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**STRIPPING THE GEARS OF NATIONAL GOVERNMENT:
*Justice Stevens' Stand Against
Judicial Subversion of Progressive Laws and Lawmaking***

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Introduction And Summary

Justice Stevens has said that he wound up the leader of the Supreme Court's "liberal" bloc not because he moved to the left, but because the Court moved to the right.¹ In the main, public debate over the right-left divide to which he referred focuses on the Court's hot-button constitutional, primarily "culture war" issues – such as sexual privacy, affirmative action and minority preferences, and political and civil rights. These items on the Court's agenda dominated media, political, and public attention during his 35 year term. But there is another side to that history. This is the Court's application of statutes, in particular the vast edifice of regulatory, safety net, and civil rights laws enacted by both the federal and state governments since the early 20th century dawn of progressive government. Questions about the interpretation and enforcement of these categories of laws (henceforth labeled "progressive statutes") have and continue to occupy much more of the Court's case-load, affect Americans' daily lives far more, and implicate the Constitution and the Court's constitutional role, at least as much as higher visibility constitutional controversies. Since William Rehnquist became Chief Justice in 1986, the Court has been aggressively activist in narrowing, undermining, or effectively nullifying an array of progressive statutes.

For the past quarter century, Justice Stevens has been alert to this "continuing campaign," spotlighting its excesses and countering its designs. He has done so more persistently than any of his colleagues, or for that matter, more than any observer in Congress,

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¹ Jeffrey Rosen, "Interview Transcript: Justice John Paul Stevens," NY TIMES, Sep. 23, 2007, <http://www.nytimes.com/2010/04/12/magazine/12stevens-interview.html?adxnml=1&adxnmlx=1313111018-0aHOH9qJKM1mqkG+jZe8ng&pagewanted=all> ("I think I have not deviated very far from the views I expressed at the time, although people always said I was a surprise. I think I really have been very consistent with the views that I expressed on the Court of Appeals, and every now and then issues come up that I had on the Seventh Circuit, and they're amazingly similar.

What changed? Was it the court that changed or the country?

"No, the court. There's no doubt about the fact ... It's a *tremendous* change in the law. And that's different justices.").

academia, or progressive advocacy circles. Over and over, Justice Stevens called out the conservative bloc for “unabashed law-making,” and for “skewed interpretations” that impose “its own policy preferences,” “defeat the purpose for which a provision was enacted,” and “ignore the interest of unrepresented” constituencies whom statutes were enacted to protect. He recognized this “kind of judicial activism [as] such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises.” And he never shrank from acting on that recognition, with eloquence but also the professional and strategic craft for which he was renowned on all sides.

During the Rehnquist Court’s early years, voting over these statutory issues did not always break down into rigid right-left patterns. But over time, these statutory interpretation issues have increasingly provoked the same 5-4 ideological and partisan splits typical of constitutional culture war cases. To be sure, the Court, including the conservative justices, has not been hostile to individuals seeking to enforce progressive laws in every single such case to come before them. And, at least up till now, the Court’s conservative members have largely supported the principal constitutional bases relied upon by Congress and state legislatures to enact 20th century progressive legislation – i.e., broad construction of Congress’ commerce, tax-and-spend, and necessary and proper powers, coupled with strict construction of substantive due process limits on those powers.² Simultaneously, however, the Rehnquist and Roberts Courts have developed a formidable arsenal of largely non-constitutional techniques for limiting the reach and impact of progressive statutes, blunting or neutralizing the intent and purpose of the legislatures that enacted them, elevating the Court’s power vis-à-vis both Congress and state legislatures, and, even, impeding Congress’ practical capacity to carry out its legislative function. All this has been done with little attention from the media. Significantly, the Court’s self-aggrandizing conduct has received inconsistent and infrequent notice or push-back from Congress itself or from progressive advocacy communities. In this respect, Congress’ indifference to the Court’s power-grabbiness has paralleled its simultaneous, though far more widely noticed, cession of turf and clout to the executive branch.

The conservative justices have fashioned for themselves a broad selection of doctrinal monkey-wrenches to throw into the machinery of the modern progressive state. These are summarized immediately below and more fully outlined in Section II-V in the body of the Article:

² Simon Lazarus, *The Health Care Lawsuits: Unraveling a Century of Constitutional Law and the Fabric of Modern American Government*, ACS Issue Brief 4-9 (Feb. 8, 2011), available at <http://www.acslaw.org/publications/issue-briefs/the-health-care-lawsuits-unraveling-a-century-of-constitutional-law-and-th>. Marshall’s broad definition has not been fundamentally challenged by conservative justices appointed by 20th and 21st century Republican presidents, up to this point at least, with the exception of Justice Clarence Thomas. *United States v. Lopez*, 514 U.S. 549, 585 (2005) (Thomas, J., concurring); *US v Carolene Prods*, 304 U.S. 144, 152 n.4 (1938).

