Act unless specific provisions specify otherwise), 1344(b) (giving the EPA authority to set guidelines for section 404 permits and veto power over the Army Corps’ issuance of those permits); 43 Op. Atty. Gen 197 (1979) (concluding that “Congress intended to confer upon the administrator of the [EPA] the final administrative authority” to determine the reach of the term “navigable waters”).

<sup>365</sup> 33 U.S.C. §§ 1362(7) (defining “navigable waters” for the entire Act); 1342(a) (giving the EPA the authority to issue National Pollutant Discharge Elimination System permits for “discharges of pollutants,” which is defined to include discharges into the “navigable waters”).

considerably attenuated. Because ‘subsequent history is less illuminating than the contemporaneous evidence,’ . . . respondents face a difficult task in overcoming the plain text and import of § 404(a).”<sup>366</sup> Because the respondents could point to nothing definitive beyond “some legislative history showing Congress’ recognition of the Corps’ assertion of jurisdiction over ‘isolated waters,’” they failed to convince the majority that Congress had acquiesced to that jurisdiction in 1977.<sup>367</sup>

Nor did the “other waters” provision in section 404(g) help the Army Corps, because “§ 404(g) gives no intimation of what those waters might be . . . .”<sup>368</sup> Thus, although “[r]espondents conjecture that “other . . . waters” must incorporate the Corps’ 1977 regulations, . . . it is also plausible, as petitioner contends, that Congress simply wanted to include all waters adjacent to ‘navigable waters,’ such as nonnavigable tributaries and streams.”<sup>369</sup>

At bottom, as with Justice Scalia’s view of “take” in the ESA, the majority could not let go of the traditional meaning of “navigable waters.” It emphasized that the Army Corps’ counsel had conceded that extension of Clean Water Act “navigable waters” to isolated waters would have to “assume that ‘the use of the word navigable in the statute . . . does not have any independent significance.’”<sup>370</sup> The majority, however, could not agree that Congress had defined “navigable” out of that term of art.<sup>371</sup> Conceding that the *Riverside Bayview* Court had found the word “navigable” to be of “limited import,” the *SWANCC* majority nevertheless insisted that

it is one thing to give a word limited effect and quite another to give it no effect whatever. The term ‘navigable’ has at least the import of showing us what Congress had in mind as its authority for enacting the [Clean Water Act]: its traditional jurisdiction over waters that were or had been navigable in fact or

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<sup>366</sup> *SWANCC*, 531 U.S. at 170 (quoting *Hagen v. Utah*, 510 U.S. 399, 420 . . . (1994)).

<sup>367</sup> *Id.* at 170-71.

<sup>368</sup> *Id.* at 171.

<sup>369</sup> *Id.* at 171.

<sup>370</sup> *Id.* at 171-72 (quoting Transcript of Oral Argument 28).

<sup>371</sup> *Id.* at 172.

which could reasonably be so made.<sup>372</sup>

Given this historical meaning, moreover, the jurisdictional extent of section 404, at least so far as isolated waters and migratory birds were concerned, was “clear.”<sup>373</sup>

Justice Stevens, writing in dissent for himself and Justices Souter, Ginsburg, and Breyer, relied upon a far different cultural context to discern the meaning of the Clean Water Act’s “navigable waters.” He began with statutory history, contextualizing the Clean Water Act’s place in federal water quality regulation by tracing federal water quality regulation from the 19<sup>th</sup> century forward, “a history that the majority largely ignores.”<sup>374</sup> Emphasizing that the 1972 Clean Water Act was “‘watershed’ legislation” that “endorsed fundamental changes in both the purpose and the scope of federal regulation in the Nation’s waters,”<sup>375</sup> he dialogically contrasted Congress’s use of “navigable waters” in the Clean Water Act to its previous use of that phrase in the Rivers and Harbors Act of 1899, emphasizing that Congress purposefully broadened both the Corps’ mission and its jurisdiction in the Clean Water Act and defined “navigable waters” so that it “requires neither actual nor potential navigability.”<sup>376</sup> “Indeed, the 1972 conferees arrived at the final formulation by specifically deleting the word ‘navigable’ from the definition that had originally appeared in the House version of the Act. The majority today undoes that deletion.”<sup>377</sup>

Justice Stevens also saw direct parallels between the interpretive debates in *Sweet Home* and the results in *SWANCC*:

The majority accuses respondents of reading the term “navigable” out of the statute. . . . But that was accomplished by Congress when it deleted the word from the § 502(7) definition. After all, it is the *definition* that is the appropriate focus of our attention. *Babbitt v. Sweet Home Chapter of Communities for Great Oregon*, 515 U.S. 687, 697-98,

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<sup>372</sup> *Id.* (citing *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-08 (1940)).

