

A Dialogue on Statutory and Constitutional Interpretation

*The Honorable Antonin Scalia**

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In recent years, the Supreme Court has placed increasing emphasis on the meaning of the enacted text not only in statutory cases,¹ but also in constitutional cases.² One might say that this trend merely reflects a commonsense approach to interpretation. In a Government of Laws, one in which the people and agents of the people owe fidelity to democratically enacted texts, it would perhaps seem uncontroversial to suggest that an interpreter's job entails determining what those texts convey to a reasonable person—one conversant with our social linguistic conventions. Indeed, the same conclusion follows if one believes (as we do not) that the object of the interpretive enterprise is to determine what the lawmakers meant rather than what the words convey: one should presumably focus upon the way a reasonable lawmaker—one conversant with our social linguistic conventions—would have understood the chosen language.³

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¹ See, e.g., *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (“[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.”).

² See, e.g., *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788 (2008) (“In interpreting this [constitutional] text, we are guided by the principle that ‘[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.’” (second alteration in original) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931))). Many have suggested that this represents a new emphasis in the Court's approach. See, e.g., Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 742–43 (2011). But in fact the tradition of relying on constitutional text runs deep. See, e.g., *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 721 (1838) (concluding that the meaning of the Constitution “must necessarily depend on the words of the constitution [and] the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions of the people of and in the several states”).

³ See, e.g., Jeremy Waldron, *Legislators' Intentions and Unintentional Legislation*, in *LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY* 329, 339 (Andrei Marmor ed., 1995).

A legislator who votes for (or against) a provision like ‘No vehicle shall be permitted to enter any state or municipal park’ does so on the assumption that—to put it crudely—what the words mean to him is identical to what they will mean to those

While gaining favor among judges, this trend has proven controversial among legal academics. Critics argue that textualism overemphasizes the importance of the text and undervalues other evidence in conveying Congress's policymaking directives.⁴ They claim that textualists behave selectively in their allegiance to the text and their willingness to rely on extrinsic evidence.⁵ They argue that even if textualism works in statutory cases, it simply cannot work for an old, broadly worded, and hard-to-amend Constitution,⁶ and that textualists therefore find it necessary to act inconsistently in constitutional and statutory cases.⁷ This Dialogue will examine, and attempt to answer, some of the most common questions raised within this debate.

I. WHY THE TEXT?

Q: Professor Max Radin once wrote that “[t]he legislature that put the statute on the books had the constitutional right and power to set [the statute’s] purpose as a desirable one for the community, and the court or administrator has the undoubted duty to obey it.”⁸ He then added: “To say that the legislature is ‘presumed’ to have selected its phraseology with meticulous care as to every word is in direct contradiction to known facts and injects an improper element into the relation of courts to the statutes.”⁹ Why do interpreters owe fidelity to the text instead of to some ascertainable sense of background purpose?

to whom they are addressed (in the event that the provision is passed). . . . That such assumptions pervade the legislative process shows how much law depends on language, on the shared conventions that constitute a language, and on the reciprocity of intentions that conventions comprise.

Id.

⁴ See, e.g., Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 859 (1992) (describing the bureaucratic nature of the modern legislative process); DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 98 (1991) (arguing that rank-and-file members rely on explanations found in legislative history produced by legislative gatekeepers).

⁵ See, e.g., William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1516–22 (1998) (book review); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 670–72 (1990).

⁶ See, e.g., Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 781–88 (2010) (discussing the problems in translation of eighteenth-century texts); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 885–86 (1996) (explaining the “dead hand” problem).

⁷ See, e.g., William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1310–16 (1998).

⁸ Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388, 398 (1942).

⁹ *Id.* at 406.

A: Well, they owe that fidelity, first of all, because we are governed by what the legislators enacted, not by the purposes they had in mind. When what they enacted diverges from what they intended, it is the former that controls.

But secondly, even if you think our laws mean not what the legislature enacted but what the legislators intended, there is no way to tell what they intended *except* the text. Nothing but the text has received the approval of the majority of the legislature and of the President, assuming that he signed it rather than vetoed it and had it passed over his veto. Nothing but the text reflects the full legislature's purpose. Nothing.

All the rest in the legislative history is, at most, a statement of a committee. It's not clear (or indeed even likely) that the other Members of Congress even read that committee report, much less that they agreed with it. And a floor statement by the manager of the bill? There was nobody on the floor. You know that. It is the last surviving legal fiction in American law that legislative history reflects the purpose of the Congress. It does not.

