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A Matter of Interpretation: Federal Courts and the Law

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BOOK REVIEW

A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW

by Antonin Scalia

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*Reviewed by Charles R. Priest**

Justice Scalia's engaging essay,[1] "Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws," and the four comments it provokes,[2] should provide lawyers, judges, and other lawmakers with an interesting evening.[3] Instead of presenting a theoretical view of the role of the federal courts in interpretation, Justice Scalia sketches out a case for "textualism." "Textualism" is one of several currently contending methods of interpreting statutes and the United States Constitution, and is currently popular among federal judges who see their role as restricting government's powers to those expressly stated in the written text.[4]

Unbeknownst to most lawyers, and to some judges and academics, a battle over statutory interpretation has been hard fought during the past two decades, with the outcome of this struggle still in serious doubt.[5] As happens so often, this battle is set in the law schools and law reviews and has not been clearly outlined in judicial opinions, which form the chief professional reading matter of most lawyers and judges. Nevertheless, the struggle shapes judicial opinions, as Justice Scalia makes clear, even though many judges are often unaware that they are in the front lines of this battle.

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1. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3-47 (Amy Gutmann, ed., 1997).

2. *See* Ronald Dworkin, Comment, *in* A MATTER OF INTERPRETATION, *supra* note 1, at 115-29; Mary Ann Glendon, Comment, *in* A MATTER OF INTERPRETATION, *supra* note 1, at 95-115; Laurence H. Tribe, Comment, *in* A MATTER OF INTERPRETATION, *supra* note 1, at 65-95; Gordon S. Wood, Comment, *in* A MATTER OF INTERPRETATION, *supra* note 1, at 44-65.

3. Justice Scalia sees his audience as "all thoughtful Americans who share our national obsession with the law" and "not just . . . lawyers." Scalia, *supra* note 1, at 3; but it is an unusual lay person who, having no professional investment in the legal system, will read the entire book.

4. *See, e.g.*, Scalia, *supra* note 1, at 25-26 (illustrating the concept of "textualism" with examples).

5. *See, e.g.*, John Copeland Nagle, *Newt Gingrich, Dynamic Statutory Interpreter*, 143 U. PA. L. REV. 2209 *passim* (1995) (reviewing WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994)); David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921 *passim* (1992) (listing some of the most important articles on statutory construction during the past two decades).

The chief contenders of this debate and their approaches may be summarized as follows. The textualists claim to limit their interpretation of statutes to ideas clearly expressed in the text of the statute at issue and surrounding statutes. Those professing to follow the Legal Process Theory, set out by Hart and Sacks,[6] claim that "statutes should be interpreted to carry out their purposes over time . . . [and] should be interpreted consistently with the surrounding legal terrain or legal principles."[7] The Law and Economics School emphasizes a pragmatic, economic approach to finding the costs and benefits of various interpretations and then choosing the one yielding the best result.[8] Those advocating a feminist viewpoint cite the need for an ethic of caring to be used in statutory interpretation.[9] Finally, those advocating Critical Race Theory say that statutes should be interpreted to reflect the needs and concerns of disadvantaged minorities.[10] Justice Scalia does not deal specifically with these various schools; rather, he attempts to make his readers aware of the issues involving statutory and constitutional interpretation apart from specific substantive areas and to set forth his recommendations on how statutes and the United States Constitution should be interpreted.

Justice Scalia first presented his essay as one of the Tanner Lectures at Princeton University's Center for Human Values. To make the discussion even more interesting, the University Center asked Professors Wood, Tribe, Glendon, and Dworkin to comment on the lecture and then gave Justice Scalia an opportunity to reply to the comments.[11]

Justice Scalia begins with a criticism of American legal education, which, he says, teaches the common law method at the expense of

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

7. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 143 (1994).

8. *See generally* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990). *See also* RICHARD A. POSNER, OVERCOMING LAW (1995) (critiquing other interpretive theories from a Law and Economics perspective).

9. *See, e.g.*, Naomi R. Cahn, *The Case of the Speluncean Explorers: Contemporary Proceedings*, 61 GEO. WASH. L. REV. 1754, 1761 (1993).

10. *See, e.g.*, John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2160-78 (1992). There are yet other theories, too numerous to mention.