<sup>373</sup> *Id.*

<sup>374</sup> *Id.* at 177, 177-82 (J. Stevens, dissenting).

<sup>375</sup> *Id.* at 175 (J. Stevens, dissenting).

<sup>376</sup> *Id.* (J. Stevens, dissenting).

<sup>377</sup> *Id.* at 180-81 (J. Stevens, dissenting).

n. 10 . . . (1995) (refusing to be guided by the common-law definition of the term “take” when construing the term within the Endangered Species Act of 1973 and looking instead to the meaning of the terms contained in the definition of “take” supplied by the statute). Moreover, a proper understanding of the history of federal water pollution regulation makes clear that – even on respondents’ broad reading – the presence of the word “navigable” in the statute is not inexplicable. The term was initially used in the various Rivers and Harbors Acts because (1) at the time those statutes were first enacted, Congress’ power of the Nation’s waters was viewed as extending only to “water bodies that were deemed ‘navigable’ and therefore suitable for moving goods to or from markets,” Power 513; and (2) those statutes had the primary purpose of protecting navigation. Congress’ choice to employ the term “navigable waters” in the 1972 Clean Water Act simply continued nearly a century of usage.<sup>378</sup>

In Justice Stevens’ view, therefore, the majority in *SWANCC* blinded itself to this dialogic evidence of statutory evolution and hence gave too much weight to the traditional meaning of “navigable waters.”

The majority similarly blinded itself to the interactions between Congress and the agencies that implement the Clean Water Act, especially the Army Corps, again distorting the majority’s interpretation of “navigable waters.” Unlike the majority, for example, Justice Stevens outlined *why* the Army Corps had changed its initial regulatory definition of “waters of the United States”: “The reaction to those regulations in the federal courts, in the Environmental Protection Agency (EPA), and in Congress convinced the Corps that the statute required it ‘to protect water quality to the full extent of the [C]ommerce [C]lause’ and extend federal regulation over discharges ‘to many areas that have never before been subject to Federal permits or to this form of water quality protection.’”<sup>379</sup>

Moreover, Justice Stevens more broadly reviewed the 1977 Army Corps/Congress debate about Clean Water Act jurisdiction. He noted, for instance, that when the Army Corps revised

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<sup>378</sup> *Id.* at 182 (J. Stevens, dissenting).

<sup>379</sup> *Id.* at 183-84 (J. Stevens, dissenting) (quoting 40 Fed. Reg. 31,320 (1975) and citing *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685, 686 (D.C. 1975); *United States v. Holland*, 371 F. Supp. 665 (M.D. Fla. 1974); Letter dated June 19, 1974, from Russell E. Train, Administrator of EPA, to Lt. Gen. W.C. Gribble, Jr., Chief of Corps of Engineers (as presented in Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings before the Senate Committee on Public Works, 94<sup>th</sup> Cong., 2d Sess. 349 (1976)); 33 U.S.C. § 1251(d); 43 Op. Atty. Gen. 197 (1979); H.R. REP. NO. 93-1396, at 23-27 (1974)).

its regulations between 1975 and 1977, it detailed three phases of implementation:

phase 1, which became effective immediately, encompassed the navigable waters covered by the 1974 regulation and the RHA; phase 2, effective after July 1, 1976, extended Corps jurisdiction to nonnavigable tributaries, freshwater wetlands adjacent to primary navigable waters, and lakes; and phase 3, effective after July 1, 1977, extended Corps jurisdiction to all other waters covered under the statute, including any waters not covered by phases 1 and 2 (such as “intermittent rivers, streams tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters”) that “the District Engineer determines necessitate regulation for the protection of water quality.”<sup>380</sup>

The final 1977 regulations, moreover, made it clear that these Phase 3 waters included isolated waters and wetlands.<sup>381</sup> Justice Stevens then illustrated that, in its 1977 statutory amendments, Congress was aware of these three phases and of the Corps’ inclusion of isolated waters within the scope of the Clean Water Act.<sup>382</sup> Thus, in refusing to limit the meaning of “navigable waters” in 1977 and in adding subsections (f) and (g) to section 404, Congress not only acquiesced in the *entire* package of the 1977 regulations but also conveyed its understanding that Clean Water Act jurisdiction extended to isolated waters.<sup>383</sup>

