

The Politics of Statutory Interpretation: The Hayekian Foundations of Justice Antonin Scalia's Jurisprudence

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Introduction

This is Justice Antonin Scalia's twenty-ninth year on the Supreme Court of United States. In the course of the last three decades, through a multitude of opinions on a diverse array of topics, he has forged a distinctly personal approach to statutory interpretation. It is an approach that comprises a number of different—and at times, unrelated—methods, such as an antipathy towards legislative history, a fondness for dictionaries, and a rejection of precedent. Each of these methods has been rigorously criticized in a growing body of literature. In an attempt to respond to his critics, Justice Scalia co-authored with Professor Bryan Garner his definitive book on statutory interpretation.¹ With its series of canons and anti-canons, the book is meant to provide the one true, *correct* approach to interpreting statutes. The authors state that their methodology is the “normal, natural way of understanding anything that has been said or written in the past.”²

Needless to say, this claim has not been taken at face value.³ Taking *Reading Law* as my point of departure, I aim to mount a comprehensive critique of Justice Scalia's jurisprudence that has not yet found a place in legal literature. I attempt to bring together the diverse aspects of his approach to statutory interpretation, as evidenced through his judicial and extra-judicial writings—that is,

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1. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

2. *Id.* at 82.

3. William N. Eskridge, *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 556 (2013).

textualism, original public meaning, rejection of legislative history, traditions, linguistic canons, the rule of lenity, the use of dictionaries, rejection of balancing tests and overall judicial minimalism—into one coherent framework grounded in a *normative vision* of the legal enterprise. My approach necessarily involves identifying some pronouncements as mistakes and rejecting them as inconsistent, as well as attributing philosophical positions to Justice Scalia that he himself does not represent to hold. Nonetheless, my approach tries to provide the best possible justification for Justice Scalia’s overall approach to statutory interpretation, taken *as a whole*. I also hope to clarify those aspects of Justice Scalia’s theory (e.g., the use of dictionaries) that might at first blush appear to be ambiguous or susceptible to more than one interpretation, by grounding his theory in a distinct normative vision.

I state my argument at the outset: Justice Scalia’s approach to statutory interpretation rests upon his belief in a thin concept of the rule of law—that is, generally worded rules ought to be applied prospectively and impartially across the board. On the flip side of this coin, he adopts a philosophy of judicial minimalism—that is, leaving as small a role as possible for judicial “discretion.” And, as a corollary, his theory of precedent is purely pragmatic in nature. The normative values that justify this approach are twofold: first, equal protection of laws; and second, predictability and certainty. Furthermore, while Justice Scalia occasionally doffs his hat to popular sovereignty and the separation of powers, neither of these can do the intellectual work that is required for him to justify his approach; or even if they can, he doesn’t do utilize them to that end. In sum, the bulwark of Justice Scalia’s theory is the formal rule of law and the values that it serves. Lastly, I also examine how the Scalian vision is undergirded by a particular deep idea of liberty that was originated and defended by the noted political thinker Friedrich Hayek.

While the arguments in this Article are closely focused upon Justice Scalia’s jurisprudence, they seek to make a larger point. Whether it is Justice Scalia, Justice Breyer, Professor Eskridge, Ronald Dworkin, or someone else, no approach to statutory interpretation is *self-explanatorily correct* to the exclusion of others. Rather, it depends upon certain deeply held normative beliefs about the basic purpose of the legal enterprise. Interpretive accounts, therefore, are not subject to empirical verification or falsification in the simple sense. They are simply appeals to what the interpreter in question finds most valuable about law. Yet one will not be in a position to choose between them (or, if neither, then even from the many approaches that occupy the spectrum between them) *without*

examining their underlying normative/political accounts (whether articulated or not). This is because it is *those accounts* that determine the concrete interpretive approaches in each case. It is in this sense that statutory interpretation is deeply and pervasively political (as opposed to the evident—and superficial—connections between a judge’s political stance and the outcomes of cases), and this is what justifies the title of the Article: *the politics of statutory interpretation*.

In order to identify the normative values underlying Justice Scalia’s vision of statutory interpretation, let us begin by listing the two major concrete aspects of his approach to statutes: textualism (and its corollary: the rejection of legislative history) and original public meaning (and its corollaries: the use of dictionaries and deference to tradition).

I. Textualism

In *A Matter of Interpretation*, Justice Scalia argues that a text must be understood “to contain all that *it* fairly means . . . *words* have a limited range of meaning, and no interpretation that goes beyond *that range* is permissible.”⁴ It is not my claim here that Justice Scalia is only concerned about the meaning of words, and ignores context. Indeed, on the page immediately preceding this observation he *also* says, while discussing scribes’ errors, that “one can give *the totality of the context* precedence over a single word.”⁵ What is crucial to note here, however, is that Justice Scalia operates with a very specific notion of context: context is to be gleaned only from within the *totality of the words used in the statute* (or at best, associated statutes) and not beyond.⁶

In so doing, I suggest that Justice Scalia very self-consciously selects one theory of communicative meaning over another; he selects *semantic*—or *sentence* meaning—over *pragmatic* meaning as forming the basis of his interpretive theory. The two phrases are terms of art (and “pragmatic,” especially, is not to be confused with its use in ordinary language). The roots of this distinction lie deep in linguistic philosophy, but the following example ought to make things clear. Imagine that you are standing by the side of a highway, a car pulls up

4. SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 24 (1997) (emphasis added).

5. *Id.* at 21.

6. *Begier v. IRS*, 496 U.S. 53, 67 (1990) (Scalia, J., concurring); *Taylor v. United States*, 495 U.S. 575, 603 (1990) (Scalia, J., concurring); *Fort Stewart Schs. v. FLRA*, 495 U.S. 601 (1990) (Scalia, J.); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 738–39 (1989) (Scalia, J., concurring).

besides you, and the driver asks you: “*where is the nearest petrol pump?*” You direct him to the closest, physically located petrol pump, which you know to be closed on that evening. Have you correctly interpreted his question?⁷

Semantic—or sentence—meaning would tell you that you have correctly interpreted this question. You were asked about the location of a petrol pump. You provided the location of a petrol pump. A closed petrol pump is as much a petrol pump as an open one.

A pragmatic theory of meaning, however, holds that the circumstances under which the question was asked makes it very clear that what was *meant* to be asked—the *meaning* of the utterance—was directions to an *open* petrol pump. What you did by directing the driver to a closed petrol pump was, in essence, misunderstanding the *meaning* of this question, which must be deduced not only from the linguistic content of his utterance, but the non-linguistic circumstances that surround it. So, if on the other hand, a researcher doing a headcount of all the petrol pumps in the area asked the question, it would make perfect sense to direct him to the closed petrol pump. In other words, the *meaning* of a linguistic utterance is at least partially determined by its non-linguistic context.

This, then, is the basic thesis of the theory of pragmatic meaning: *Non-linguistic context* must be taken into account in the determination of the meaning of an utterance, and we have seen—and as we shall continue to see—in the context of legal interpretation, it is a theory that Justice Scalia rejects.⁸ In *Reading Law*, he makes it abundantly clear that meaning is to be determined from the “*historical associations*” carried by a word (or a phrase) and by the “*immediate syntactic setting*” (that is, the words that surround it in a specific utterance).⁹ The inquiry, thus, is limited to the associations carried by the words. To return to our petrol pump example,

7. This example is from PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 32 (1991).

8. A clarification: I do not claim here that Justice Scalia would hold that, in the petrol pump example, the first interpretation is the correct interpretation. Nobody could sensibly hold that position—indeed, the absurdity of the example has led some scholars to argue that the “full linguistic content” of an utterance must be derived using pragmatic methods. See, e.g., Andrei Marmor, *The Pragmatics of Legal Language*, 21 *RATIO JURIS* 423, 437 (2008). My point is that in restricting himself to only the *linguistic context* of the statutory utterance (which would include considerations of how language is used in everyday contexts, as evidenced by Justice Scalia’s dissent in *Smith v. United States*, *infra* note 15), he is *transplanting the methods of semantic interpretation in ordinary conversation into the legal context*—and, as I shall subsequently argue, this approach is justified by normative considerations.