11. Commentators included Gordon S. Wood, Professor of American History at Brown University; Lawrence Tribe, Ralph S. Tyler, Jr., Professor of Constitutional Law at Harvard Law School; Ronald Dworkin, Professor of Law at New York University and Professor of Jurisprudence at Oxford University; and Mary Ann Glendon, Learned Hand Professor of Law at Harvard University. *See* Scalia, *supra* note 1, at 151. As one can see by reading Professor Tribe's comments on pages 67 and 80, the Center also gave commentators the right to reply to Justice Scalia's final comment and to the comments of fellow commentators. This can lead to a conceptual difficulty almost as confusing as trying to interpret a statute which the courts have commented upon, which the legislature has then amended, and which the courts have again commented upon. It is not clear that all of the other writers have seen all of the comments in final form. One is then left wondering who had the last word.

statutory interpretation.[12] Indeed, the entire first year of law school is devoted not to interpreting statutes but to the common law method. This method, says Justice Scalia, teaches students (and judges) to extract rules of law from judicial opinions and to read cases either narrowly or broadly in order to extract narrower or broader rules of law.[13] In dealing with a new factual dispute to resolve, the student reviews the facts at hand in the present case and decides whether earlier cases, with their rules of law, are applicable depending upon the facts of the earlier cases. If those cases do not squarely apply, then the student establishes a new rule of law for the present case, using analogy from the rules of law in earlier cases and the customs of society in the factual situation.

The problem, of course, says Justice Scalia, is that when judges use the common law to make law, it is they, rather than our elected representatives, who are making the law, even though under our democracy and Constitution that role belongs to our elected representatives.[14] To the argument that, in fact, judges use the common law method only to discover "a preexisting body of rules, uniform throughout the nation," Justice Scalia replies that, "with the rise of legal realism . . . we came to acknowledge that judges in fact 'make' the common law[.]"[15] This appears to mean that judges using the common law method do not, in fact, decide cases by a reasoned elaboration of pre-existing rules of law, but rather respond in a pragmatic way to solve the problem before them. Rules of law may later be derived from these decisions, but the rules come second rather than first. The problem, of course, is that Congress, and not the judiciary, is supposed to be creating new law to solve new problems.

Justice Scalia would be content to leave the areas of private law, such as contracts and torts, to state judges and the common law method. At the same time, he notes that because "[e]very issue of law resolved by a federal judge involves interpretation of a text—the text of a regulation, or of a statute, or of the Constitution, . . . the subject of statutory interpretation deserves study and attention in its own right, as the principal business of judges and (hence) lawyers."[16] Justice Scalia says that Hart and Sacks were correct, however, when they stated that "[t]he hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation."[17] Indeed, says Justice Scalia, both the "American bar and American legal education, by and large, are unconcerned with the fact that we have no intelligible theory,"[18] that law schools do not

12. *See* Scalia, *supra* note 1, at 14-15.

13. *See id.* at 7-8.

14. *See id.* at 10.

15. *Id. See also* AMERICAN LEGAL REALISM (William W. Fisher III et al. eds., 1993) (collection of writings relevant to Legal Realism).

16. Scalia, *supra* note 1, at 13-14.

17. HART & SACKS, *supra* note 6, at 1169.

18. Scalia, *supra* note 1, at 14.

require courses in statutory interpretation, and that the only way for most students to get some fragmentary knowledge of statutory interpretation is to read cases in law courses, such as Securities Law, which are governed by statutes.[19]

Justice Scalia then moves on to a discussion of "a few aspects" of statutory interpretation, stating that the subject is so broad that he cannot deal with it comprehensively in his essay.[20] He begins by asking, "What are we looking for when we construe a statute?"[21] The answer provided in many judicial opinions is that "we look for the intent of the legislature."[22] Justice Scalia therefore begins by examining legislative intent.[23]

Judges cannot be searching for the subjective intent of the legislature, says Justice Scalia, because their inquiry must stop when they find that the statutory text in question is clear.[24] This holds true, according to Justice Scalia, even though it might be possible to show that the subjective legislative intent is contrary to what the judge thinks is a clear statutory expression.[25] Justice Scalia argues that judges, in fact, look for "a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law" when placed in the context of the rest of the governing law.[26] By using this method, judges avoid having the "meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated."[27] They also avoid bringing common law methods of judicial lawmaking into statutory interpretation. Such interjection of common law occurs when judges attempt to find legislative intent by putting themselves in the place of legislators and using their own "objectives and desires" to determine legislative intent even though none was expressed in the text of the statute.[28]