Finally, Justice Stevens put the Clean Water Act’s federalism concerns in historical context, noting that Congress specifically amended section 404 in 1977 to extend states like Illinois the opportunity to regulate wetlands.<sup>384</sup> As a result, “[b]ecause Illinois could have taken advantages of the opportunities offered to it through § 404(g), the federalism concerns which the majority adverts are misplaced,” and the Corps’ interpretation was entitled to deference.<sup>385</sup>

In *SWANCC*, therefore, the majority’s adialogic view of “navigable waters” impeded Congress’s conscious broadening of that term’s historical meaning for purposes of the Clean

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<sup>380</sup> *Id.* at 184 (J. Stevens, dissenting) (quoting 40 Fed. Reg. 31,325-26 (1975)).

<sup>381</sup> *Id.* (J. Stevens, dissenting) (citing 42 Fed. Reg. 37,127 (1977) (amending 33 C.F.R. § 328.3(a)(3) (1977)).

<sup>382</sup> *Id.* at 185-91 (J. Stevens, dissenting).

<sup>383</sup> *Id.* at 188, 189-90 (J. Stevens, dissenting).

<sup>384</sup> *Id.* at 191-92 (J. Stevens, dissenting) (emphasizing 33 U.S.C. § 1344(g) and S. REP. NO. 95-370, at 75, *reprinted in* 1977 U.S.C.C.A.N. 4400).

<sup>385</sup> *Id.* at 192 (J. Stevens, dissenting).

Water Act, despite a broad statutory definition, broad regulatory definitions, and substantial interactions between Congress, the lower courts, and the agencies responsible for implementing the Act that revealed Congress's acceptance of a consensual interpretation that Clean Water Act "navigable waters" extended to the limits of the Commerce Clause – an interpretation that Congress arguably had intended since 1972. In so doing, the majority distorted Congress's hierarchy of purposes, elevating federalism concerns over water quality goals in contradiction to both literal statutory presentation<sup>386</sup> and the Act's historical evolution from a state-based water quality regime to a federal-agency-based regulatory regime.<sup>387</sup> Predictably, commentators on *SWANCC* overwhelmingly argue that the *SWANCC* majority got it wrong, violating both Congress's and the relevant subculture's understanding of how the Clean Water Act works.<sup>388</sup>

#### IV. CONCLUSION

Statutory interpretation and construction are exercises of power. The person who interprets the law controls how that law is actually applied and hence how people behave, what

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<sup>386</sup> See 33 U.S.C. 1251 (putting water quality goals prior to federalism goals).

<sup>387</sup> See ROBIN KUNDIS CRAIG, *THE CLEAN WATER ACT AND THE CONSTITUTION: LEGAL STRUCTURE AND THE PUBLIC'S RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT* 10-21 (2004) (tracing the evolution of the Federal Water Pollution Control Act, the Clean Water Act's predecessor).

<sup>388</sup> See, e.g., John D. Ostergren, *SWANCC in Duck Country: Will Court-Ordered Devolution Fill the Prairie Potholes?*, 22 *STAN. ENVTL. L.J.* 381 (June 2003); Edward A. Fitzgerald, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers: Isolated Waters, Migratory Birds, Statutory and Constitutional Interpretation*, 43 *NATURAL RESOURCES J.* 11 (Winter 2003); Bradford C. Mank, *The Murky Future of the Clean Water Act After SWANCC: Using a Hydrological Connection Approach to Saving the Clean Water Act*, 30 *ECOLOGY L.Q.* 811 (2003); James Duquet, *Could Narrowing Federal Jurisdiction Under the Clean Water Act Actually Take Away States; Ability to Protect Their Own Waters? The Unintended Consequences of SWANCC*, 20 *T.M. COOLEY L. REV.* 361 (2003); Margaret A. Johnston, *The Supreme Court Scales Back the Army Corps of Engineers' Jurisdiction Over "Navigable Waters" Under the Clean Water Act*, 24 *U. ARK. LITTLE ROCK L. REV.* 329 (Winter 2002); William F. Northrip, *Running Aground on the (Shoal) "Waters of the United States": The Supreme Court Invalidates the Migratory Bird Rule*, 66 *MO. L. REV.* 903 (Fall 2001); Philip Weinberg, *It's Time for Congress to Rearm the Army Corps of Engineers: A Response to the Solid Waste Agency Decision*, 20 *VA. ENVTL. L.J.* 531 (2001); Robin Kundis Craig, *Navigating Federalism: The Missing Statutory Analysis in Solid Waste Agency*, 31:5 *ENVTL. L. REP.* 10508 (May 2001).

policies take priority, who profits, who pays – who wins and who loses.<sup>389</sup> So much should be uncontroversial.