9. SCALIA & GARNER, *READING LAW*, *supra* note 1, at 33.

meaning would be determined by the historical associations that go with “petrol pump” (i.e., a particular place with a particular use) and the sentence it is in, but *not* the (non-linguistic) circumstances under which it was spoken.

Consider also his defense of the rule of lenity: Justice Scalia does not argue that it is something the legislature intends or is a value that ought to play a role in judging, but that it has become so ingrained in the legal system that it “*must* be known to drafter and reader alike . . .”¹⁰ The use of the word “must” here is, obviously, a way of deeming (that is, a legal fiction), and in this way, Justice Scalia reads the rule of lenity into statutes *by making it inseparable from their meaning*. In effect, he contends that all relevant parties at all times *know* that lenity is the background interpretive framework.¹¹ This is a clear disavowal of *specific* (non-linguistic) contexts under which statutes are produced (e.g., a possibly clear legislative indication that the rule of lenity is not intended to apply) in favor of attributing a timeless, *acontextual* (by ‘acontextual’ here I mean limiting context to within the text, and reading in the rule of lenity into that textual context) meaning to the words and phrases of a statute.¹²

These principles are also visibly at work in Justice Scalia’s defense of using various linguistic canons that the legislature itself may or may not use. He justifies *ejusdem generis* on the ground that it “parallels common usage,”¹³ and *expressio unius* is applied because that is “how people express themselves and understand verbal expression.”¹⁴ Once again, these ideas of “common usage” and general understanding are used to infuse *semantic content* into words when juxtaposed together to form sentences.

To take an example, the disagreement between the majority and Justice Scalia in *Smith v. United States*¹⁵ is a classic illustration of semantic meaning at work. The question in that case was whether a drug dealer who sells his gun in exchange for drugs “*uses*” his firearm “*in relation to*” a drug-related crime.¹⁶ The majority cited a number of dictionaries to establish the principle that the word “use” had a wide

10. *Id.* at 31 (emphasis added).

11. *Id.*

12. This is one way to understand the great respect that Justice Scalia accords to tradition. Practices that are deeply rooted in the nation’s traditions (e.g., the rule of lenity) form part of the interpretive background for precisely the reasons that we have outlined in the text.

13. SCALIA & GARNER, *READING LAW*, *supra* note 1, at 199.

14. *Id.* at 170.

15. *Smith v. United States*, 508 U.S. 223 (1993).

16. *Id.* at 225.

ambit, and that when juxtaposed with an item, did not only refer to its most common use (that is, using a firearm by discharging or threatening to discharge it in furtherance of a violent crime).¹⁷ Justice Scalia dissented, holding that the *ordinary* meaning of “use” referred to its most natural use in the context contemplated.¹⁸ So, for instance, he observed, “[t]o use an instrumentality *ordinarily means* to use it for its intended purpose. When someone asks “Do you use a cane?” he is not inquiring whether you have your grandfather’s silver handled walking stick on display in the hall; he wants to know whether you walk with a cane.”¹⁹

Thus, the disagreement centers upon the meaning of the word “use” as reflected in *general, non-context-specific linguistic usage*. Justice Scalia does not contemplate, for instance, a situation in which the same question is asked in a conversation about home decoration, and whether, given legislative history, this was the sense in which the *legislature* was asking the question. In other words, he did not ask what, specifically, was the *non-linguistic* context in which the legislation was drafted. Analyzing the *Smith* disagreement, after criticizing the majority opinion, Scott Soames writes about Justice Scalia:

Scalia is wrong in claiming that the ordinary meaning of the phrase excludes uses of firearms for sale or trade. The ordinary meaning is silent about the manner of use. Thus, when the phrase occurs in a sentence, the resulting assertion must be completed—either by the content provided by an explicit phrase . . . or by *pragmatically supplied content from the context of utterance . . . since, the latter option was employed by the Congress, the job of the Court was to infer what Congress asserted from the incomplete semantic content provided by the statutory language.*²⁰

As an example of what such an inquiry would look like, consider the last paragraph of the majority opinion:

17. *Id.* at 228–231.

18. *Id.* at 242 (Scalia J., dissenting).

19. *Id.* (emphasis added).

20. SCOTT SOAMES, *Interpreting Legal Texts: What Is, and What Is Not, Special About the Law*, in PHILOSOPHICAL ESSAYS, VOL. 1 403, 414 (2008) (emphasis added).

When Congress enacted the current version of § 924(c)(1), it was no doubt aware *that drugs and guns are a dangerous combination*. In 1989, 56 percent of all murders in New York City were drug related; during the same period, the figure for the Nation's Capital was as high as 80 percent . . . the fact that a gun is treated momentarily as an item of commerce does not render it inert or deprive it of destructive capacity. Rather, as experience demonstrates, it can be converted instantaneously from currency to cannon.²¹

This paragraph provides the beginnings of pragmatic linguistic reasoning because it addresses the dispute about whether the *ordinary meaning* or the *full range of meanings* of the word “use” should prevail, *given the non-linguistic context in which the word was used* (recall our petrol pump example). Naturally, it is almost unavoidable that such an approach would refer to legislative history, an approach that Justice Scalia utterly rejects.

A contrary example is *Muscarello v. United States*,²² where the question was whether keeping a gun in the glove compartment of your car amounts to “*carrying*” it.²³ The majority accepted that “carry” had a broad meaning that would include carrying something in a car as well as a narrow meaning that was limited to carrying something on your person.²⁴ Again, after surveying a bewildering diversity of linguistic sources, the majority then observed:

From the perspective of any such purpose (persuading a criminal “to leave his gun at home”) [gleaned from the legislative history] *what sense would it make for this statute to penalize one who walks with a gun in a bag to the site of a drug sale, but to ignore a similar individual who, like defendant Gray-Santana, travels to a similar site with a similar gun in a similar bag, but instead of walking, drives there with the gun in his car?* How persuasive is a punishment that is without effect until a drug dealer who has brought his gun to a sale (indeed has it available for use) actually takes it from the trunk (or unlocks the glove compartment) of his

21. *Smith*, 508 U.S. at 240 (O'Connor, J.).

22. *Muscarello v. United States*, 524 U.S. 125 (1998).

23. *Id.* at 126.

24. *Id.* at 128–131.

car? It is difficult to say that, considered as a class, *those who prepare, say, to sell drugs by placing guns in their cars are less dangerous, or less deserving of punishment, than those who carry handguns on their person.*²⁵

Once again, we see that the majority endeavors to select one meaning out of multiple possible meanings by trying to understand what would make sense, given the non-linguistic context in which the utterance was made. Justice Ginsburg's dissent, by contrast (in which Justice Scalia joined), is far more linguistically oriented, although it too refers—if only obliquely—to the pragmatics of the situation:

It is reasonable to comprehend Congress as having provided mandatory minimums for the most life-jeopardizing gun-connection cases (guns in or at the defendant's hand when committing an offense), leaving other, less imminently threatening, situations for the more flexible Guidelines regime. As the Ninth Circuit suggested, it is not apparent why possession of a gun in a drug dealer's moving vehicle would be thought more dangerous than gun possession on premises where drugs are sold . . .²⁶

A. Corollary I: Semantic Meaning and the Faithful Agent Theory

The first important corollary of this theory is that it is inconsistent with the *faithful agent thesis*, advanced by scholars who also claim adherence to textualism.²⁷ According to the faithful agent thesis, law is a form of communication; the legislature communicates certain rules and standards that constitute the law.²⁸ Judges are faithful agents of the legislature, with their task being to *faithfully*—*i.e., accurately—interpret (i.e., determine the meaning of) the*

25. *Id.* at 133 (Breyer, J.) (emphasis added).

26. *Id.* at 145 (Ginsburg, J., dissenting). This shows that Justice Scalia is not a semantic absolutist; there are times that he does adopt the pragmatics of meaning. Broadly, however, his insistence on limiting himself to the *linguistic* context (words, sentences, associations) and his rejection of non-linguistic resources such as legislative history put him—at least presumptively—in the semantic camp.

27. John Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001).

28. *Id.* at 5. See also Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 189 (1986).