1. Interpretive approaches that “turn laws on their heads,” as Senator Patrick Leahy put it in a June 2008 Judiciary Committee hearing.³ Leahy was referencing the conservative bloc’s penchant for pulling individual statutory terms and provisions out of context, analyzing them in isolation, and imposing interpretations that ignore and flat-out contradict the purposes Congress enacted them to achieve. These techniques, which mainly fly under the banner of an idiosyncratic and tendentious brand of “textualism,” include:

- Excluding consideration of all forms of legislative history, regardless of how reliable or authoritative.
- Arbitrary rejection of Congressional findings from investigations and hearings, even in committee reports or when codified in the statute under review.

As Justice Stevens observed in one of many critiques of the conservatives’ “playing ostrich” with contextual indicia of statutory meaning, “A method of statutory interpretation that is deliberately uninformed, and hence unconstrained, may produce a result that is consistent with a court’s own views of how things should be, but it may also defeat the very purpose for which a provision was enacted.”

2. Judicially prescribed substantive policies embedded in interpretive presumptions, canons, or other less formally defined approaches that expressly trump the meaning and evident purpose of statutes. Some of these are loosely connected to allegedly implicit constitutional “postulates” or “presuppositions.” Some are simply asserted with no purported link to legal authority. These include:

- “Super-strong clear statement rules,” a term coined by Professors William Eskridge and Philip Frickey.⁴ Traditionally, “clear statement” rules require courts to apply a *rebuttable* presumption that Congress did not intend an interpretation of a statutory provision that would transgress some well-established norm or convention, in the absence of a clear Congressional statement endorsing such an interpretation. In practice, “super-strong” versions are precisely the opposite of genuine “clear statement”

³ *Short-Change for Consumers and Short-Shrift for Congress? The Supreme Court's Treatment of Laws that Protect Americans' Health, Safety, Jobs and Retirement Before the S. Comm. on the Judiciary*, 110th Cong. 1 (2008) (statement of Sen. Patrick Leahy, Chairman, Sen. Comm. on the Judiciary), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_hearings&docid=f:44331.pdf; Simon Lazarus, *Hertz or Avis? Progressives' Quest to Reclaim The Constitution and The Courts* 9–11, at 5, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1896449 (forthcoming, 72 OHIO STATE L.J. (2011)).

⁴ William N. Eskridge, Jr. & Philip P. Frickey, [Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking](#), 45 *Vand. L. Rev.* 593, 597 (1992) [hereinafter *Quasi-Constitutional Law*].

requirements; they contravene and trump the meaning of statutory terms, even when that meaning and Congress' purpose in enacting them is in fact clear.

- Obstructing and eliminating private rights of action to enforce statutory rights. This theme runs through many of the conservative justices' interpretive approaches
 - A one-sided caricature of "federalism" that equates federalism exclusively with devolving power to the states. In fact, the actual design of the framers – of the 1789 Constitution as well as its major amendments – contemplated significant federal no less than state roles, in particular, vesting robust economic, national security, taxing and spending, and liberty-securing authority in the federal government.
3. Arrogation to the federal judiciary of roving authority to invalidate state as well as federal regulatory laws, and common law remedies. The conservative justices have elaborated two approaches to this end, each having scant basis in federal statutes from which they purport to derive authority:
- Aggressive deployment of Supremacy Clause-based "preemption" authority to strike down state regulatory laws, in cases generally brought by businesses. Under Chief Justice Rehnquist's tenure, from 1986 to 2004, preemption cases accounted for a staggering 8% of the Court's civil docket, according to the American Enterprise Institute.⁵
 - Transmutation of the 1925 Federal Arbitration Act into a platform for immunizing businesses from private remedies under federal and state laws protecting customers, retirees, depositors, workers, and other individuals. The Frankensteinian reach of the judicially revamped FAA bears no relationship to the modest scope delineated by the text and legislative history of the law.⁶

⁵ Out of 1,302 civil cases decided by the Rehnquist court over that time, 105 were preemption cases. Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP. CT. ECON. REV. 43, 50 (2006).

⁶ As developed below in Section IV(B) (and exhaustively demonstrated in dissenting opinions by Justice Stevens), the Federal Arbitration Act was originally understood simply to require federal judges (who, in 1925, tended toward hostility to non-litigative alternatives to dispute resolution, to uphold *consensual* provisions in *commercial agreements* between *commercial enterprises* (with equivalent bargaining power) to submit contractual disputes to arbitration before or in lieu of seeking judicial resolution. The modern Supreme Court has reshaped this modest measure into what former Justice Sandra Day O'Connor called "an edifice of its own creation." This made-up construct extends the FAA to contracts of adhesion between large organizations and individual workers, customers, and the like, invalidates all federal and state laws prescribing the option of judicial remedies for particular types of law violations or in particular types of circumstances for equitable reasons, and bars state or federal legislators, courts, or even arbitrators, from imposing minimum fairness requirements for arbitration (such as

4. Hamstringing Congress. The conservative justices have not only reached out to undermine or nullify specific statutes but have done so in ways that *weaken Congress as an institution*, and impair its practical ability to function. As former *New York Times* Supreme Court correspondent Linda Greenhouse observed, “The exercise of power is a zero-sum game, and the court, defining the rules of engagement, is winning at the expense of Congress.”⁷ Examples include:
- Dictating unworkable internal legislative procedures and organizational arrangements. In particular, thwarting its ability to delegate responsibilities to committees and staff with specialized expertise, and adopt their products and conclusions.
 - Disabling Congress from shaping legislation with confidence that its well-founded judgments will endure the gauntlet of judicial review. Such is the natural consequence of the conservative bloc’s increasingly apparent readiness, noted above, to ignore, distort, and spurn Congressional factual findings, policy choices based on them, and efforts to provide guidance to courts.
 - Moving the goal posts. In general, the conservative justices have shown no compunction about blind-siding Congress by changing interpretive approaches retroactively – and even, serially.
 - Brushing aside corrective legislation that overrides the Court’s misinterpretations, continuing to treat overridden decisions and their rationales as binding precedents, except in the precise circumstances of the particular discredited decision.