Justice Scalia then cites *Church of the Holy Trinity v. United States*[29] as the prime example of judicial lawmaking disguised as an attempt to find legislative intent. This case, a staple of law school courses in statutory interpretation, involved the Church of the Holy Trinity in New York City contracting with Walpole Warren, an Englishman, to be its rector.[30] The United States argued that this contract violated the federal Act of February 26, 1885, which, among other things, outlawed contracting to import an alien into the United States "to perform labor

19. *See id.* at 14-15.
20. *See id.* at 16.
21. *Id.*
22. *Id.*
23. *See id.* at 16.
24. *See id.*
25. *See id.* at 16-17.
26. *Id.* at 17.
27. *Id.*
28. *See id.* at 18.
29. 143 U.S. 457 (1892).
30. *See id.* at 457-58.

or service of any kind in the United States."[31] The Church successfully argued that Congress did not intend to outlaw the importation of a minister.[32] Mr. Justice Brewer stated that, "[i]t is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."[33] The statute was intended to reach the evil of the importation of manual laborers, said the Court, and not ministers.[34]

According to Justice Scalia, this holding is simply incorrect. The importation of Walpole Warren "was within the letter of the statute, and was therefore within the statute: end of case."[35] As a warning to anyone arguing before the Supreme Court, Justice Scalia states: *"Church of the Holy Trinity* is cited to us whenever counsel wants us to ignore the narrow, deadening text of the statute, and pay attention to the life-giving legislative intent. It is nothing but an invitation to judicial lawmaking."[36]

Justice Scalia then cites other ways of "judicial lawmaking" that are "more sophisticated" than relying on subjective legislative intent.[37] For example, Justice Scalia cites Judge Guido Calabresi's proposal that courts deal with statutes that "could not be reenacted today" by recognizing their obsolescence and not applying them.[38] Justice Scalia also summarizes Professor William Eskridge's proposal by explaining that judges who apply statutes should look not only to their abstract meaning but also to "what [the statutes] ought to mean in terms of the needs and goals of our present day society."[39] Justice Scalia admits that the judicial opinions discussed by Calabresi and Eskridge accomplish "by subterfuge" what Calabresi and Eskridge propose to do outright; but Scalia counters that, because judges are not elected, they cannot have—in a democracy—the power to say that "laws mean whatever they ought to mean."[40]

At this point, Justice Scalia briefly sets out his theory of textualism. Textualism is not strict constructionism, which Justice Scalia illustrates with *Smith v. United States*,[41] where the Supreme Court held that a defendant who offered an unloaded firearm in exchange for cocaine had violated the applicable statute by "using" a firearm during and in relation to a drug trafficking crime.[42] Justice Scalia insists that the phrase "uses

31. *See id.* at 458 (citing Act of Feb. 26, 1885, ch. 164, 23 Stat. 332).
32. *Id.* at 459.
33. *Id.*
34. *See id.* at 463.
35. Scalia, *supra* note 1, at 20.
36. *Id.* at 21.
37. *See id.*
38. *See id.* (quoting GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 2 (1982)).
39. Scalia, *supra* note 1, at 22 (citing WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 50 (1994) (other citations omitted)).
40. *Id.*
41. 508 U.S. 223 (1993).
42. *See* Smith v. United States, 508 U.S. 223, 225, 241 (1993) (6-3 decision) (Scalia, J.,

a gun" must mean "uses as a weapon," and that to interpret the phrase as the majority did is overly literal.[43]

In his essay, Justice Scalia does not extensively set out what textualism is. Textualism appears to be a recognition that "[t]he text is the law; and it is the text that must be observed."[44] According to the tenets of the doctrine, judges should neither pursue purposes beyond those set out in statutory text nor use interpretation to write new law; rather, judges should recognize that "[w]ords do have a limited range of meaning, and no interpretation that goes beyond that range is permissible."[45] Textualism recognizes that form is inherent in "a government of laws and not of men" and that canons of construction, such as *expressio unius est exclusio alterius*[46] and *ejusdem generis*,[47] although unfortunately set forth in Latin, are really "commonsensical" and "*one indication*" of meaning, although they may be overcome by other contrary indications.[48]