*communicative utterances of the legislature.*²⁹ However, as our petrol pump example demonstrates, if legal interpretation is about accurate determination of the meaning of a communicative utterance issued by a speaker, then it is the *pragmatic*—and not *semantic*—theory of meaning that will yield the correct answer. And indeed, Justice Scalia understands this because he makes the specific claim that the judges are *not* faithful agents of the legislature, but faithful agents of the *people*.³⁰

Specifically, in fact, he goes so far as to concede—when analyzing the presumption of consistent usage as a linguistic canon—that this is *not* how the legislature tends to draft its statutes.³¹ This is a clear statement *against* the idea that courts are the faithful agents of legislatures.

B. Corollary II: Rejection of Legal Positivism

Although perhaps not of much practical significance, it is also interesting to note that Justice Scalia's theory of meaning is in tension with traditional legal positivism.³² Eschewing complexities, traditional legal positivism holds that the content of law is determined by social facts—in particular, facts about what the authority (here, the legislature) has communicated in a particular case.³³ Thus, determining the content of law means an inquiry into the full linguistic meaning of an authoritative utterance, an inquiry that must therefore involve pragmatics.³⁴ As we shall see subsequently, Justice Scalia is not a positivist in the traditional sense not *just* because he doesn't treat the interpretive inquiry as an instance of recovering full linguistic meaning, but also because his *grounds* for doing so are normative³⁵—something that the positivist school of thought is committed to deny.³⁶

29. *Id.*

30. SCALIA & GARNER, *READING LAW*, *supra* note 1, at 138 (“Courts are not agents of the legislature but agents of the people”).

31. *Id.* at 170.

32. By legal positivism, I refer here to the school of legal philosophy, whose traditional representatives are taken to be H. L. A. Hart, Joseph Raz, and—more recently—Andrei Marmor and Scott Shapiro, among others.

33. *See generally* JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (2d ed. 2009).

34. This is the point that Scott Soames and Andrei Marmor make. *See generally* SOAMES, *Interpreting Legal Texts*, *supra* note 20; Marmor, *The Pragmatics of Legal Language*, *supra* note 8.

35. As William Eskridge points out, in Justice Scalia's jurisprudence, there seems to be a continuous toggling back and forth between facts and norms. William N. Eskridge,

1. Justification I: Separation of Powers

How, then, does Justice Scalia *justify* textualism and semantic meaning? Earlier on in this Article, we saw some indications that he considers it to be a conceptual truth, simply entailed in the meaning of “meaning”—but also, for various reasons, we noticed that this justification is unsatisfactory. And indeed, a closer look reveals that Justice Scalia’s theory of meaning is undergirded by definitively *normative* concerns.

Justice Scalia’s primary argument justifying his interpretive theory is that it is mandated by the constitutional separation of powers found in Articles I through III.³⁷ According to Justice Scalia, the Constitution clearly places the task of lawmaking upon legislatures, and that of interpreting the law upon judges.³⁸ Any theory other than a textualist theory would violate this mandate by vaulting judges into the domain of lawmaking.³⁹

The flaw with this defense, however, is that the Constitution—and its division of powers—imposes no particular interpretive theory upon judges.⁴⁰ Justice Scalia’s argument is circular because not only does he argue that only textualism is consistent with a separation of powers that assigns the task of lawmaking to legislatures, but *at the same time* he uses textualism to come to a conclusion of *what* law has been made by the legislature. Clearly, however, this will not do: If textualism is faithful to the scheme of separation of powers that is envisaged by the Constitution, then we *first* need to know how we are to understand the responsibilities of lawmaking and law-interpretation that the Constitution separates, and we cannot invoke textualism for *that* purpose. Professor Tribe makes the point in

Nino’s Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms, 57 ST. LOUIS U. L.J. 865 (2013).

36. Lest positivists argue that I am holding them to too high a standard: it is not the case that positivism denies any role to moral and normative arguments in legal analysis. Positivism does argue, however, that these arguments are legitimate *because* they are authorized by legal sources that are ultimately social and fact-based. A good example of this is Justice Scalia’s constant reference to Articles I and III of the Constitution to justify his view of separation of powers and the correct interpretive methodology, both questions that seem to involve normative issues and analyses.

37. See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); SCALIA, A MATTER OF INTERPRETATION, *supra* note 4.

38. *Id.* at 1185 (1989); Cass Sunstein, *Justice Scalia’s Democratic Formalism*, 107 YALE L.J. 529, 539 (1997); William N. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 649 (1990).

39. Antonin Scalia, *The Rule of Law as a Law of Rules*, *supra* note 37, at 1185.

40. See, e.g., William N. Eskridge, *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509 (1998).

another way. Referring to Justice Scalia's practice of grounding his interpretive theory within the Constitution itself, Professor Tribe points out that this necessarily raises the specter of infinite regress:

Prominent . . . is the simple but ultimately deep problem of self-referential regress whenever one seeks to validate, from within any text's four corners, a particular method of giving that text meaning. Even if one sought to "prove" a proposition as seemingly straightforward as that the marks on the pages of a given text should be understood as written in *English* rather than in some other tongue, one could not do so by quoting from the page itself . . . although I nonetheless share with Justice Scalia the belief that the Constitution's written text has primacy and must be deemed the ultimate point of departure . . . [t]here is certainly nothing in the text itself that proclaims the Constitution's text to be the sole or ultimate point of reference—and, even if there were, such a self-referential proclamation would raise the problem of infinite regress and would, in addition, leave unanswered the very question with which we began: how is the text's *meaning* to be ascertained?⁴¹

Or, in other words, we cannot refer *to* the constitutional text to understand how to interpret that text. This, then, brings us to what I believe *is* the legitimate philosophical defense that Justice Scalia offers: A theory of interpretation that is grounded in a particular vision of the rule of law.

2. *Justification II: Rule of Law*

In his extra-judicial writings, Justice Scalia states that his primary concern is ensuring the maintenance of a "government of laws, not men."⁴² In other words, he places great value upon the rule of law in its most formal and basic sense. In other words, he insists that, for there to be a genuine government of laws, the laws themselves should fulfill certain criteria of prospectivity, generality, clarity, and so on, with minimal individual discretion in understanding and applying

41. Laurence Tribe, *Comment, in SCALIA, A MATTER OF INTERPRETATION, supra* note 4, at 78.

42. SCALIA & GARNER, *READING LAW, supra* note 1, at 375.

them.⁴³ We shall consider later the specific normative values that underlie this vision—in particular, predictability and formal equality. For now, we may notice that this is one way of explaining Justice Scalia’s preference of semantic over pragmatic meaning, and his consequent rejection of the faithful agent theory. The pragmatics of a situation are not only often not known to a significant portion of the audience (this would be especially true in cases of law, addressed to citizens at large), but—arguably—are more subject to manipulation and the play of individual discretion than simple sentence meaning. Thus, the reason why Justice Scalia has settled upon semantic—as opposed to pragmatic—meaning is driven by what he sees to be the basic *normative purpose* of the legal enterprise: maintaining and upholding the rule of law, and the values that are served thereby. Professor Eskridge agrees, placing a number of the Scalian interpretive canons within the rubric of the rule of law:

Scalia and Garner’s particular list of canons is dominated by a nonconstitutional value, that of *continuity* . . . Continuity is a rule of law value: Americans rely on longstanding legal rules, plan their lives around them, and assume that most of the really important rules will continue to be in place. Similarly, the rule of law abhors *uncertainty and fluctuating rules*. These values of continuity undergird what Scalia and Garner call the “stabilizing canons,” namely the presumption against change in common law . . . the canon of imputed common-law meaning, the prior-construction canon, the presumption against implied repeals, and a few technical canons. Continuity values are also an important justification for the authors’ supremacy-of-text principle, fixed-meaning canon, presumption of consistent usage, presumption against federal preemption, and presumption against implied rights of action. And of course the best example of a continuity-preserving canon is the stare decisis rule, which Scalia and Garner do not discuss but do endorse as an exception to textualism in many cases.⁴⁴

43. For a conception of the thin rule of law, see LON FULLER, *THE MORALITY OF LAW* (1964).

44. Eskridge, *The New Textualism and Normative Canons*, *supra* note 3, at 556 (emphasis added).

The focus on continuity as a means of ensuring stability provides a justification for Justice Scalia's deference to tradition. Scholars have pointed out that such deference appears to sit uneasily with Justice Scalia's rejection of precedent as having value in and of itself.⁴⁵ What principle justifies according value to certain aspects of the past but not to others? The answer is that traditions deeply rooted in the nation's history self-explanatorily serve the precise value of stability and continuity that Professor Eskridge highlights as part of the Scalian vision of the rule of law—while precedents, by themselves, do not.⁴⁶ This is also consistent with Justice Scalia's seemingly selective deference to precedent. His touchstone is the point at which precedents become established to a degree that people—as with traditions—begin to organize their lives around the assumption that the law established by the precedent will remain firm and undisturbed⁴⁷ (the basic idea of legitimate expectation and estoppel, in contract law). Naturally, this line is blurry, but it still helps us to understand the principle that underlies what might, at first blush, appear to be cherry-picking among precedents.