Simply skimming the above summary suggests the breadth and depth of logical contradictions within and among these doctrinal initiatives. Quite evidently, the tissue connecting these disparate elements of the Rehnquist and Roberts Courts’ statutory interpretive repertoire is the type of political and policy results they generate, not their jurisprudential kinship. For example, contrast the conservative justices’ hospitality to business plaintiffs seeking preemption of state regulatory laws, noted above, with their sensitivity to state autonomy and “dignity” implicit in what American Enterprise Institute scholar Michael Greve has candidly called the “anti-entitlement doctrines” (also noted above) that obstruct civil rights and safety net plaintiffs suing state governments.⁸

provisions for collective arbitration of disputes suitable for class treatment) that could threaten business interests enough to disincentivize businesses from opting for arbitration over litigation.

⁷ See below at note 156 and accompanying text.

⁸ Michael S. Greve, *Federalism, Yes. Activism, No.*, Federalist Outlook, July 1, 2001, http://www.aei.org/publications/pubID.15851/pub_detail.asp.

Professor Ernest Young has observed that driving this two-faced regime is a “libertarian vision” that “sees federalism as a tool of deregulation with the potential to keep both national and state governments within relatively narrow bounds.”⁹

In the same vein, all these conservative approaches to interpreting statutes conflict with the credo of “originalism,” embraced by many of the same conservatives when they turn to interpreting the Constitution. When toggling between interpreting statutory text and interpreting constitutional text, conservatives execute a remarkable 180 degree reversal. On constitutional questions,¹⁰ conservative originalists’ priority is *confining* the sweeping language of the document itself, by looking outside the text for the meaning “originally” contemplated by those who enacted it, i.e., the drafters, legislators, and ratifiers. In contrast, conservative textualism for interpreting statutes frowns on or outright bars consideration of extrinsic evidence of the context in which statutory provisions were enacted, especially any indications of the purpose or meaning “originally” attached to them by those responsible for enactment.¹¹

Why this contradiction? It is hard to resist surmising that modern conservatives feel comfortable deferring to 18th century legislators and voters whose policy preferences they project as constrained by the government-enforced racial, class, ethnic, and gender homogeneity of political participants in that era. In contrast, conservatives may well feel – indeed, they betray – acute discomfort with the orientation of the legislatures (and political constituencies) responsible for the reforms of the Progressive, New Deal, Great Society, and more recent eras. At a minimum, the conservative justices, seeming to mirror conservative academics’ jaundiced “public choice theory” perspective on modern democratic pluralist institutions, have revealed ignorance, distaste, and intense disapproval of Congress and the legislative process. Beneath the densely technical weeds one must untangle to fully explicate these doctrinal initiatives, they share roots in familiar conservative policy, ideological, and political precepts.¹²

⁹ Ernest A. Young, *Federal Preemption and State Autonomy*, in *Federal Preemption: States' Powers, National Interests* 249, 249 (Richard A. Epstein & Michael S. Greve eds., 2007).

¹⁰ Conservatives’ use of constitutional originalism is, as has been widely noted, selective. See Section III(D) *infra*, on the late 1990’s “federalism” campaign. James E. Ryan, *Laying Claim to the Constitution: the Promise of New Textualism*, Public Law and Legal Theory Research Paper Series No. 2011–19, U.Va. School of Law (2011), available at <http://ssrn.com/abstract=1840704>, *forthcoming, University of Virginia Law Review*.

¹¹ This contradiction is noted and discussed in Professor Ronald Dworkin’s comment on Justice Scalia’s essay, *Common Law Courts in Civil Law System*, in *A MATTER OF INTERPRETATION*). See also William N. Eskridge, *Should the Supreme Court Read The Federalist But Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301 (“The puzzle posed by this Article is that the new textualists, particularly Justice Scalia, refuse to consider the debating history of statutes as relevant context but do consider such history of the constitution and its amendments, sometimes in great detail.”). The issue is elaborated below.