Justice Scalia also views presumptions and rules of construction that help determine the outcome of a case—such as the "rule of lenity," which resolves ambiguity in criminal laws against the government—with skepticism.[49] He admits the antiquity of many of those rules, but wonders "where the courts get the authority to impose them," and whether judges should construe laws to mean what they "fairly say."[50]

Given his emphasis on text as determinative of a statute's meaning, Justice Scalia attacks the use of legislative history "as an interpretive device."[51] His position is clear: "My view that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads me, of course, to the conclusion that legislative history should not be used as an authoritative indication of a statute's meaning."[52] English and American courts, says Justice Scalia,

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dissenting); *see also* 18 U.S.C. § 924(c)(1) (1994) (providing that whoever, during and in relation to a drug trafficking crime, "uses" a firearm shall be held criminally liable).

43. *See* Scalia, *supra* note 1, at 24.

44. *Id.* at 22.

45. *Id.* at 24.

46. The expression of one thing is the exclusion of others not expressed. BLACK'S LAW DICTIONARY 581 (6th ed. 1990).

47. Of the same kind. BLACK'S LAW DICTIONARY 517 (6th ed. 1990). This is usually used when a number of terms are listed, such as cats, dogs, and other animals. The less specific term, "other animals," is limited by the previously listed terms. Thus, other animals would probably be pets.

48. *See* Scalia, *supra* note 1, at 26-27. Justice Scalia skewers the classic Karl N. Llewellyn article, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950), which listed canons by setting the thrust of one against the parry of another. *See id.* Justice Scalia says that the canons, when examined carefully, may be limited in application, but do not contradict each other as Llewellyn stated. *See* Scalia, *supra* note 1, at 27.

49. *See id.* at 27-28.

50. *Id.* at 29.

51. *Id.*

52. *Id.* at 29-30.

traditionally held to this position,[53] and only moved away from it in the 1920s and 1930s in order to support progressive legislation against the previous judicial reliance upon legislative intent and canons to invalidate that legislation.[54]

Of course, to Justice Scalia, the use of legislative history removes the inquiry from one on the text of a statute to extraneous materials around that statute.[55] Justice Scalia cites a number of examples of the trouble that the use of legislative history can cause, two of which are worth noting. For the first, he cites a petitioner's brief which said the follwing: "Unfortunately, the legislative debates are not helpful. Thus, we turn to the other guidepost in this difficult area, statutory language."[56] For the second, he sets forth at length what must have been an uncomfortable colloquy in 1982 between Senator Dole, then acting as the Chairman of the Committee on Finance of the Senate, and Senator Armstrong.[57] Senator Armstrong was questioning Senator Dole as to whether he had read the committee report accompanying a tax bill.[58] Senator Dole said at first that he intended the courts to take guidance from the committee report, but was then forced to admit publicly that he did not write the report, that probably no other senator wrote the report, that he had not read the report in its entirety, and that the Finance Committee had not voted on the report.[59] Senator Armstrong also asserted, correctly, that the report could not be amended by the Senate from the floor.[60]

The usual response to this type of example is that most senators and other lawmakers not only do not read committee reports but also do not know the details of statutory text upon which they actually vote. Scalia counters that Article I, Section 7 of the United States Constitution requires that a statute be passed by a majority, but is silent as to whether or not the majority has an "*adequate understanding*" of the statute; but, in order for legislative history to be useful to show Congressional intent, it must be "the *basis* for the house's vote."[61] In other words, "genuine knowledge is a precondition for the supposed authoritativeness of a committee report, and not a precondition for the authoritativeness of a statute."[62]

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53. *See id.* at 30. Here, he cites as support Chief Justice Taney, whom he earlier criticized for writing the first Supreme Court case to use the Due Process Clause of the Fifth Amendment to prevent the federal government from "taking away certain liberties" beyond those expressly set forth in the Constitution. *See id.* at 24 (citing Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 450 (1857)).

54. *See* Scalia, *supra* note 1, at 30.

55. *See id.* at 29-31.

56. Brief for Petitioner at 20, Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989) (No. 87-2084) (cited in Scalia, *supra* note 1, at 31).

57. *See* 128 CONG. REC. 16918-19 (1982) (cited in Scalia, *supra* note 1, at 32-34).