But my objection goes beyond that. Legislative history is not just unlikely to reflect the genuine purpose of Congress; it is increasingly likely to portray a phony purpose. The more you use legislative history, the phonier it will become. Downtown Washington law firms make it their business to create legislative history; that is a regular part of their practice. They send up statements that can be read on the floor or statements that can be inserted into committee reports. So the more we use it, the less genuine it is. It's not that we use it because it's there. It's there because we use it.

But as I said at the outset, I don't even agree that what we are looking for is the purpose. I, frankly, don't care what the legislators' purpose is beyond that which is embodied in the duly enacted text.

Suppose that the Members of Congress all get together and say something quite definitive about their purpose in passing a bill. It's not a committee report. It's a report of the whole House or something of that sort. I still would say I don't care because we are "a government of laws and not of men."¹⁰ We are governed by the laws that the Members of Congress enact, not by their unenacted intentions. And if they said "up" when they meant "down" and you could prove by the testimony of 100 bishops that that's what they meant, I

¹⁰ MASS. CONST. art. XXX (1780).

would still say, too bad. Again, we are governed by laws, and what the laws say is what the laws mean.

That also answers your question—do you think legislators really are so meticulous in their use of language? They had better be because they are enacting laws for all of us. If you reject the assumption of meticulousness, what is Congress supposed to do when it wants a certain precise result? There's no way legislators can meticulously bring about that result because judges are not paying attention anymore. Whether or not Congress is always meticulous, if we don't *assume* that Congress picks its words with care, then Congress won't be able to rely on words to specify what policies it wishes to adopt or, as important, to specify just how far it wishes to take those policies.

So our delegates to Congress are not meticulous? No, we have to assume the contrary. That is the assumption of democracy. We are governed by text enacted by the Members of Congress, not by their purposes. Since we can't know what's in the minds of 436 legislators (counting the President), all we can know is that they voted for a text that they presumably thought would be read the same way any reasonable English speaker would read it.¹¹ In fact, it does not matter whether they were fall-down drunk when they voted for it. So long as they voted for it, that text is the law.

Q: How does the absurdity doctrine differ from doctrines that allow interpreters to use unenacted purpose or intent to trump the text? In your book *A Matter of Interpretation*, you say, "I acknowledge an interpretative doctrine of what the old writers call *lapsus linguae* (slip of the tongue), and what our modern cases call 'scrivener's error,' where on the very face of the statute it is clear to the reader that a mistake of expression (rather than of legislative wisdom) has been made."¹² If we have to live by the text for which Congress voted—if the words are the words—then why is it ever legitimate to correct a "mistake of expression"?

A: The quote you read requires that the scrivener's error be "clear to the reader." If it's clear to the reader, that's what the text means. When, for example, the word "not" is left out—oh, G-d, they left out the "not"!—sometimes you can tell that. Or, where it says

¹¹ See Gerald C. MacCallum, Jr., *Legislative Intent*, 75 YALE L.J. 754, 758 (1966) ("The words [a legislator] uses are the instruments by means of which he expects or hopes to effect . . . changes [in society]. What gives him this expectation or this hope is his belief that he can anticipate how others (e.g., judges and administrators) will understand these words.").

¹² 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* 3, 20 (Amy Gutmann ed., 1997).

“defendant” when obviously the only reading that makes sense is “criminal defendant,” and you can fix that recurrent imprecision with just a minor tweak—it’s clear that it’s just a mistake of transcription.¹³ Yes, I’ll go along with that, but I go along with that only because the intelligent reader would understand the meaning that way.

Here’s another example. Suppose the drafters spell “not” wrong. They spell it “nut.” When you read it, you say, “Oh, that means ‘not.’” Do you believe that that’s somehow not paying attention to the text? No, it’s giving the text the meaning that any reasonable person would give it.

Q: How is that different from the absurdity doctrine?

A: You can call it the absurdity doctrine, if you like, so long as you define it as narrowly as I have. Many people, however, use the term to describe not using absurdity as a factor in concluding that there was a mistake in expression, but as a factor in concluding that the legislature ought to have enacted—and therefore must have intended—a different disposition. Defined this way, the absurdity doctrine does not address mistakes of transcription or text, but rather mistakes in policy judgment. It allows a court to say, “Oh, this result follows from the language. But it is such an absurd result that Congress could not have intended it, just as a policy matter.” That is something quite different.

I’m not willing to let judges decide at large what is or is not absurd. There are pretty absurd statutes out there. That is what you get from legislative compromise. In *Barnhart v. Sigmon Coal Co.*,¹⁴ my Court interpreted a statute that required coal companies that had entered certain collective bargaining agreements after World War II to pay new taxes to cover underfunded coal-miner pensions created by those agreements. Under this scheme, if one of the original coal companies sold its mining assets to a new company, the new coal company had no liability to pay taxes for the underfunded pensions. But if one of the original coal companies also owned an affiliated business (say, a bakery) and sold *those* assets to a third party, that third party would inherit the tax obligation for the miners’ pensions.