The received wisdom is that the strict plain meaning approach reduces federal court power by reducing the federal courts’ discretion and flexibility in interpreting statutes.<sup>390</sup> And it may be true that, given the Supreme Court’s increasing use of a strict plain meaning approach, judges in lower courts now have (or at least feel that they have) less discretion to depart from or even gloss a statute’s plain meaning as discerned from within the “four corners” of the statute. The Court’s self-imposed interpretive hamstringing, however, does not change the fact that the strict plain meaning approach concentrates interpretive authority within the judicial branch. Thus, although rarely discussed as such, the Supreme Court’s shift from the traditional plain meaning approach to the textualists’ strict plain meaning approach is also an exercise of power. As James Boyd White has noted, “[t]he law establishes roles and relations and voices, positions from which and audiences to which one may speak, and it gives us as speakers the materials and methods of discourse.”<sup>391</sup> Moreover, “[t]he legal text . . . – whether constitution, trust, statute, or contract – always requires that one who claims a meaning for it answer the question, ‘Who are you when you speak as you do?’”<sup>392</sup> The shift from the traditional to the strict plain meaning approach effectively changes the context of statutory interpretation, in the process altering who has the authority to establish statutory meaning and what interpretive arguments are acceptable.

At its core, for all statutes, the shift from the traditional to the strict plain meaning approach is a shift from a Congress-centered to a Court-centered context for statutory

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<sup>389</sup> See WHITE, *supra* note 163, at 264 (describing *McCulloch v. Maryland* as “not an isolated exercise of power” (emphasis added) but rather as “part of a continuing and collective process of conversation and judgment” dependent both on precedent and future changes).

<sup>390</sup> Karkkainen, *supra* note 6, at 425-30; Randolph, *supra* note 26, at 74; Schauer, *supra* note 17, at 730-34; Eskridge, *supra* note 9, at 674-75; Gilhooley, *supra* note 8, at 278-79.

<sup>391</sup> WHITE, *supra* note 163, at 266.

<sup>392</sup> *Id.* at 267.

interpretation. As Judge Patricia Wald has noted, “much of the textualists’ critique attacks reliance on materials other than statutory text because Congress has a voice as a constitutional player only through its finally enacted statutes, not through any supplemental explanation thereof.”<sup>393</sup> This change in relevant context changes the methodology of statutory interpretation from a broad, historical review of congressional purpose to a narrow, contemporary, and instantaneous examination of only the text itself – from a good faith attempt to determine what Congress thought it was doing and to the Court’s exposition of its own understanding of the words Congress employed.

For statutes aimed at a particular legal subculture, the Court’s shift from the traditional to the strict plain meaning approach *doubly* changes the relevant interpretive context, shifting the Court’s focus not only from author (Congress) to reader but also from intended reader (administrative agency, regulated entity) to an “ordinary reader,” whose relevant stand-ins are the Supreme Court Justices themselves.<sup>394</sup> To be sure, these shifts are not always blatant. Nor do they necessarily – or even often – result in constructions of federal statutes that differ from how a Court using the traditional plain meaning approach with a fully developed sense of

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<sup>393</sup> Wald, *supra* note 11, at 285.

<sup>394</sup> Writing to justify judges use of legislative history, Judge Wald has argued that the strict plain meaning approach:

begs the questions: “reasonable” to whom? “Apparent” to whom? The answer, as far as I can see, is the writing judge. Which, then, is the best source: 1) the ruminations of an article III judge who has turned away from legislative materials to discern independently a “pattern” or a “reasonable purpose” in a statute in order to shed light on an issue that the statutory language itself fails to clearly settle; or, 2) the admittedly nonbinding, but often illuminating declarations of a House or Senate report explaining what the committee thought it was doing, or the speech of a bill’s sponsor in which the sponsor declares his or her objectives in introducing the legislation? Given a choice, I would pin my hopes for fidelity to the “intentions of Congress” on the latter. We need not kill a useful concept – the “intention of Congress” – simply because we have a hard time defining it in the abstract.”