58. *See id.*

59. *See id.*

60. *See id.*

61. Scalia, *supra* note 1, at 34-35.

62. *Id.* at 34.

Another common argument made by those advocating the use of legislative history is that, because Congress gives authority to committee reports (and presumably similar legislative materials), courts must defer to them as well.[63] Justice Scalia responds by citing Article I, Section 1 of the Constitution, which provides that all legislative powers are vested in a Congress consisting of a Senate and a House.[64] Justice Scalia reads this provision to prohibit Congress from delegating legislative power to committees, and says that only Congress as a whole can enact statutes.[65] Thus, committee reports have authority only if Congress as a whole adopts them, which Congress does not do.[66]

In essence, says Justice Scalia, legislative history as practiced in Congress has become so expansive that some portion of it can be used to support either side of an argument on statutory construction.[67] The use of legislative history is, for Justice Scalia, a "failed experiment," the termination of which would result in the saving of an "enormous amount of time and expense" by judges, lawyers, and clients.[68]

At this point in his essay, Justice Scalia moves from statutory to constitutional interpretation.[69] To him, the Constitution is "an unusual text."[70] According to Justice Scalia, "[i]n textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation—though not an interpretation that the language will not bear."[71] Thus, when interpreting the Constitution, he will look to the writings of contemporaries of the framers as well as to the framers themselves, not to find the intent of the Constitution's draftsmen but "because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood."[72]

Because this original understanding is important, Justice Scalia spends some time refuting the chief argument in support of the interpretation favoring "The Living Constitution."[73] This argument, in essence, is that this kind of interpretation enables the Constitution to be "flexible" as American society changes. To this, Justice Scalia replies that the argument presupposes that the evolution towards flexibility would result in fewer constitutional restrictions upon democratic government.[74] However, especially during the last thirty-five years, this

63. *See id.* at 35. *See also* U.S. CONST. art. I, § 1.
64. *See* Scalia, *supra* note 1, at 35.
65. *See id.*
66. *See id.*
67. *See id.* at 35-36.
68. *Id.* at 36.
69. *See id.* at 37-47.
70. *Id.* at 46.
71. *Id.* at 37.
72. *Id.* at 38.
73. *See id.* at 41-47.
74. *See id.* at 41.

type of interpretation has in fact limited the power of the government, not expanded it. Justice Scalia then cites a series of Supreme Court decisions which prevent government from doing what it formerly could do. For instance, in *Mapp v. Ohio*,[75] the Court held that states were prohibited from "admitting in a state criminal trial evidence of guilt that was obtained by an unlawful search," although they were previously permitted to do this.[76] Justice Scalia envisions future "evolving" constitutional decisions as continuing to limit the power of democratic government, rather than increasing that power to allow it to deal with changed societal conditions.[77]

He also attacks another view of those favoring an evolving Constitution, which is that changes in judicial interpretation of the Constitution lead to "greater personal liberty."[78] Justice Scalia counters by stating that recent judicial decisions have, in fact, curtailed constitutional protections for such liberties as individual property rights, the right not to have the government impair a contract, and the right to bear arms.[79] He admits that modern society does not value these rights, but says that the framers of the Constitution were correct in embedding essential rights in the Constitution which future ages might not value in order to protect those rights.[80] As an example, he refers to *Maryland v. Craig*,[81] where the Supreme Court allowed a young child to testify in a child abuse prosecution while the defendant and the judge viewed the child's testimony over television instead of being in the same room.[82] The right to confrontation, says Justice Scalia, means "face-to-face" now and meant the same when the Sixth Amendment was adopted, and the purpose of allowing face-to-face confrontation in a criminal trial was "to induce *precisely* that pressure upon the witness which the little girl found it difficult to endure."[83] The constitutional language has not changed, says Justice Scalia; only society's view of child abuse prosecutions has changed. To him, the *Craig* decision clearly did away with "a liberty that previously existed."[84]

Justice Scalia then makes his final objection to the concept of the evolving Constitution: There is no "guiding principle" which those interpreters follow.[85] Justice Scalia states that, "[a]s soon as the discussion goes beyond the issue of whether the Constitution is static, the evolutionists divide into as many camps as there are individual views