That result is certainly absurd as a matter of substance. But we enforced it as written because the text was clear, and we presumed that the opposing factions in Congress had bargained for just such a result. Justice Thomas’s opinion for the Court said that “negotiations

¹³ See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527–29 (1989) (Scalia, J., concurring in the judgment).

¹⁴ 534 U.S. 438 (2002).

surrounding enactment of this bill tell a typical story of legislative battle among interest groups, Congress, and the President. . . . As such, a change in any individual provision could have unraveled the whole. It is quite possible that a [different] bill . . . would not have survived the legislative process.”¹⁵ Legislation is often the product of unseen and unknowable compromise. That’s why we talk about “backroom deals.” And it is now the Court’s position—and properly so—that “[t]he deals brokered during a Committee markup, on the floor of the two Houses, during a joint House and Senate Conference, or in negotiations with the President, . . . are not for us to judge or second-guess.”¹⁶ The compromise in *Barnhart* was quite absurd—made no sense—but there it is.

Q: So are you saying that the scrivener’s error doctrine—or the absurdity doctrine as you would define it—doesn’t pose these problems?

A: Quite so. An absurdity attributable to a single word or phrase is readily identifiable as a drafting error; a reasonable person would recognize that just from looking at the text. I mean the inclusion or omission of a “not,” the misnumbering of a cross-reference, and things of that sort. In those situations, it will usually also be pretty clear that the result produced by the error could not possibly be chalked up to a compromise.

II. READING LEGAL TEXTS

Q: You have sharply criticized the practice of using legislative history to interpret statutes. You point out that legislative history doesn’t go through bicameralism and presentment.¹⁷ You also think it isn’t good evidence of what the legislators understood because, as you said earlier, we don’t know who’s there to listen to it or who agrees with it.¹⁸ But why is this different from the extrinsic evidence that you and other textualists use to define terms of art? In a famous dissent, you read the term “falsely made” in a criminal statute in light of the meaning expressed in old treatises, state cases, state statutes, and

¹⁵ *Id.* at 461.

¹⁶ *Id.*

¹⁷ *See, e.g.*, *Thompson v. Thompson*, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring in the judgment).

¹⁸ *See, e.g.*, *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 620 (1991) (Scalia, J., concurring in the judgment); *Blanchard v. Bergeron*, 489 U.S. 87, 97–100 (1989) (Scalia, J., concurring in part and concurring in the judgment); *Hirschey v. FERC*, 777 F.2d 1, 7–8 (D.C. Cir. 1985) (Scalia, J., concurring).

lower federal court cases.¹⁹ None of these extrinsic sources went through bicameralism or presentment. Do you think that any legislators have gone out and looked those up, gone out and tried to ascertain the meaning of terms of art? If not, why do you use them but not legislative history?

A: You forget that I don't care what the legislators intended. I care what the fair meaning of this word is. If legislators didn't look up the materials needed to define a technical term, they should have—because that's the meaning the persons subject to the law will understand. And there's a huge difference between consulting legislative history and looking to what you call extrinsic evidence of terms of art. Legislative history often simply declares what the committee or sponsor intends a word or phrase to mean: "Subsection B means this or that." That statement is meant to be authoritative; its one and only function is to tell us how that committee or sponsor wants the bill to be interpreted. When judges attribute that intention to Congress as a whole, they are not ascertaining meaning; they are instead simply allowing part of Congress to set meaning for the whole. The external sources you're talking about—a dictionary, the cases that define a term of art, and so on—just go to the ordinary meaning of the words in their context.

And by the way, I don't object to all uses of legislative history. If you want to use it just to show that a word could bear a particular meaning—if you want to bring forward floor debate to show that a word is sometimes used in a certain sense—that's okay. I don't mind using legislative history just to show that a word could mean a certain thing. We are trying to ascertain how a reasonable person uses language, and the way legislators use language is some evidence of that, though perhaps not as persuasive evidence as a dictionary. That is using legislative history as (mildly) informative rather than authoritative: "the word can mean this because people sometimes use it that way, as the legislative debate shows," rather than "the word must mean this because that is what the drafters said it meant."

Q. You have said that a judge should "read the words of [a statutory] text as any ordinary Member of Congress would have read them, and apply the meaning so determined."²⁰ Because the post-New Deal Court routinely treated committee reports or sponsor's statements as

¹⁹ See *Moskal v. United States*, 498 U.S. 103, 122–26 (1990) (Scalia, J., dissenting).