I will now attempt to demonstrate how this idea comports well with various other aspects of Justice Scalia's jurisprudence.

II. Legislative History

A linguistic approach founded on sentence meaning, undergirded by a formal understanding of the rule of law logically leads Justice Scalia to one of the most well-known aspects of his interpretive theory: his rejection of legislative history. As we have seen above, reference to legislative history is an exemplar of pragmatic linguistic reasoning; it derives linguistic meaning by reference to non-linguistic contexts. The best statement of this idea can be found in the Court's opinion in *Watt v. Alaska*:⁴⁸ “[t]he circumstances of the enactment of particular legislation may persuade a court that Congress did not

45. See, e.g., Robert A. Burt, *Precedent and Authority in Antonin Scalia's Jurisprudence*, 12 CARDOZO L. REV. 1685 (1990).

46. I argue later that deference to tradition also forms part of Justice Scalia's substantive view on liberty.

47. See, e.g., *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 34–35 (1989) (Scalia, J., concurring in part and dissenting in part) (“the mere venerability of an answer consistently adhered to for almost a century, and the difficulty of changing, or even clearly identifying, the intervening law that has been based on that answer, strongly argue against a change”). Justice Scalia goes on to elaborate how forty-nine states have legislated following the rule in *Hans v. Louisiana* (the impugned case at issue).

48. *Watt v. Alaska*, 451 U.S. 259 (1981).

intend words of common meaning to have their literal effect.”⁴⁹ We are now in a position to understand this more clearly; “*circumstances of enactment*” refers to *non-linguistic facts*—the factual background of the petrol-pump question, which is set up in opposition to “*literal effect*,” which refers to sentence/semantic meaning. As Professor Eskridge argues, the aim is to figure out the “assumptions, goals, and limitations of the enacting Congress”⁵⁰—all non-linguistic concerns.

Thus, by endorsing a semantic theory of meaning, Justice Scalia—perfectly and consistently—refuses to invoke legislative history in determining meaning. This, indeed, becomes clear in cases like *Babbitt v. Sweet Home Chapter of Communities. for a Great Oregon*,⁵¹ where Justice Scalia, writing in dissent, specifically deploys the rule of lenity—which he treats as providing *linguistic context/background*—*against* the majority’s use of *legislative* (non-linguistic) history.⁵² The division in that case between Justice Scalia and Justice Stevens is—*inter alia*—along the lines of using the rule of lenity versus legislative history to clarify ambiguities which, in turn, tracks the contestation between semantic and pragmatic meanings.

But what justifications does Justice Scalia himself provide for rejecting legislative history? Again, there are two.

A. Justification I: Separation of Powers

Separation of powers is the first justification. Justice Scalia argues that by entering into the thicket of legislative history, the Court is essentially going into legislative intent.⁵³ He argues that the task of the legislature is to frame laws, not to have intentions.⁵⁴ For him, therefore, investigating legislative history is tantamount to the Court stepping into the legislative domain and doing its task for it.⁵⁵ For the precise reason noted above, this will not do; the Constitution, in its allocation of powers, *does not impose any particular interpretive theory upon judges*. Justice Scalia would argue that what the

49. *Id.* at 266.

50. Eskridge, *The New Textualism*, *supra* note 38, at 630.

51. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995).

52. *Id.* at 721 (Scalia, J., dissenting); Eskridge, *The New Textualism and Normative Canons*, *supra* note 3, at 545.

53. *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia J., concurring).

54. *Id.* See also, for instance, his opinions in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 130 S. Ct. 1431 (2010) and *INS v. Cardoza-Fonseca*, 408 U.S. 480 (1987).

55. An argument Professor Eskridge attributes to the Department of Justice 1989 Re-Evaluation Paper. Eskridge, *The New Textualism*, *supra* note 38, at 648; *see id.* at n. 101.

Constitution does mandate is that the legislators make law, and judges interpret it. That leaves the question of what law *is* entirely open.

Justice Scalia's other separation of powers-based argument—that ultimately, because of the institutions of bicameralism and presentment, law simply ought to be the text that all parties agree upon, and that consulting legislative history would privilege Congress over the other lawmaking branches⁵⁶—also will not do because, as Professor Eskridge points out:

Bicameralism and presentment requirements are only formally applicable when “actions taken by either House . . . ‘contain matter which is properly to be regarded as legislative in its character and effect,’” namely, to alter legal rights and duties. As a formal matter, committee reports consulted to explain the meaning of the statute do not themselves seek to alter legal rights and duties. Consulting them does not violate bicameralism or presentment any more than would consulting a dictionary.⁵⁷

Separation of powers, therefore, cannot justify the rejection of legislative history.

B. Justification II: Minimalism

At various places, we note Justice Scalia's other concern with the use of legislative history: That it “becomes a smokescreen for smuggling in the preferences of judges.”⁵⁸ One of the dominant bases of his theory of interpretation, then, is concerned with *restricting the scope of discretion accorded*—as he understands it—to judges. This, if we delve deeper into Justice Scalia's writings, stems from a deeper quest—that is, a quest for *objectivity*.⁵⁹ Justice Scalia believes that the more discretion judges have (for instance, interpreting “cruel and unusual” in light of the “evolving standards of decency”⁶⁰), the less

56. *Thompson v. Thompson*, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring in the judgment).

57. Eskridge, *The New Textualism*, *supra* note 38, at 672.

58. SCALIA, *A MATTER OF INTERPRETATION*, *supra* note 4, at 18; *see also* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988).

59. SCALIA & GARNER, *READING LAW*, *supra* note 1, at 89 (“Originalism is the only *objective* standard of interpretation.”).

60. *Trop v. Dulles*, 356 U.S. 86 (1958).

bound they are by the four corners of the text. And this is undesirable, because judges' preferences are indeterminate (at least to the people who are bound by their judgments), while the text—as Justice Scalia argues—is tangible, objective,⁶¹ and determinate. But this, we will notice, is simply the rule-of-law justification by another name. Indeed, Justice Scalia explicitly makes the connection between judicial minimalism and the rule of law in an essay, where he writes:

But when one does not have a *solid textual anchor or an established social norm from which to derive the general rule*, its pronouncement appears uncomfortably like legislation. If I did not consider my judgment governed by the original meaning of constitutional text, or at least by current social practice as reflected in extant legislation, I would feel relatively comfortable deciding case-by-case whether, taking into account all of the circumstances, the death sentence for this particular individual was “cruel and unusual”—but I would feel quite uncomfortable announcing *firm rules* (legitimated by nothing but my own sense of justice) regarding the relevance of such matters as the age of the defendant, mental capacity, intent to take a life, and so forth.⁶²

The ideal of objectivity provides a second justification for Justice Scalia's deference to tradition. Indeed, he makes a categorical link between the two. By holding that judges must defer to tradition at the most *specific* level possible, he argues that judges will thus ensure conformity with “principles adhered to, over time, by the American people, rather than those favored by the personal . . . philosophical dispositions of a majority of this Court.”⁶³ This concern is perhaps expressed most vividly in *Michael H. v. Gerald D.*,⁶⁴ where Justice Scalia links tradition with the very idea of identifiable rules, and thus, with his conception of law: “general traditions provide such imprecise guidance [that] they permit judges to dictate rather than discern

61. See, e.g., SCALIA, A MATTER OF INTERPRETATION, *supra* note 4, at 21 (“When the *objective* import of the statute is clear enough”).