75. 367 U.S. 643 (1961).
76. Scalia, *supra* note 1, at 41-42 (citing Mapp v. Ohio, 367 U.S. at 655).
77. *See id.*
78. *Id.* at 42.
79. *See id.* at 43.
80. *See id.*
81. 497 U.S. 836 (1990).
82. *See id.* at 851-57.
83. Scalia, *supra* note 1, at 43-44.
84. *Id.* at 44.
85. *See id.* at 44-45.

of the good, the true, and the beautiful."[86] As this, according to Justice Scalia, is inevitable, the evolutionary method is "simply not a practicable constitutional philosophy."[87]

Again, Justice Scalia admits that "originalists," who seek the original meaning of the text, do not always agree about the application of that meaning to "new and unforeseen"[88] circumstances, but their difficulties are small compared to those for whom "every question is an open question."[89] For example, Justice Scalia cites capital punishment, whose "use is explicitly contemplated in the Constitution."[90] He writes: "Under [the view of] the Living Constitution the death penalty may have *become* unconstitutional [and] it is up to each Justice to decide for himself (under no standard I can discern) when that occurs."[91]

Justice Scalia finally admits that "at the end of the day an evolving constitution will evolve the way the majority wishes."[92] The evil of this, however, is that the majority "will look for judges who agree with *them* as to what the evolving standards have evolved to; who agree with *them* as to what the Constitution *ought* to be."[93] While the Nineteenth Amendment was used to guarantee women the right to vote seventy-five years ago, the judiciary today, by relying upon the "Living Constitution," says Justice Scalia, becomes the "instrumentality of change."[94] The problem with this path is that it allows the majority to interpret the Constitution as it wishes:

> This, of course, is the end of the Bill of Rights, whose meaning will be committed to the very body it was meant to protect against: the majority. By trying to make the Constitution do everything that needs doing from age to age, we shall have caused it to do nothing at all.[95]

None of the four commentators, Professors Wood, Tribe, Dworkin, and Glendon, deal at length with Justice Scalia's discussion of statutory interpretation other than to summarily agree with the need to avoid looking for subjective legislative intent when interpreting statutes. Rather, they prefer to concentrate on legal history, constitutional interpretation, and civil law.

In his comment, Professor Wood essentially agrees with Justice Scalia that American judges do have extraordinary power in comparison with judges in other Western countries; but Professor Wood proposes that this power arose in the late eighteenth century in response to what Americans

86. *Id.* at 45.
87. *Id.*
88. *Id.* at 45.
89. *Id.* at 46.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 47.
94. *Id.*
95. *Id.*

felt were overly democratic, partisan legislatures.[96] The American judiciary has jealously guarded its power to interpret the United States Constitution and statutes ever since, so that this power is now "deeply rooted in our history, and . . . probably not as susceptible to [Justice Scalia's] solution as he implies."[97] According to Professor Wood, "[t]extualism . . . appears . . . to be as permissive and as open to arbitrary judicial discretion and expansion as the use of legislative intent or other interpretive methods."[98] He has no solution to the problem of judicial lawmaking, other than "the hope for the revival of some semblance of disinterested jurisprudence."[99]

Professor Lawrence Tribe admits that he does not have a theory of textual interpretation and doubts that "any defensible set of ultimate 'rules' exists. Insights and perspectives, yes; rules, no."[100] In his main discussion, he sets forth a theory of two types of constitutional language: constitutional language which is "concrete" and constitutional language which "enact[s] fairly abstract principles."[101] Those constitutional provisions consisting of concrete constitutional language that are a type of blueprint defining governmental institutions and practices, such as the provision requiring a president to be at least thirty-five years of age, ought to be interpreted as having a "fixed meaning" until they are changed by constitutional amendment.[102] However, Professor Tribe disagrees with Justice Scalia's view that the Constitution is entirely composed of these provisions.[103]

On the other hand, those constitutional provisions which contain abstract language tend to set out broad principles, leading present interpreters to conclusions which were not part of the subjective intentions of those adopting the constitutional language. For example, Professor Tribe agrees that *Brown v. Board of Education*[104] "correctly interprets what the Fourteenth Amendment says (and *always* said)—even though it may well defy what the amendment's authors and ratifiers expected the amendment to do."[105] The important thing, says Professor Tribe, is for interpreters of constitutional language to:

> concede how difficult the task is; avoid all pretense that it can be reduced to a passive process of *discovering* rather than *constructing* an interpretation; and replace such pretense with a forthright account, incomplete and inconclusive though it might be, of why one deems his or her proposed construction of the text to be worthy of

96. *See* Wood, *supra* note 2, at 49-51.
97. *Id.* at 58.
98. *Id.* at 63.
99. *Id.*
100. *See* Tribe, *supra* note 2, at 73.
101. *Id.* at 68.
102. *See id.* at 93.
103. *See id.* at 94.
104. 347 U.S. 483 (1954).
105. Tribe, *supra* note 2, at 68.