¹² As noted below in Section V, the ideological agenda behind contemporary conservatives’ statutory interpretation techniques is underscored by the fact that the Office of Legal Policy in President Ronald Reagan’s Justice Department issued a 123 page report to the Attorney General endorsing Justice Scalia’s textualism. The report’s analysis is freighted with public choice theory notions, echoing Justice Scalia, that the Congressional process is dominated by “intrigue” and “hidden deals” that interpretive

In all events, the conservative justices are aware that, although superficially granular, these issues of statutory interpretation are at least as significant as higher visibility constitutional issues. As Justice Scalia has observed, “By far the greatest part of what I and all federal judges do is to interpret the meaning of federal statutes and agency regulations . . . [which] is the principal business of judges and (hence) lawyers.”¹³ (On this point, he and his allies have a better grasp than many of their progressive adversaries, who have tended to treat statutory issues as comparatively insignificant or to virtually ignore them.)¹⁴ And not only do the conservatives’ statutory interpretation techniques often have more practical impact than their treatment of constitutional questions. Their purportedly non-constitutional interpretive doctrines are, in important instances, implicitly constitutional themselves; as Professors Frickey and Eskridge have observed, the conservatives statutory jurisprudence becomes in some cases “a backdoor version of the constitutional activism that most Justices . . . have publicly denounced.”¹⁵

The 2011-2012 term will throw light on whether, going forward, the Supreme Court under Chief Justice John Roberts will start giving vent to such ideologically driven activism on broad questions of Congress’ constitutional authority, as well as on “backdoor” statutory interpretation issues. By the end of this term the Court will have ruled on pending challenges to the constitutionality of the Affordable Care Act (ACA) “individual mandate” to carry health insurance or pay a tax penalty.¹⁶ As President Reagan’s Solicitor General Charles Fried has testified, the Court cannot strike down the ACA mandate without scuttling precedents reaching back to Chief Justice John

approaches that ignore legislative purpose and history can mitigate. U.S. Department of Justice, Office of Legal Policy, REPORT TO THE ATTORNEY GENERAL: USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION 29-30, notes 112-13 (January 5, 1989)

¹³ Justice Scalia estimated that “less than a twentieth” of the Supreme Court’s docket involve constitutional issues (excluding criminal cases). Antonin Scalia, *Common-Law Courts in a Civil-Law System: The role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (“AN ESSAY BY ANTONIN SCALIA WITH COMMENTARY BY AMY GUTMANN, EDITOR, GORDON S. WOOD, LAURENCE H. TRIBE, MARY ANN GLENDON, AND RONALD DWORKIN 13–14 (Princeton University Press 1997) (Hereafter “A MATTER OF INTERPRETATION”). Justice Scalia is – commendably – far more appreciative of the comparative importance of statutory interpretation than many of his progressive critics. Revealingly, while the dominant focus of progressive commentators on this seminal essay is his exposition of the precepts of originalist constitutional interpretation, the first 34 pages of the essay elaborate his views of statutory interpretation, and only the remaining 10 pages target constitutional interpretation methodology.

¹⁴ For example, Justice Scalia’s 10-page exposition of constitutional originalism concluding his essay in *A Matter of Interpretation* is the target of a truly vast literature by progressive critics. They tend to identify that as the principal or the only subject of the essay, even though his constitutional argument is preceded by a 34-page elaboration of his textualist statutory interpretation credo.

¹⁵ *Quasi-Constitutional Law*, supra note 4, at 597.

¹⁶ Pub. L. No. 111-148, §1501, Internal Revenue Code §5000A (“Requirement to Maintain Minimum Essential Coverage”); pleadings and decisions in the multiple cases challenging the mandate and other provisions of the ACA are collected and continuously updated on the “ACA Litigation Blog” managed by Professor Brand Joondeph of Santa Clara University, <http://acalitigationblog.blogspot.com/>

Marshall’s foundational decisions and reaffirmed as recently as the 2009-2010 term. The principles established by these decisions require broad judicial deference to Congress’ exercise of its powers to regulate commerce and to tax and spend for the general welfare, and, especially, to “allow to the national legislature that discretion, with respect to the *means* by which the powers [the Constitution] confers are to be carried into execution”¹⁷ If, when contemplating the signature legislative accomplishment of President Barack Obama and the Democratic 111th Congress, the conservative justices feel inclined to sideline restraint and let ideology trump precedent, their statutory jurisprudence provides a roadmap of how they will go about that enterprise. Such a result will ratchet up pre-New Deal “Lochneresque” activism – already rampant on statutory issues – to the constitutional “front door” – with historic implications for the distribution of power to set 21st century domestic policy as well as its content.¹⁸

Justice Stevens consistently targeted all his conservative colleagues’ challenges to progressive statutes and the threat they pose to the role of Congress and state legislatures in the democratic process. This area of his jurisprudence should rank among the most important elements of his legacy. His successors on the Court and his admirers off the Court should devote priority attention to carrying forward his commitment to keeping the Court in its democratic place.

Scholars, including participants in this symposium, have spotlighted, catalogued, debated, and brilliantly critiqued various of these doctrinal theories and initiatives. This Article considers them together, as elements of a campaign bent on constraining the impact of 20th and 21st century progressive legislation. Section I briefly outlines the three-part “big-picture” strategic agenda of the conservative justices and their allies; their approach to statutory interpretation forms one of the three components. Section II considers conservatives’ “textualist” approach to interpreting individual statutes. Section III considers interpretational devices and doctrines that *expressly* empower federal judges to contravene statutory text and intended meaning. Section IV considers conservatives’

¹⁷ *Testimony of Charles Fried Before the Senate Committee on the Judiciary, Hearing on “The Constitutionality of the Affordable Care Act*, February 2, 2011, available at <http://judiciary.senate.gov/pdf/11-02-02%20Fried%20Testimony.pdf> (quoting *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819) (emphasis added) Professor Fried notes that the broad latitude judges must give to Congress’ choice of means was most recently reaffirmed by Justice Scalia (*Gonzales v. Raich*, 545 U.S. 1, 39 [2005] [concurring in the judgment]) and Chief Justice Roberts (joining the majority opinion in *United States v. Comstock*, 130 S.Ct. 1949, 1965 [2010]) .