62. Scalia, *The Rule of Law as a Law of Rules*, *supra* note 37, at 1185 (emphasis added).

63. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 96 (1990) (Scalia, J., dissenting).

64. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

society's views . . . a rule of law that binds neither by text nor by any particular, identifiable tradition, is no rule of law at all."⁶⁵

III. Original Public Meaning

So far, we have traced the links between textualism, the rejection of legislative history, deference to tradition, and semantic meaning within an overall normative framework that places primary value upon the rule of law. Let us now consider the second great pillar of Justice Scalia's interpretive theory: *original public meaning*—that is, the public meaning of the words used in a text *at the time that it was enacted*.⁶⁶ We can fit public meaning into Justice Scalia's theory easily enough; values of clarity and fair warning, that form the basis of the rule of law, are served best when words are given the meaning that the general public would most readily associate with them. But why must we refer to the *original* public meaning? Wouldn't those same values of the rule of law be served better by adopting the *current* public meaning—the one that the people *now* (that is, the intended audience of the legislative communicative act, at any given point)—would most readily associate with the statutory text? While there does seem to be a conflict here, Justice Scalia resolves it internally, by viewing it as a clash between *two* rule of law values, and giving more weight to the ideal of *objectivity*. Objectivity—achieved through minimalism—is revealed in his rejection of living constitutionalism, where he argues that that particular theory fails because there is “no agreement, and no chance of agreement, upon what is to be the guiding principle of the evolution.”⁶⁷ The concern with agreement is the same as the concern with objectivity: Elsewhere, Justice Scalia treats as conclusive the argument that “originalism is the only *objective* standard of interpretation even competing for acceptance.”⁶⁸ Thus, what worries Justice Scalia is the *unpredictability* that accompanies a failure of agreement or excessive subjectivity in determining how laws are to be understood, which he considers to be necessary fallout of an evolving interpretation.

65. *Id.* at 128 (Scalia J.); *see also* *Burnham v. Super. Ct. of Cal., Cnty. of Marin*, 495 U.S. 604 (1990); *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

66. SCALIA, A MATTER OF INTERPRETATION, *supra* note 4, at 38 (emphasis added).

67. *Id.* at 46.

68. SCALIA & GARNER, READING LAW, *supra* note 1, at 89.

A. Corollary: Clarifying the Use of Dictionaries

It is in this context that we now examine Justice Scalia's approach to dictionaries. It is well-documented that Justice Scalia is a frequent user of dictionaries, and indeed, the use of dictionaries by the Court during his tenure has been pervasive.⁶⁹ There are, however, two distinct ways in which dictionaries might be used in legal analysis: as *authoritative sources of meaning* or as *reliable guides to meaning*. The former treats dictionaries as playing the pivotal role in what is essentially a form of a coordination convention.⁷⁰ To serve the goals of efficient communication, every system of language needs certain linguistic authorities (much like science needs scientific authorities). Dictionaries serve this role because we all treat them as the *generators* of correct meaning—that is, a word means what it means *by virtue of the fact the a dictionary says so*.⁷¹

The latter idea, however, does not focus on *correct* meaning, but rather on *the publicly accepted meaning*. According to this theory, dictionaries are not markers of truth, but simply utilitarian tools that *work* because we all—as a matter of contingent fact—defer to the meanings that they list. We refer to a dictionary, therefore, simply to know how a community of linguistic users is most likely to use a word.

Justice Scalia purports to subscribe to the second of these accounts, which is entirely consistent with his theory of statutory interpretation. So, for instance, in *Liteky v. United States*,⁷² he analyzes the meaning of the words “prejudice” and “bias” in the following way: “As *generally used*, these are pejorative terms, describing dispositions that are *never* appropriate. It is *common to speak of* ‘personal bias’ or ‘personal prejudice’ without meaning the adjective to do anything except emphasize the idiosyncratic nature of bias and prejudice.”⁷³ Similarly, in *Chisom v. Roemer*,⁷⁴ writing in dissent, Justice Scalia emphasized the need for ordinary terms used in their ordinary context to be given a “predictable meaning”⁷⁵—which, in dictionary terms, would translate to picking the meaning commonly

69. James J. Brudney & Cory Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2005).

70. DAVID LEWIS, CONVENTION: A PHILOSOPHICAL STUDY (2002).

71. See, e.g., HILARY PUTNAM, *The Meaning of Meaning*, in MIND, LANGUAGE AND REALITY, VOL. 2: PHILOSOPHICAL PAPERS 275 (1975) (calling this the “*linguistic division of labour*”).

72. *Liteky v. United States*, 510 U.S. 540 (1994).

73. *Id.* at 550–51 (emphasis added).

74. *Chisom v. Roemer*, 501 U.S. 380 (1991).

75. *Id.* at 417 (Scalia J., dissenting).

followed by the lay reader. In that case, indeed, he settled upon what he considered to be the *ordinary* (as opposed to *correct*) meaning of the word “representative” from *Webster’s Second*.⁷⁶ And in *Wisconsin Department of Revenue v. William Wrigley Jr.*, he cited *Black’s Law Dictionary* and *Webster’s Third* to hold that “‘solicitation,’ *commonly understood*, [as opposed to ‘correctly understood’] means ‘[a]sking’ for, or ‘enticing’ to, something . . .”⁷⁷

Furthermore, in a parallel—yet closely related—context, when explaining why he would examine the framing debates, he says:

I will consult the writings of some men who happened to be delegates to the constitutional convention—Hamilton’s and Madison’s writings in *The Federalist*, for example. I do so, however, not because they were Framers and therefore their intent is authoritative and must be the law; *but rather because their writings, like those of other intelligent and informed people of the time*, display how the text of the Constitution was originally understood. Thus I give equal weight to Jay’s pieces in *The Federalist*, and to Jefferson’s writings, even though neither of them was a Framers.⁷⁸

The Framers’ writings—exactly like dictionaries—are thus *guides to public usage*, and not *determinants of correct usage*.⁷⁹ This fits

76. *Id.* at 410 (Scalia J., dissenting). See also Note, *Looking it Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1442 (1994). For the purpose of this argument, I wish to bracket the legitimate critique that dictionaries are not, actually repositories of ordinary meaning, and examine Justice Scalia’s arguments on its own terms. See, e.g., *id.* at 1445; Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

77. *Wis. Dep’t of Revenue v. William Wrigley, Jr.*, 505 U.S. 214, 223 (1992) (emphasis added).

78. SCALIA, A MATTER OF INTERPRETATION, *supra* note 4, at 38 (emphasis added).

79. *But see* *MCI v. AT&T*, 512 U.S. 218 (1994), which turned upon the meaning of the word “modify.” Professor Eskridge argues that in that case, Justice Scalia rejected the use of *Webster’s Third* because it was merely “colloquial.” Eskridge, *Textualism, the Unknown Ideal?*, *supra* note 40, at 1546. If true, this is certainly an inconsistency in Justice Scalia’s jurisprudence, and must be acknowledged as such. I am not sure, however, if colloquialism was the ground for rejecting *Webster’s Third*. Justice Scalia does not mention colloquialism in his judgment, and his opinion is focused more on how the definition in *Webster’s Third* is a lone voice in the wilderness, against an array of dictionaries on the other side. Consider: “a meaning set forth in a single dictionary (and, as we say, its progeny) which not only supplements the meaning contained in all other dictionaries, but contradicts one of the meanings contained in *virtually all other dictionaries*.” *MCI*, 512 U.S. at 227 (emphasis added). Now, it is true, as Justice Stevens’s dissent pointed out, and as Professor Eskridge points out, there were actually a *number* of

neatly with the overall normative vision of the rule of law as guiding action and creating predictability because if dictionaries do serve this role, then adhering to the meaning provided therein is the best way of adhering to law's role of putting citizens on advance notice about what actions are prohibited and what are permitted. Thus, the Framers' writings serve *both* of Justice Scalia's goals of formal equality (impartiality) through prospectivity and predictability through public knowledge.