> acceptance, in light of the Constitution as a whole and the history of its interpretation.[106]

In his comment, Professor Dworkin sees Justice Scalia, despite his best efforts, as still entangled in the problem of legislative intent; for Justice Scalia, in choosing among the several possible meanings of a crucial word in a statute, must decide which meaning Congress intended. However, Professor Dworkin agrees with Justice Scalia that what is important is not the intention of individual legislators but of Congress as a whole.[107]

Professor Dworkin then moves quickly to constitutional interpretation, specifically to the Bill of Rights. He recognizes two forms of possible original meaning for provisions in the Bill of Rights: "'semantic' originalism," which means that the provisions should be "read to say what those who made them intended to say," and "'expectation' originalism," which means that the provision "should be understood to have the consequences that those who made them expected them to have."[108] The Bill of Rights mixes abstract and concrete principles; thus, interpreters should not read those abstract principles as specifically limited to the precise meaning intended by the original drafters—even if all the drafters had agreed among themselves on that intention, which they often did not. Rather, interpreters should treat those provisions as containing abstract principles which must be newly applied to contemporary situations.[109]

In her comment, Professor Glendon, who has an interest in comparative law, reviews the experience of European civil lawyers, who are supposed to concentrate on interpreting statutes primarily by relying on statutory text rather than upon judicial opinions interpreting that text. She says that when civil lawyers were dealing with coherent, all-inclusive legal codes, this method worked well.[110] However, with the continuing enactment of new statutes, which are hastily drafted or not clearly related to older ones, this approach is becoming more difficult.[111]

Professor Glendon also notes that European civil lawyers, when studying constitutional law in American law schools, are surprised to find that they are studying judicial opinions interpreting the Constitution instead of engaging in a close analysis of the Constitution's text, which is "glimpsed only in a fragmentary way."[112] Instead of teaching the Constitution "from preamble to last amendment—as a design for self-government as well as a charter of rights, and as a text whose parts cannot be understood in isolation from one another," American law

106. *Id.* at 71-72.
107. *See* Dworkin, *supra* note 2, at 118.
108. *Id.* at 119.
109. *See id.* at 122.
110. *See* Glendon, *supra* note 2, at 97.
111. *See id.* at 100-01.
112. *Id.* at 107.

schools have focused on various constitutional topics, such as the commerce clause, federalism, separation of powers, and, since the 1960s, on individual rights.[113] Thus, "con law classes have long had the same relation to the Constitution as the Elgin Marbles have to the Parthenon."[114]

Finally, Professor Glendon notes that the "legal culture widely shared by lawyers and judges with diverse personal backgrounds, economic views, and political sympathies"[115] is a strength of the civil law, and leads to "predictability and coherence."[116] This type of legal culture is lacking in America, and the resultant lack of predictability and coherence has driven "many American friends of democratic and rule-of-law values . . . to espouse what most civil lawyers would regard as excessively rigid forms of textualism."[117]

When Justice Scalia's essay and the resulting comments are viewed as a whole, it appears that the difficulty in his approach to statutory and constitutional interpretation is that he seeks certainty in textual interpretation. He is convinced that, although fallible judges may not be able to find it, there is one, correct interpretation of each statute and constitutional provision which a judge must interpret. Given the correct method, which involves careful attention to the form and express meaning of the text, and consideration of the context in which that text became law, a judge can and must be able to state what the meaning of the text is and how that meaning resolves the factual issue before the judge. That meaning, according to Justice Scalia, is fixed at the time the text became law. Thus, presumably, if Chief Justice Marshall was transported from the early nineteenth century to the present, he would hold that an early nineteenth century statute being applied to modern circumstances has the same meaning as it had when applied to early nineteenth century circumstances. For Justice Scalia, this certainty of judicial interpretation is necessary in a democracy, as it ensures that elected representatives make and change the law through constitutional procedures, rather than allowing judges to make and change the law through interpretive sleight of hand.