*Id.* at 305.

statutory context might have construed the same provision.<sup>395</sup> Again, one must emphasize: most of the time language works as intended, and *any* approach that starts with the words of the statute will often lead to the same construction.<sup>396</sup>

Nevertheless, the current Court has become almost infamous for the number of 5-4 and 6-3 decisions it issues, and such splits turn often enough on the Justices' approaches to statutory construction to make any differences between those approaches, however subtle, worth noting.<sup>397</sup> Moreover, as the split decisions discussed in this article illustrate, the Justices' shifts in the acceptable audience-based context for construing a statute and their willingness to engage in a dialogical mode of analysis do in fact change the meaning of statutes.

The purpose of this article is to suggest that the Supreme Court's increasing reliance on a strict plain meaning approach is a particularly potent power-shifting mechanism for particular kinds of statutes: complex public regulatory statutes implemented through administrative agencies that have existed and evolved over a significant period of time, allowing a recognizable legal subculture to develop and to converse statutorily through increasing specialized language. In taking an "acontextual" textualist reading of such statutes – the reading of an outsider "ordinary person" coming cold to the most recent statutory pronouncements – the strict plain meaning approach ignores the statute's dialogic dimension, the evolved and evolving meanings accepted by the relevant subculture, allowing Justices using that approach to exploit textual

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<sup>395</sup> Schauer, *supra* note 17, at 717.

<sup>396</sup> See Aleinikoff & Shaw, *supra* note 8, at 700 (noting that "when Congress wants to accomplish something badly enough to write a statute about it, Congress will quite likely will seek and be able to find words that rather clearly express what it wishes to accomplish. That is, 'plain meaning' is more than likely to reflect fairly closely the underlying purposes of the statute.").

<sup>397</sup> See Schauer, *supra* note 17, at 717-18 ("Thus, if we at times focus on those instances in which interpretive issues rise to the level of conscious examination, we will be concerned with a skewed subset of all instances of statutory direction – a subset consisting only of instances in which nonfrivolous interpretive principles indicate mutually exclusive results."), 719 (arguing that "even if the number of cases in which plain meaning and purpose diverge is small, the decisions in those cases may have an effect larger than immediately apparent on legal understanding").

imprecision and historical terms of art to impose their own meaning on the statutory language.

When such Justices are in the majority, the resulting decision can – and has – violently upset the understanding and practice of the subculture’s participants (including Congress), with no guarantee, given political realities, that Congress can “fix” the statute afterwards.<sup>398</sup>

Two other trends in the Supreme Court indicate that this suggested “power grab” is not too far-fetched. First, as in *City of Chicago* and *SWANCC*, the Court has been repeatedly limiting the situations in which it will accord *Chevron* deference to administrative agencies,<sup>399</sup> effectively transferring interpretive authority from those agencies to the Court itself. Second, the Justices are less likely to insist on the strict plain meaning approach in non-administratively mediated, general areas of law already under the Court’s control, such as civil procedure and federal court jurisdiction. For instance, in its recent decision in *Intel Corp. v. Advanced Micro Devices, Inc.*,<sup>400</sup> the seven Justice majority (Justice O’Connor did not participate) freely used the

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<sup>398</sup> Professors Aleinikoff and Shaw, for example, have noted:

Advocates of “plain meaning” may feel vindicated by Congress’s actions: the interpretive strategy lodges law-making power in Congress, not the courts, and any judicial “errors” may be corrected easily. But there are substantial costs to court-induced incoherence. Legislative corrections do not come easily. . . . Moreover, even when legislative action is accomplished, it requires the spending of political capital that otherwise could have been invested elsewhere.

Aleinikoff & Shaw, *supra* note 8, at 697-98.