IV. Overall Justification I: Popular Sovereignty and Democracy

We have now examined Justice Scalia's interpretive approach in detail. Does he provide an overall justification for it? At the very beginning of *A Matter of Interpretation*, he argues that it is:

incompatible with *democratic government* to have the meaning of law determined by what the lawgiver *meant* rather than what the lawgiver *promulgated* . . . [A] government of laws means that it is *law* that will govern . . . [M]en may intend what they will, but it is only the laws that they enact which bind us.⁸⁰

At another place, he argues: "Originalism is the only approach to text that is compatible with democracy. When government-adopted texts are given a new *meaning*, *the law is changed*; and *changing written law*, like adopting written law in the first place, is the function of the first two branches of government."⁸¹ We have argued above that these statements are not as self-evidently true as it seems at first glance, because they do not begin to answer the question: What techniques must we apply to know what it is that the lawgiver promulgated, or what the law means? Once again, circularity is evident, especially in the second statement. Originalism is the only philosophy that interprets the law as it is and does not change it—but what the law *is*, is to be determined by applying the techniques of originalism itself!

It is similarly question-begging to argue—as some scholars do—that Justice Scalia's emphasis on judicial minimalism is undergirded by democratic concerns, because it seeks to curtail judicial discretion

other dictionaries that adhered to the contrary meaning of "modify." That would imply, however, that Justice Scalia misapplied his own test on *facts*, not that he supported a different—and contradictory—*principle*.

80. SCALIA, *A MATTER OF INTERPRETATION*, *supra* note 4, at 17 (emphasis added).

81. SCALIA & GARNER, *READING LAW*, *supra* note 1, at 82 (emphasis added).

to provide greater scope for action to the more democratically responsive branch, the legislature.⁸² This is because judicial minimalism must *depend upon* a theory of interpretation, rather than *giving rise* to one. We cannot know whether, by being minimalists, judges are carrying out their duty to interpret laws, unless we *first* know what those laws say. Without that knowledge, there is no way of telling whether judicial minimalism is not simply a judicial abdication of duty.⁸³ Professor Sunstein points out a further—and related—problem when he argues that Justice Scalia’s minimalism essentially involves a near-complete deference to unchecked majoritarian processes.⁸⁴ Now it could well be that Justice Scalia believes in a version of democracy that is almost entirely majoritarian in nature. But if so, that is a contested idea at best, and he has not mounted a defense to it.

What all this emphasizes, however, is that Justice Scalia’s underlying theory of democracy does little independent work in his theory of interpretation. Indeed, his conception of democracy is reducible—at least as he states it—to his conception of the rule of law. This is evident from the argument he provides that *does* seek to locate the substance of democracy as grounded in something beyond simply judges-sticking-to-the-meaning-of-laws (without providing an account of how that meaning is to be determined). Justice Scalia argues:

In a democratic system, of course, *the general rule of law* has special claim to preference, since it is the

82. Tom Levinson, *Confrontation, Fidelity, Transformation: The Fundamentalist Judicial Persona of Justice Antonin Scalia*, 26 PACE L. REV. 445, 471 (2006); Sunstein, *Justice Scalia’s Democratic Formalism*, *supra* note 38, at 529.

83. A point made by David Strauss in a slightly different context: “[the originalist] argument does not identify the theoretically correct way to interpret the Constitution. Justice Scalia’s defense of traditionalism (and originalism—the same points apply) is that the principal alternative way of interpreting the Constitution is too dangerous because it allows judges to act on the basis of their predilections. He does not contend that the traditionalist answer is what the Constitution actually prescribes. It is just that, according to him, judges will come closer to what the Constitution prescribes if they try to be traditionalists. In order to evaluate that claim, one must have an account of what the Constitution does prescribe. Without such an account, one cannot determine whether traditionalism or some other approach comes closer. That is, if there were no bounded rationality problem if a judge had the capacity to do exactly what Justice Scalia wants her to do—what would Justice Scalia tell her?” David Strauss, *Tradition, Precedent and Justice Scalia*, 12 CARDOZO L. REV. 1699, 1711 (1991).

84. Cass Sunstein, *Justice Scalia’s Democratic Formalism*, *supra* note 38, at 562; see generally Robert Post & Reva Siegel, *Originalism as Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545 (2007).

normal product of that branch of government most responsive to the people. Executives and judges handle individual cases; the legislature generalizes. Statutes that are seen as *establishing rules of inadequate clarity or precision* are criticized, on that account, as undemocratic—and, in the extreme, unconstitutional—because they leave too much to be decided by persons other than the people’s representatives.⁸⁵

Here, judicial minimalism is grounded in ideas of popular sovereignty, because the more discretion is vested with judges, the less decision-making is done by the most representative branch. But that is at best a partial justification, since once again the focus is on *generality* (being the “normal product” of legislative action) and clarity and precision arise *out of* that generality.⁸⁶

V. Overall Justification II: Rule of Law—Meaning and Values

We come at last to the real philosophical justification underlying Justice Scalia’s approach to statutory interpretation—the rule of law. We have referred, peripherally, to the values underlying the formal rule of law. Let us now examine them in greater detail. For Justice Scalia, there are two distinct values at stake.

A. Predictability and Stability

The formal rule of law is designed, by creating predictability and stability, to allow people to plan their affairs with a degree of certainty. This idea goes back to Lon Fuller’s inner morality of law, where he locates the fundamental purpose of any legal system as providing people basic security to make at least medium-term plans without constant threat of disruption.⁸⁷ Justice Scalia agrees and observes: “[U]ncertainty has been regarded as incompatible with the Rule of Law. Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes . . .”⁸⁸ Predictability is at the top of his mind, as well, when he declines to

85. Scalia, *The Rule of Law as a Law of Rules*, *supra* note 37, at 1176 (emphasis added).

86. Indeed, Sunstein himself comes to the conclusion that predictability is the most important value that emerges out of this “democratic formalism.” Cass Sunstein, *Justice Scalia’s Democratic Formalism*, *supra* note 38, at 532.

87. See FULLER, *THE MORALITY OF LAW*, *supra* note 43.

88. Scalia, *The Rule of Law as a Law of Rules*, *supra* note 37, at 1179.

invoke the “spirit” of statutes, on the ground that “plain words must evoke predictable meanings.”⁸⁹

This rule of law value justifies—or at least, purports to justify—Justice Scalia’s use of certain interpretive canons. Recall that, for Justice Scalia, while certain linguistic canons are no more than “presumptions about what an intelligently produced text conveys,”⁹⁰ certain canons also have a “directive” purpose—that is, to “promote *clearer* drafting.”⁹¹ Notice, specifically, the aspect of drafting that Justice Scalia seeks to promote—and also, consequently, believes in keeping with the judicial role and with the separation of powers—is that of *clarity*, which is directly linked to the predictive and certainty-creating functions of the rule of law. This is found, as well, in his adoption of several of the linguistic canons, especially the presumption of consistent usage. There, Justice Scalia admits that the legislature does not *actually* function in that way (what about concerns of democracy *there?*), but the presumption of consistent usage—which, essentially, seeks to apply uniformity and predictability of meaning within the same legislative instrument—is nonetheless to be invoked by courts, either to *impose coherence where there was none, because the value of coherence (and predictability) outweighs the value of accurate interpretation*—or/and to persuade legislatures to draft more clearly in the future.⁹²

B. Formal Equality

The other basic value Justice Scalia finds attractive is that of formal equality, which means treating like cases alike.⁹³ “Impartiality” and “consistency” are two other terms that might be used to characterize this value. So, he observes:

when a case is accorded a different disposition from an earlier one, it is important, if the system of justice is to be respected, not only that the later case be different, but that it be seen to be so . . . [M]uch better, even at the expense of the mild substantive distortion that any

89. SCALIA & GARNER, *READING LAW*, *supra* note 1, at 345. For an analysis, see George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 *YALE L.J.* 1297, 1307 (1990).

90. SCALIA & GARNER, *READING LAW*, *supra* note 1, at 82.

91. *Id.* (emphasis added).

92. *Id.* at 170.