The difficulty with this search for certainty, as pointed out by William N. Eskridge, Jr., in his book *Dynamic Statutory Interpretation*, is that "the new textualists' methodology is no more objective or constraining than other methodologies [of statutory interpretation]."[118] Eskridge, who is the co-author of one of the leading texts currently used in law school

113. *Id.* at 111.

114. *Id.*

115. *Id.* at 112.

116. *Id.* (citing John P. Dawson, *The General Clauses, Viewed from a Distance*, 41 RABELS ZEITSCHRIFT 441, 455 (1977)).

117. *Id.* at 113.

118. ESKRIDGE, *supra* note 7, at 230. William N. Eskridge, Jr., is a Professor of Law at Georgetown University Law Center.

courses on statutory interpretation,[119] criticizes several of the basic principles of textualism, such as the arguments on the constitutional requirements for statutory enactment, the separation of powers argument, the "democracy-enhancing argument," as well as textualism's refusal to consider legislative history.[120] The Constitution, says Eskridge, sets limits on how Congress enacts statutes, but it does not set limits on how the executive or judicial branches may interpret those statutes.[121] Congress uses committee reports to aid it in lawmaking, and there is the opportunity to criticize and correct legislative history within the legislative process.[122] According to Eskridge, it is better to rely on carefully weighed legislative history than to depend upon canons of construction, which are judicially created, pliable, and often arbitrary.[123]

Eskridge also maintains that the textualists' reliance on the "plain meaning" of texts is illusory because "the legislative drafting process ensures textual ambiguities, which only multiply over time" due to the differing goals of various legislative authors and the use by lawmakers of textual ambiguity to resolve political obstacles to enactment.[124] In addition, the meaning of textual language depends on its factual context, one of the usual examples being that a sign reading "No Vehicles in the Park" does not normally exclude baby carriages. Finally, because of differing backgrounds and perspectives, what is obvious, plain textual meaning to one interpreter is not at all obvious to another.[125]

In place of textualism, and several other contending theories, Eskridge advocates an interpretation based on what happens in fact, which he calls "dynamic statutory interpretation."[126] In essence, he says, the interpretation of a statute evolves over time because of changing factual contexts and the changing perspectives of its interpreters.[127] It is better to recognize this evolution, in which statutory meaning often goes beyond and occasionally against "original legislative expectations," while trying in new situations to interpret the statute so that the "pragmatic interpretation is one that most intelligently and creatively 'fits' into the complex web of social and legal practices."[128] Eskridge advocates using the different traditions of American law, "including liberalism and its emphasis on individual autonomy, legal process and

119. *See* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (2d ed. 1995). The title shows the influence of the common law on the study of legislation and statutes, although the text has more non-case material in it than most.

120. *See* ESKRIDGE, *supra* note 7, at 230-38.

121. *See id.* at 230.

122. *See id.* Indeed, Justice Scalia's quotation of the colloquy between Senator Dole and Senator Armstrong is an example of that criticism. *See supra* notes 57-60 and accompanying text.

123. *See* ESKRIDGE, *supra* note 7, at 233.

124. *Id.* at 38.

125. *See id.* at 42.

126. *Id.* at 192.

127. *See id.* at 193.

128. *Id.* at 201.

its interest in considering a plurality of viewpoints, and normativism's insistence on justice and/or efficiency . . . to reexamine practical and conventional readings of a statute."[129] This method of statutory interpretation does not make possible a precise prediction of a specific interpretation of a statute, but it has the virtue of being open enough to allow understanding and criticism of the result.

As is clear from Justice Scalia's essay and the comments upon it, we are still without a widely accepted theory of statutory interpretation. Justice Scalia's textualism, due to his efforts and those of other judges, has a following but lacks majority acceptance. Whether, as Professor Tribe maintains, we ultimately cannot come to an accepted set of rules for statutory interpretation, or whether, at this point, the theory of statutory interpretation is still too underdeveloped to allow for a theory of general acceptance, Justice Scalia's essay, and the comments which accompany it, are an enjoyable introduction to the current debate.

129. *Id.*