¹⁸ *Lochner v. New York*, 198 U.S. 45 (1905), launched and has come to symbolize the notoriously activist anti-regulatory regime of the first third of the 20th century. I have elaborated the reasons why, doctrinally, a decision to invalidate the ACA individual mandate will necessarily restore the substantive logic as well as the spirit of the jurisprudence of that era, in an issue brief for the American Constitution Society, *The Health Care Lawsuits: Unraveling A Century of Constitutional Law and The Fabric of Modern American Government* (February 2, 2011) <http://www.acslaw.org/files/Lazarus%20-%20health%20reform%20lawsuits.pdf> . See also a briefer account: Simon Lazarus, *Jurisprudential Shell Game: Health Reform Lawsuits Sneak Lochnerism Back Into The Constitution*, NATIONAL LAW JOURNAL, December 20, 2010, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202476355698&slreturn=1&hbxlogin=1>

doctrinal initiatives that they have devised to invalidate state as well as federal progressive statutes. Section V considers steps the conservative majority has taken that not simply undermine or nullify individual laws, but weaken Congress as an institution, and impair its capacity to perform its constitutional functions.

I. The Conservative Justices' Three-Part Strategic Agenda Under Chief Justice Rehnquist and Chief Justice Roberts

From a big-picture vantage point, the new brand of ideological conservative Supreme Court justices named by Presidents Reagan, George H.W. Bush, and George W. Bush have pursued a strategic agenda with three components. The first of these generated the attention-grabbing controversies during the Rehnquist, now the Roberts years. As noted above, these issues have involved constitutional questions on various fronts of the nation's culture wars. Here, the goal of the conservative justices and their allies off the Court was to limit or overrule Warren and Burger Court decisions and doctrines that had expanded individual and minority rights under the Bill of Rights and the Fourteenth Amendment – as noted above, decisions affecting sexual privacy, racial preferences and affirmative action, and political and civil rights, especially including religious autonomy.

To justify an agenda that consisted of disrespecting and, in many cases, overturning established precedent, conservative legal thought-leaders recognized that they needed a principled jurisprudential basis. To meet that need, they developed an approach to interpreting the Constitution, which they labeled “originalism.” Originalism, they claimed, was the only legitimate way to determine what constitutional provisions mean and how they should be applied. This interpretive credo held that, while the provisions undergirding the midcentury rights-expanding decisions were, indeed, broad and vague enough to permit modern liberal interpretations, these decisions were nevertheless incorrect and, indeed, illegitimate. This was because the correct interpretation of constitutional provisions had to be (as initially propounded by conservative theorists) that intended by their framers (“original intention”), or (as subsequently modified) that understood by the public that ratified it (“original understanding” or “original meaning”).¹⁹ As stated by Justice Scalia, “[P]articularly in the past thirty-five years, the ‘evolving’ Constitution has imposed a vast array of new constraints [on government].” Justice Scalia lists a few examples of these new “constraints,” all of which expand individual and minority rights protections in progressive directions which in his view flout the relevant provisions’ original meaning.²⁰

¹⁹ The shift from “a jurisprudence of original intention” to one of “original meaning” is recounted by several observers, most recently and comprehensively by James Ryan of the University of Virginia, in Ryan, *supra* note 10, at 3 (“Conservatives have generally abandoned original intent in favor of original meaning.”).

²⁰ A MATTER OF INTERPRETATION 41 Scalia’s examples are: of “things that formerly could be done or not done, as the society desired, but now cannot be done” are: “admitting in a state criminal trial evidence of guilt that was obtained by an unlawful search; permitting invocation of God at public-school graduations; electing one of the two houses of a state the way the United States Senate is elected, i.e., on a basis that does not give all voters numerically equal representation; terminating welfare payments as soon

From an operational standpoint, in either the original intention or the original meaning package – often more distinguishable in principle than in practice – conservative constitutional interpretive methodology has the same content: its premise is that, while, in principle, legal text is necessarily the starting point for analysis and interpretation, constitutional text is often or usually ambiguous, and could logically justify multiple interpretations (potentially including modern liberal interpretations). The next step is their claim that only the “original” understanding, or meaning, or interpretation, can be correct or legitimate. Finally, to find that original meaning, and determine what the law “actually” is, the conservatives’ interpretive enterprise concludes by looking to *contemporaneous sources outside the text* – dictionaries, records of the Constitutional Convention and the Congresses that drafted amendments, materials from the ratification debates, especially, of course, the Federalist Papers, and, frequently, societal practice – to uncover the original understanding attached to the text by framers, ratifiers, and contemporary opinion shapers.²¹