²⁰ *Chisom v. Roemer*, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting) (citation omitted).

authoritative evidence of legislative intent,²¹ why wouldn't a reasonable legislator familiar with applicable interpretive conventions properly have assumed that the contents of the committee report were functionally part of the bill?

A: I will give effect in my interpretation of the statute, as a legislator ought to give effect, to *constitutional* interpretive practices. But, as I have said, it is an unconstitutional practice to say that the meaning of a statute which the full Congress adopted is going to be determined by a committee or, indeed, by a single individual speaking on the floor of Congress.²²

Legislative power is not delegable, any more than judicial power is delegable. I can't leave it to my law clerk to decide the case. He can write the opinion for me, but it is I who must sign and issue the opinion. And it's the same thing in Congress. A House of Congress cannot delegate, for example, the approval of bills dealing with governance of the District of Columbia to a District Committee. It can't say: "Oh, gosh, it's too much work to worry about proposals concerning the District. Anything the District Committee says is okay with us." Even if each House takes such an approach, and the President signs the bill, the bill is ineffective. Congressional delegation of its legislative authority to its committees or to individual members would make nonsense of the bicameralism and presentment procedures required by Article I, Section 7.²³ Not to mention that Article I, Section 1 says that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."²⁴ If Congress can leave it to committees or sponsors to "fill in the details" of statutes, then what do those constitutional provisions mean?

III. STATUTES AND THE CONSTITUTION

Q: Though you reject the use of legislative history in statutory interpretation, you have no trouble citing *The Federalist* in constitu-

²¹ The pivotal decision signaling the Court's acceptance of legislative history was *United States v. Am. Trucking Ass'ns, Inc.*, 310 U.S. 534 (1940).

²² See *Bank One Chi., N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 280 (1996) (Scalia, J., concurring in part and concurring in the judgment); see also John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 694, 696–99 (1997).

²³ See U.S. CONST. art. I, § 7; see also *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276–77 (1991); *INS v. Chadha*, 462 U.S. 919, 951–56 (1983).

²⁴ U.S. CONST. art. I, § 1.

tional adjudication.²⁵ As compared with the process of legislation, the process of ratification is divided among a far greater number and more far-flung lawmaking participants, with greater independence from one another than the House and the Senate, and with very poor means of communication. It is impossible to know which ratifiers actually read and agreed with *The Federalist*. If it's impermissible to use a committee report in construing legislation, shouldn't it be impermissible a fortiori to use *The Federalist* in construing the Constitution?

A: I cite *The Federalist*, but not because it's legislative history. I don't rely on the views of its authors because they were present at the writing of the Constitution—because since they wrote it, they must know what it means. That's not the reason. One of the authors, John Jay, did not attend the Philadelphia Convention.

Nor do I rely on *The Federalist* because the ratifiers must have known and agreed with it. (That's the kind of unrealistic assumption the practitioners of legislative history use.) I rely on it because it sets forth the views of intelligent, well-informed persons of the time, which are entitled to great weight on the basis of their experience and their closeness to the process. For similar reasons, I'll consider what Thomas Jefferson says, though he also was not present at the Constitutional Convention and though his words were most unlikely to have been before the ratifying conventions. His words won't be conclusive, but they may supply a persuasive indication of what the Constitution meant to the people at the time. That's quite different from legislative history.

And by the way, most if not all of my citations of *The Federalist* do not pertain (as legislative history ordinarily does) to the meaning of a particular word or phrase, but rather to general principles underlying the Constitution, such as the need for a unitary Executive, and the need to guard against the legislature as the most dangerous branch.

Q: Since these were advocacy documents, do you feel any obligation to verify the assertions that are made in *The Federalist* before you rely on them, to see if they're right, if they're accurate?

A: Well, I always use other evidence. I don't use *The Federalist* exclusively. Of course, if it's contradicted by other evidence, I'll see which weighs the most. I will rely on a particular essay in *The Federalist* if it's persuasive—if it convincingly accounts for the text, structure, history, and tradition that are the staples of constitutional interpreta-

²⁵ See, e.g., *Printz v. United States*, 521 U.S. 898, 910–15 (1997).

tion. And that's the damnable thing about legislative history. It is cited as *authoritative*; in our practice until recently, its weight came from the role of its authors in the legislative process, not from the persuasiveness of its content. I use *The Federalist*, as I said, if it's persuasive in light of other evidence, not because it was written by key constitutional drafters who claim some sort of authority to speak for the ratifiers as a whole.