93. The formulation is Aristotle’s, to whom Justice Scalia refers to approvingly. See Scalia, *The Rule of Law as a Law of Rules*, *supra* note 37, at 1182.

generalization introduces, to have a clear, previously enunciated rule that one can point to in explanation of the decision.⁹⁴

This explains, in fact, another interpretive technique that Justice Scalia brings to statutory construction, one that is, as it turns out, inconsistent with actual legislative practice. In *Green v. Bock Laundry Match Co.*,⁹⁵ he holds that an interpretation must be “most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind.”⁹⁶ Given that Justice Scalia *himself* admits that this is a fiction, the logical question is—why *this* fiction?⁹⁷ And that is because coherence and consistency are implicitly linked with formal equality, or equal treatment.

Furthermore, this also helps us to understand yet another of Justice Scalia’s assumptions that is largely untethered from democratic realities—that is, the assumption that legislators do actually follow the canons of drafting that Justice Scalia brings to bear on the interpretive process (and that they can be made to do so by judicial practice aimed at bringing them in line). This is untethered from reality because, as Eric Lane points out, “bill drafters are generally not aware of the canons of construction or other guidelines for interpretation. More importantly, even if they were, it would make no difference, since the logic of the canons is not applicable to the process from which legislation emerges and could not be applied.”⁹⁸ Justice Scalia’s ignoring actual legislative process makes sense, however, if we understand that the rule of law values he ascribes to the legal enterprise *require* him to make precisely those assumptions. Much like the “benign fiction” he proposed in *Green*, the following of the interpretive canons is simply another benign fiction designed to bring practice in line with the normative value of the rule of law. Nor is this untoward; once we understand that interpretive theories—including Justice Scalia’s—are relentlessly norm-and-purpose driven, the disconnect between his interpretive

94. Scalia, *The Rule of Law as a Law of Rules*, *supra* note 37, at 1178.

95. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989).

96. *Id.* at 528.

97. John Manning, for instance, argues that this fiction is positively harmful, as it goes against the interest-group bargaining and compromises that are an essential part of legislation. John Manning, *Textualism and the Equity of the Statute*, *supra* note 27, at 70.

98. Eric Lane, *Legislative Process and Its Judicial Renderings: A Study in Contrast*, 48 U. PITT. L. REV. 639, 651 (1987); *c.f.* Eskridge, *The New Textualism*, *supra* note 38, at 679.

assumptions and the actual legislative process should no longer be surprising.⁹⁹

This understanding also helps to assess criticisms. Professor Eskridge argues:

There is a democracy problem with a canons-based textualism. If the canons overwhelmingly reflect judicial values and not legislative ones, they can be expected to operate in antidemocratic ways . . . the democracy problem is exacerbated if canons-toting judges overturn agency interpretations that are consistent with Congress's expectations, which is what Justice Scalia was trying to do in *Sweet Home*. And the democracy problem becomes a serious indictment if judges are imposing canons-based meanings onto statutes under circumstances where Congress is not aware of the canons judges are using or is unable to incorporate canonical rules into statutory drafting, given the conditions of the legislative process.¹⁰⁰

We can now understand the response that Justice Scalia would give—or at least, the response he ought to give: Democratic government involves a number of values, the most important of which is ensuring stability and equal treatment by adhering to the rule of law. Therefore, while there might arguably be a democratic loss in ignoring the way the peoples' representatives actually function, there is a democratic gain in the values that are thereby preserved. Of course, it then becomes important for Justice Scalia to demonstrate *how* this is so, and for that he needs a detailed theory of democracy, one that he has yet to provide.

VI. Rule of Law, Democracy and Freedom: A Hayekian Framework

We might, however, be permitted a little extrapolation on Justice Scalia's behalf. At the heart of this formalistic vision of law lies a further normative vision about the true meaning of liberty, one that is developed by Friedrich Hayek. Hayek defines freedom as the absence of coercion, and coercion as the imposition of someone else's

99. Of course, it counts against a theory that departs radically and consistently from actuality. See Paul Thagard, *The Best Explanation: Criteria for Theory Choice*, 75 J. PHIL. 76 (1978).

100. Eskridge, *The New Textualism and Normative Canons*, *supra* note 3, at 538.

arbitrary will upon you.¹⁰¹ For Hayek, the formal rule of law is a guarantor of freedom precisely because it prevents—to the greatest extent possible—the imposition of such arbitrary will. So, Hayek argues, “what distinguishes a free from an unfree society is that in the former each individual has a recognized private sphere clearly distinct from the public sphere, and the private individual cannot be ordered about but is expected to *obey only the rule which are equally applicable to all.*”¹⁰² In other words, “so long as kept within the bounds of the law, there [is] no need to ask anybody’s permission or to obey anybody’s orders.”¹⁰³

This, in turn, can happen only if laws are known and certain, and thus the decisions of the Courts can be predicted, because they lead to consistent and foreseeable results. Thus we notice how—just like for Justice Scalia—equality, predictability, promulgation, consistency and certainty are all values that come together to form a framework within which the individual is maximally free to plan his affairs without interference by the arbitrary will of another.

Early on in *The Constitution of Liberty*, Hayek provides us with the clearest statement of this principle:

The coercion which a government must . . . use . . . is reduced to a minimum and made as innocuous as possible by restraining it through known general rules, so that in most instances an individual need never be coerced unless he has placed himself in a position where he knows he will be coerced . . . in this way . . . being made impersonal and dependent upon general, abstract rules, whose effects on particular individuals cannot be foreseen at the time they are laid down, even the coercive acts of government become data on which the individual can base his own plans.¹⁰⁴

Thus, the supreme advantage of abstract rules—and this meshes with Justice Scalia’s determination towards judicial minimalism—is that “the *source* of the decision on what particular action is to be

101. FRIEDRICH HAYEK, *THE CONSTITUTION OF LIBERTY* 11 (1960).

102. *Id.* at 207–08 (emphasis added). Notice the language of equality, found in Justice Scalia’s writings in almost the same terms. The stress on formal equality is emphasized by Westmoreland. Robert Westmoreland, *Hayek: The Rule of Law or the Law of Rules?*, 17 *LAW & PHIL.* 77, 95 (1998).

103. HAYEK, *THE CONSTITUTION OF LIBERTY*, *supra* note 101, at 208.

104. *Id.* at 21.

taken shifts from the issuer to the actor . . . the ideal type of law . . . provides merely additional *information* to be taken into account . . .”¹⁰⁵ This explains the Scalian passion for objectivity and cabining discretion. Justice Scalia, following Hayek, sees a direct connection between taking discretionary decision-making ability out of the hands of the law’s creators and interpreters, and putting them into the hands of the people to maximize freedom.

What is equally interesting is how, for Hayek, freedom and the rule of law are implicitly bound up with *traditions*. Central to Hayek’s philosophy is an analytical distinction between two kinds of order: *organizational* and *spontaneous*.¹⁰⁶ A free society is precisely a spontaneous ordering of individual actions and such a society can be made possible—i.e., spontaneity is possible—only under a regime of generally framed rules applicable to all.¹⁰⁷ This is opposed to a regime of specific *commands*, which characterize planned/organized societies.¹⁰⁸ Commands are geared towards achieving specific, defined ends and constrain individual action in service of those ends.¹⁰⁹ This is the very definition of coercion.¹¹⁰ Thus, for Hayek, true freedom is possible only through spontaneous ordering.¹¹¹

But Hayek then *further* argues, “[O]nly against a *settled background of principle* can a society of free and spontaneous agents function at all.”¹¹² This is the backbone of his justification of traditions as integral to freedom. In his words:

The value of freedom consists mainly in the opportunity it provides for the growth of the undesigned, and the beneficial functioning of a free society rests largely on the existence of such freely grown institutions. There probably never has existed a genuine belief in freedom, and there has certainly been no successful attempt to operate a free society, without a genuine reverence for grown institutions, for

105. *Id.* at 150 (emphasis added).

106. Struan Jacobs, *Spontaneous Order: Michael Polanyi and Friedrich Hayek*, 3 CRITICAL REV. INT’L SOC. & POL. PHIL. 49 (2000).

107. *Id.* at 55.

108. *Id.* at 56.