While condemning mid-twentieth century expansion of individual and minority constitutional rights as “liberal judicial activism,” mainstream conservatives nevertheless emphatically endorsed a second component of modern liberal constitutional jurisprudence: post-New Deal Supreme Court precedents that broadly construed Congress’ constitutional authority to enact progressive legislation pursuant to the Commerce, “General Welfare” (taxing and spending authority), and Necessary And Proper clauses. Indeed, leading legal conservatives such as Robert Bork, Justice Scalia, and Reagan Attorney General Edwin Meese condemned pre-New Deal “conservative activism” no less than contemporary liberal activism.²² To be sure, throughout the

as evidence of fraud is received, subject to restoration after hearing if the evidence is satisfactorily refuted; imposing property requirements as a condition of voting; prohibiting anonymous campaign literature; prohibiting pornography.” At another point in the volume, Justice Scalia added some additional examples of new rights created by the Warren and Burger courts incompatible in his view with original meaning analysis – all decisions generally favored by progressives and opposed by conservatives. *Id.* at 139.

²¹ Antonin Scalia, A MATTER OF INTERPRETATION 38, 41-47 (stating that he will “consult” the Federalist Papers because its authors were typical “intelligent and informed people of the time [whose] writings . . . display how the text of the Constitution was originally understood,” and arguing on the basis of such extrinsic evidence that broad constitutional provisions such as the First Amendment’s protection of “freedom of speech” and the Fourteenth Amendment’s guarantee of “equal protection of the laws” should be confined in accordance with extrinsic contemporaneous practices and writings); Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 828 (1986) (An “intentionalist” judge should study the “evidence” – i.e., sources extrinsic to the text – to determine whether “equal protection of the laws,” though it literally could be read to ban myriad forms of discrimination, should apply only to discrimination against African-Americans, or only to racial discrimination (but not discrimination on the basis of gender or disability or religion, for example).

²² Simon Lazarus, *The Health Care Lawsuits*, supra note 18 at 4 (“[W]hile Bork and the generation of conservative constitutionalists for whom he spoke condemned the ‘activism’ of the Warren Court . . . they also called the ‘activist court of the *Lochner* era . . . as illegitimate as the Warren Court’ and endorsed the post-New Deal postulate of judicial deference to Congress on economic regulatory matters.”); Doug Kendall and Glen Sugameli, *Janice Rogers Brown and the Environment: A Dangerous Choice for a Critical Court, A Report by Community Rights Counsel and Earthjustice* 2 (“Virtually every prominent

Rehnquist-Roberts years, a cadre of libertarian legal intellectuals vigorously promoted a more radical and far-reaching brand of originalism, which considered the entire fabric of twentieth century regulatory, tax, and spending legislation incompatible with the original meaning of the Constitution. These libertarians advocated activist decisions to enforce that meaning. But, at least until 2010, when Republicans filed legal challenges to the constitutionality of the Affordable Care Act, the libertarian view remained marginalized among legal conservatives, especially judges and politicians.²³

Hence, as the second component of their agenda, conservatives no less than liberals rested their constitutional vision on the post-New Deal premise that the default posture for federal judges handling challenges to laws, especially federal laws, was restraint and deference, with the exception of cases involving “fundamental” individual rights and/or oppression of “insular minorities” unable to vindicate their rights through the political process.²⁴ The principal difference between liberals and conservatives lay in their respective approaches to applying the fundamental rights/ insular minorities exception to the general rule of judicial restraint; in conservatives’ view, the judicial progressives on the Warren, Burger, and subsequent Courts over-stretched that exception.

However, while not contesting – indeed, endorsing – the fundamental precedents and principles empowering Congress (and state legislatures) to enact statutes directed toward progressive ends, Rehnquist-Roberts Court conservatives frequently gave the statutes themselves a chilly reception when opportunities arose to interpret and apply them. In such cases, the justices have often betrayed skepticism and even hostility toward the progressive purposes that drove legislators to enact them, and even toward the legislators themselves. As the third component of their agenda, the conservative justices have, as noted above, developed a panoply of techniques for narrowing, undermining, and nullifying progressive statutes. The techniques are many and varied, but they have one common basic attribute: to a greater or lesser extent, implicitly or expressly, they empower, or even require judges to ignore, blunt, nullify, or reject outright the purposes

constitutional scholar—from the left, the center, and the right—agrees that *Lochner* is paradigmatic of unconscionable judicial activism.”), (October 23, 2003), available at <http://www.communityrights.org/PDFs/BrownReport.pdf>.

²³ Damon Root, *Conservatives v. Libertarians: The Debate over Judicial Activism Divides Former Allies*, Free Republic, <http://www.freerepublic.com/focus/f-news/2530504/posts> (June 8, 2010) (describing the divisions among conservatives and libertarians about whether judicial activism is a legitimate tool to promote right wing political goals). On the Court itself, only Justice Clarence Thomas appeared to subscribe to libertarian dissent from acceptance of progressive legislation in the name of judicial restraint *United States v. Lopez*, 514 U.S. 549, 594 (1995) (J. Thomas, concurring) (“I am aware of no cases prior to the New Deal that characterized the power flowing from the Commerce Clause as sweepingly as does our substantial effects test. My review of the case law indicates that the substantial effects test is but an innovation of the 20th century.”).