<sup>399</sup> See *General Dynamics Land Sys., Inc. v. Cline*, --- U.S. ---, 124 S. Ct. 1236, 1248 (2004) (“Even for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent.”); *Alaska Dept. of Env’tl. Conservation v. Env’tl. Protection Agency*, --- U.S. ---, 124 S. Ct. 983, 1001 (2001) (holding that an EPA interpretation in internal guidance documents is not entitled to *Chevron* deference); *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110 n.6 (2002) (holding that the Equal Employment Opportunity Commission’s guidelines are not entitled to *Chevron* deference); *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (holding that tariff rulings by the U.S. Customs Service are not entitled to *Chevron* deference); *SWANCC*, 531 U.S. at 172-73 (holding that administrative rules that raises constitutional questions are not entitled to *Chevron* deference); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (holding that agency interpretations in policy statements, agency manuals, and enforcement guidelines are not entitled to *Chevron* deference); *Food & Drug Admin. V. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000) (holding that agency regulations are not entitled to *Chevron* deference when there is no implicit delegation of regulatory authority from Congress); see also generally Michael Herz, *Textualism and Taboo: Interpretation and Deference for Justice Scalia*, 12 CARDOZO L. REV. 1663 (1991) (exploring the effects of the new textualism on *Chevron* deference); Gilhooley, *supra* note 8, at 27-79 (describing how the *Chevron* analysis itself undermines a purposivist approach to statutory interpretation).

<sup>400</sup> --- U.S. ---, 124 S. Ct. 2466 (2004).

statutory evolution and history of 28 U.S.C. § 1782(a) to interpret the scope of the district court's authority to allow domestic discovery for use in foreign tribunals<sup>401</sup> – although Justice Scalia did concur especially to argue that the Court should not have considered legislative history.<sup>402</sup>

In incorporating an assumption that Congress directly commands the same undifferentiated “ordinary reader” in every federal statute, the strict plain meaning approach encourages Justices of the Supreme Court to discount or ignore the existence of legal subcultures and Congress's conversational modes of statutory drafting. As such, the strict plain meaning approach discourages Justices from embracing a dialogic mode of interpretation, in which they can acknowledge that the meaning of a current statutory statement – just like the meaning of a conversational comment – often depends both on the intended audience and on that audience's shared experience and understanding of the *prior* comment or statement, a prior comment or statement that the Justices often will not have “heard” and usually cannot reconstitute from the “plain meaning” of the statutory language in front of them.

Pushed to its logical conclusion, and arguably in perfect keeping with Justice Scalia's larger agenda for statutory interpretation, the strict plain meaning approach ultimately forces Congress to always speak *to the Supreme Court* in language that the *Court* finds acceptably clear.<sup>403</sup> Indeed, the Court has arguably already achieved this imposition of itself as primary audience in its sovereign immunity jurisprudence, discussed *supra*, and its Eleventh Amendment

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<sup>401</sup> *Id.* at 2477-82. The Court used similarly traditional methods to interpret the Alien Torts Statute, 28 U.S.C. § 1350, in *Sosa v. Alvarez-Machain*, --- U.S. ---, 124 S. Ct. 2739, 2754-65 (2004), and the federal habeas statute, 28 U.S.C. § 2241(a), in *Rasul v. Bush*, 124 S. Ct. 2686, 2693-98 (2004).

<sup>402</sup> *Intel Corp.*, 124 S. Ct. at 2484-85 (J. Scalia, concurring).

<sup>403</sup> As Bradley Karkkainen has noted, “Justice Scalia, then, would force both the courts and Congress to submit to the discipline of constraining rules, because only such constraining rules can ensure that both institutions will remain within their proper and limited roles within our constitutional scheme of separation of powers.” Karkkainen, *supra* note 6, at 429.

jurisprudence.<sup>404</sup>

Beyond the basic requirements of due process, however, nothing in the Constitution requires Congress to draft all legislation using the same presumptions of audience or to adhere to rigid standards of linguistic precision when the relevant audience can reasonably understand the statute.<sup>405</sup> Thus, when the strict plain meaning approach leads the Court to impose discernibly unintended meanings on statutes in derogation of congressional purposes and policy and Executive implementation and enforcement, it allows the Court to improperly readjust the Constitution's separation of powers, promoting the Court's interpretive supremacy at the expense of congressional policy and – ironically – of legal certainty. A dialogical approach, in contrast, would force the Court not only to acknowledge different statutory audiences and the interpretive significance thereof but also to grapple, in appropriate circumstances, with evolving statutory meaning developed through statutory conversations, reading over the participants' shoulders in order to avoid violent distortions of the statutes and congressional policies it interprets.

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<sup>404</sup> Eskridge, *supra* note 9, at 666; Wald, *supra* note 11, at 303-04 (noting in the context of Congress's attempted waivers of states' Eleventh Amendment immunity that the Court "insist[s] in effect that Congress must say it the way the Court wants to hear it").

<sup>405</sup> See Strauss, *supra* note 15, at 1572-73 (discounting constitutional justifications for the strict plain meaning approach).