109. *Id.*

110. *Id.*

111. *Id.*

112. Anthony O’Hear, *Criticism and Tradition in Popper, Oakshott and Hayek*, 9 J. APPLIED PHIL. 65, 72 (1992) (emphasis added).

customs and habits and “all those securities of liberty which arise from regulation of long prescription and ancient ways.” *Paradoxical as it may appear, it is probably true that a successful free society will always in a large measure be a tradition-bound society.*¹¹³

In other words, the thin rule of law, with its formal equality of treatment, permits¹¹⁴ individuals to generate a spontaneous order in which various practices are tried and tested, and compete with each other;¹¹⁵ traditions refer to those gradually evolving bodies of practice¹¹⁶ that have withstood the test of time, and provide the framework for further action.¹¹⁷ This, for Hayek, is the paradigm case of a free society.¹¹⁸

In a previous section, I argued that reliance on tradition serves functions of continuity and stability that Justice Scalia finds valuable in the legal enterprise. We can now see, however, that the role of tradition is deeper: in its interaction with the thin conception of the rule of law,¹¹⁹ it is central to the Hayekian-Scalian vision of freedom, democracy and the good society. While Justice Scalia’s reliance on tradition has been noted by many as Burkean,¹²⁰ in my opinion, it is more than just Burkean. In how tradition meshes with formal equality and the rule of law to form a complex, interlocking idea of the free society, Justice Scalia’s jurisprudence is the concrete exemplar of the social philosophy of Friedrich Hayek.

113. Friedrich Hayek, *Freedom, Reason and Tradition*, 68 ETHICS 229, 235 (1958) (emphasis added).

114. Or, in Hayek’s words, “induces.” See Struan Jacobs, *Spontaneous Order*, *supra* note 106, at 52.

115. FRIEDRICH HAYEK, *THE FATAL CONCEIT: THE ERRORS OF SOCIALISM* 19, 26 (1988). For a critique of the notion of competition, see Geoffrey M. Hodgson, *Hayek’s Theory of Cultural Evolution: An Evaluation in the Light of Vanberg’s Critique*, 7 ECON. & PHIL. 67 (1991).

116. Indeed, the “organic” nature of tradition has been stressed in the specific context of Justice Scalia’s jurisprudence. See, e.g., J. Richard Broughton, *The Jurisprudence of Tradition*, 103 W. VA. L. REV. 19, 21 (2001).

117. FRIEDRICH HAYEK, *NEW STUDIES IN PHILOSOPHY, POLITICS, ECONOMICS AND THE HISTORY OF IDEAS* 10 (1978). For an exposition and critique of this important point, see Martin de Vlieghe, *A Reappraisal of Friedrich Hayek’s Cultural Evolutionism*, 10 ECON. & PHIL. 285 (1994).

118. Westmoreland, *supra* note 102, at 77, 79.

119. We can also explain now something that scholars like Zeppos find particularly troubling—the dissonance between Justice Scalia’s focus on textualism, and his deference to traditions, which are emphatically non-textual. Nicholas S. Zeppos, *Justice Scalia’s Textualism: The “New” New Legal Process*, 12 CARDOZO L. REV. 1597, 1630 (1991).

120. Strauss, *supra* note 83, at 1704.

The last aspect of Hayek's thought should not now be surprising. His enthusiastic endorsement of spontaneous ordering—the role of gradually accumulated traditions as the sum of a number of individual practices interacting with each other in a social atmosphere akin to a free market—is matched by his antipathy to a “planned society,” where an individual or a group of individual attempt to deploy “rational methods” in directing individual action towards a set of pre-determined goals and outcomes.¹²¹ Such a society functions through *commands*, not *rules*, which are not only the embodiments of coercion (since they do not allow the agent freedom of action), but also prevent the “adaptive evolution” to circumstances that are so important to a free and evolving society.¹²² In other words, subject to the abstractly worded, general rules outlined above, individuals ought to be left to their devices in an entirely unregulated economic and social environment. True, in his judicial and extra-judicial writings, Justice Scalia nowhere explicitly endorses this vision.¹²³ But, surely, it is no mere coincidence that completing the triumvirate of abstract rules and deference to tradition (both of which Justice Scalia *does* explicitly endorse) is a deeply conservative vision of a minimalist state as the best guardian of individual freedom (which matches Justice Scalia's *political* views).

We can now conclude that at its deepest level, it is a Hayekian social and political vision that generates a thin, formal conception of the rule of law, focusing on generality, abstractness, predictability, certainty, prospectivity, and other similar values, designed to provide maximum scope for unconstrained individual action (or at least, that is the claim). This thin conception of the rule of law then determines Justice Scalia's concrete approach to statutory interpretation: his choice of semantic meaning over pragmatic meaning through his embrace of textualism, his rejection of legislative history, his adoption of *original* public meaning, his overriding concern with objectivity and limiting judicial (and even legislative) discretion, his reliance upon

121. Celia L. Kerstenetzky, *Hayek: The Evolutionary and the Evolutionist*, 12 RATIONALITY & SOC'Y 163, 164 (2000).

122. FRIEDRICH HAYEK, LAW, LEGISLATION AND LIBERTY, VOL. II 128 (1982).

123. *But see* Eskridge, *Nino's Nightmare*, *supra* note 35. Professor Eskridge argues that this substantive vision is visible—at least implicitly—in Justice Scalia's dissenting opinion in *Sweet Home v. Babbitt*. He points to Justice Scalia's invocation of “the small farmer” having his land “conscripted for national zoological use” to highlight Justice Scalia's normative baseline—a Blackstonian conception of strong property protection and a distrust of State intervention. Unsurprisingly, protection of property rights is a centerpiece of Hayek's rules structuring a good society as well. Eskridge, *Nino's Nightmare*, *supra* note 35, at 880.

dictionaries, and his express rejection of the faithful agent theory. I would submit that we can understand all these diverse—seemingly random, even conflicting—aspects of Justice Scalia’s theory of statutory interpretation only if we understand it in the context of his deep normative vision about the rule of law and the nature of freedom in a democratic society.

VII. Corollary: Theory of Precedent

Consistent, again, with the rest of his approach, Justice Scalia’s theory of precedent is *precisely* that he has none. Precedent, for him, has no *independent* gravitational force, that is, it has no binding—or otherwise normative—significance *simply by virtue of it having been decided by a court*. It does have force only insofar as it serves the values contained in the rule of law—that is, again, as a matter of contingent fact, people tend to order their affairs and plan their lives in pursuance of court decisions declaring what the law is.¹²⁴ It is in this context that we ought to understand Justice Scalia’s position that “*stare decisis* is not *part* of [originalism]; it is a pragmatic *exception* to it”¹²⁵—with an appropriate modification. The pragmatism involved in adhering to *stare decisis* is nonetheless in *service* of a principle, which is adhering to the rule of law’s value of maintaining predictability. This view itself is based on a notion of human society that disdains external planning, and holds that an unregulated interaction of independent human wills shall both preserve individual freedom, and lead to the best results.

Conclusion

In this Article, I have sought to demonstrate that if we are to make sense of Justice Scalia’s sprawling vision of statutory interpretation, instantiated through a number of diverse interpretive approaches, we can only do so by grounding it in a deeper, inescapably *normative* and political vision of society. The link between concrete interpretive techniques, as applied to specific cases, such as the use (or disuse) of legislative history, the weight accorded to precedent, the resort to dictionaries, and abstract political philosophy has not been adequately explored in the literature on statutory interpretation. What this Article shows is that interpretation and interpretive canons are *political*. They are not inherently part of the very concept of statutory interpretation, or

124. SCALIA & GARNER, *READING LAW*, *supra* note 1, at 414.

125. SCALIA, *A MATTER OF INTERPRETATION*, *supra* note 4, at 140.

axiomatic components of what it means to “interpret.” Therefore, the ultimate debate between rival interpretive philosophies must take place—and be settled—at the level of political values.

What we also learn, then, is that “correct” or “incorrect” are risky terms when it comes to labeling approaches to statutory interpretation. One might disagree with Hayek’s vision of the good society and his stress on general rules and formal equality, and one might propose an alternative vision of one’s own—but one cannot win that particular argument by producing irrefutable evidence in support of either side. Consequently, a defense of Justice Scalia would entail explicating what it is about the Hayekian vision that we find so convincing and persuasive; likewise, a critique of his statutory interpretation would involve arguing why that same vision is deficient, or lacking. Moving the debate to that level would do wonders for clarity and lucidity. Ultimately, whether we like it or not, we are all engaged in the politics of statutory interpretation.