²⁴ *United States v. Carolene Products*, 304 U.S. 144, 152 n. 4 (“The existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless, in the light of the facts made known or generally assumed, it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”).

and understandings that legislators, experts, constituents, the media, and the public attached to statutory provisions under review – precisely the opposite of the tack conservative originalism commands for interpreting the Constitution.

In the remaining four sections of the article, I will attempt to pull this array of doctrinal initiatives together, highlight their common aims and effects, underscore their practical impact and jurisprudential significance, and sketch what a more comprehensive examination might involve.

II. “Turning Laws On Their Heads:” Conservatives’ Text-Out-Of-Context “Textualism”

As noted above, in June 2008 Senate Judiciary Committee Chair Patrick Leahy launched a series of hearings, that have continued into 2011, spotlighting the impact of Supreme Court decisions on “Americans’ everyday lives,” and pocket-book issues such as health care coverage, retirement uncertainty, and credit card, home mortgage, and other monthly payments. In his opening statement, Leahy observed: “Congress has passed laws to protect Americans in these areas, but in many cases, the Supreme Court has ignored the intent of Congress . . . oftentimes, turning these laws on their heads, and making them protections for big business rather than ordinary citizens.”²⁵

A. “Textualism” According To Justice Scalia And His Followers

The cases targeted by Senator Leahy’s ire exemplify how the Rehnquist-Roberts Court conservatives apply their network of statutory interpretational doctrines, most particularly the principal building block of those doctrines, a theory its proponents label, “textualism.” This theory originated in opinions of Justice Scalia, when he was on the District of Columbia Circuit Court and in his early days on the Supreme Court.[cite] Its gist is that, in interpreting individual statutory provisions, judges must focus on their actual words – exclusively, with rare exceptions – independent of and rather than attempting to connect the words to, or understand them in light of Congress’ “intent,” or of ‘purposes’ driving their enactment. As Justice Scalia put it, in the course of acknowledging charges that his “textualism” leads to blinkered decisions that ignore or defeat the manifest aims of legislation:

To be a textualist in good standing, one need not be too dull to perceive the broader social purposes that a statute is designed, or could be designed, to serve One need only hold the belief that judges have no authority to pursue those broader purposes

²⁵ *Short-Change for Consumers and Short-Shrift for Congress? The Supreme Court’s Treatment of Laws that Protect Americans’ Health, Safety, Jobs and Retirement Before the S. Comm. on the Judiciary, 110th Cong. 1 (2008) (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_hearings&docid=f:44331.pdf.*

“I don’t care,” Scalia quotes Justice Oliver Wendell Holmes approvingly, “what [the legislature’s] intention was. I only want to know what the words mean.”²⁶

As described by one of the most eminent academic supporters of the conservatives’ “textualism,” John Manning of Harvard Law School, just as Justice Scalia has been its oracle, its “most vocal and . . . ablest” opponent has been Justice Stevens. Before retiring in 2010, Justice Stevens consistently defended the established mid-20th century consensus that Scalia and his allies specifically set out to sideline: “the idea that legislation is a purposive act, and that judges should interpret acts of Congress to implement the legislative purpose . . . that the federal courts in our system must discern and apply Congress’ intended meaning as accurately as possible.”²⁷

Although completely unknown outside a discrete circle of expert academics and judges, the Rehnquist-Roberts concept of statutory textualism is the subject of a massive body of scholarly exposition and criticism.²⁸ No value will be added by my attempting to replough this ground with a summary of the content, criticisms, defenses, and modifications of the “textualist” approach that Justice Scalia propounded and has, over the course of the past quarter century, persuaded his conservative colleagues often to embrace, and his progressive colleagues of necessity to respect.²⁹ Three observations seem appropriate here: that, in conceptual terms, conservative textualists misleadingly frame the debate; that the paradigm cases they marshal as typical – and academics on all sides seem to accept – are in fact highly atypical and skew analysis; and that the conservatives’ version of textualism transparently advances a substantive ideological agenda.

1. Conservative Textualists’ Misleading Frame of The Enterprise Of Statutory Interpretation

²⁶ Scalia, A MATTER OF INTERPRETATION, *supra* note** at 23.

²⁷ John F. Manning, *Competing Presumptions About Statutory Coherence*, 74 FORDHAM L. REV. 2009 (2006). See, e.g., Justice Stevens’ typical statements in *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842 (1984) (“[T]he meaning of a word must be ascertained in the context of achieving particular objectives”), and *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (“The broad language of § 202(a)(1) reflects and intentional effort to confer the flexibility necessary to forestall such obsolescence”).

²⁸ See, e.g., William N. Eskridge, Philip P. Frickey, & Elizabeth Garrett, LEGISLATION AND STATUTORY INTERPRETATION, 2nd edition 231-45, (Foundation Press 2006), and sources cited therein, especially in note 33. See Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 281 (1990) (“[T]here now exists a fully articulated and quite aggressive assault in the Supreme Court on the use of legislative history in construing statutes. The movement’s spiritual leader is Justice Scalia, but others, in particular Justice Kennedy, have taken up the torch.”); Abner S. Greene, *The Missing Step of Textualism*, 74 FORDHAM L. REV. 1913, 1916–26 (2006) (describing the approach of textualism).

²⁹ John F. Manning, *supra* note 27, at 2009, 2010, 2026 (2006) (“In matters of statutory interpretation, the story of the Rehnquist Court was, if anything, one of movement toward textualism – philosophy that gives precedence to a statute’s semantic meaning, when clear, and eschews reliance on legislative history or other indicia of background purpose to vary the conventional meaning of the text.”).

First, Justice Scalia, Professor Manning, Seventh Circuit Judge Frank Easterbrook, and other “textualism” enthusiasts misleadingly frame the comparison between their credo and the alternative backed by Justice Stevens and his allies – interpreting text in light of reliable indicia of statutory purpose. Conservative textualists’ constant refrain is that statutory text must govern, when the text is “clear.” Thus, when the text is clear, it cannot be contradicted by statements in the legislative history. Indeed, when the meaning of the statutory text is clear, legislative history cannot be consulted at all. Nor can the text of a provision – again, where the meaning is “clear” – be subordinated to some “vague” or “overarching” purpose.³⁰ The problem with this framing of the issue is that, in the real world, it is almost always completely beside the point. In the overwhelming majority of cases that come before the courts – certainly the Supreme Court – very few statutory provisions are “clear.” Certainly, precious few contested statutory provisions present verbiage so clear that there can be no serious dispute about their meaning in relation or as applied to the circumstances of the case at hand. Nor is it true, as conservative textualists’ formulations assume, that statutory words are frequently, starkly, “clearly” in conflict with the “purposes” that their progressive adversaries dredge up from extrinsic sources, in particular the legislative history. Though such situations do, of course, *sometimes* occur, they are anything but the norm. Obviously, indisputable clarity is especially – almost by definition – in cases raising questions serious enough to merit review by the Supreme Court.

In the normal case, statutory provisions at issue are not free from ambiguity. Hence, interpretation literally cannot be executed without reference to *some* extrinsic source or sources. Plainly, as a matter of common sense, the first such set of extrinsic sources to examine must be the legislative history. Where authentic and pertinent statutory purposes can be identified (as is often, though not always, the case), how could that not be an appropriate factor to weigh, probably heavily, perhaps, if appropriate, in conjunction with other pertinent factors? Obviously, such analysis has to be conducted thoughtfully. But courts cannot responsibly shirk that responsibility altogether. As prominent Republican Senate Judiciary Committee member and sometime Chair Orrin Hatch rebuffed the early stirrings of the textualist campaign:

It is undeniable that . . . attorneys and judges can manipulate the interpretive process by carefully selecting and endowing with undue weight some statements uttered in the course of the lawmaking process. Legislative history is generally accompanied, however, by clear indicia of its legitimate role in the legislative

³⁰ Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 470 (1989) (“Where the language of a statute is clear in its application, the normal rule is that we are bound by it.”) (Kennedy, J., concurring); Miranda McGowan, *Do as I Do, Not as I Say: An Empirical Investigation of Justice Scalia's Ordinary Meaning Method of Statutory Interpretation*, 78 MISS. L. J. 129 131 (2008) (“Justice Scalia exhorts judges who interpret statutes to forget about what Congress or some members of Congress might have intended.”) (2008); *Engine Manufacturers Ass'n v. South Coast Air Quality Mgmt Dist.*, 541 U.S. 246, 252 (2004) (“Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.”) (citing *Park N Fly v. Dollar Park N Fly*, 469 U.S. 189, 194 (1985)) (Scalia, J.).

process and of the weight it ought to carry in illuminating the words of the law. A *careful student of the lawmaking process should have little difficulty in establishing the weight or weightlessness of the forms of legislative history.*³¹

Consideration of historical sources indicative of the purpose and understanding of textual provisions, when their meaning is not self-evident from the text, is a necessity, not an option. It is common to interpretation of all forms of legal documents – from contracts to the Constitution.³²

In real-world cases in which Justice Scalia and his allies insist on analysis of statutory provisions in isolation, and exclude relevant materials from legislative history or indications of pertinent statutory purpose, it is not because the provisions are unambiguously clear, nor because their meaning clearly conflicts with identifiable and plausible statutory purpose or purposes. On the contrary, in the great majority of cases in which the challenge is to choose among plausible alternative interpretations of non-definitive statutory words, the practical effect of the rigidities of contemporary conservatives' textualist doctrine is to deny judges the most common-sense options for resolving ambiguities – thoughtful analysis of reliable indicia of purpose and legislative history materials generally.

2. Atypical Paradigm Cases Distort The “Textualism” Debate

A second observation I would suggest is that discussions of the pro's and con's of conservative textualism have often been thrown askew, because they are typically grounded in reference to a handful of specific decided cases, which are themselves highly atypical and inappropriate models for realistic analysis. These present circumstances where a literal reading of a particular provision plausibly yields a result in conflict with an authentic statutory purpose. Much of the academic treatment of these issues likewise focuses on this same set of cases.³³ But in practical fact, these are odd ducks, situations

³¹ Orrin Hatch, *Legislative History: Tool of Construction or Destruction?*, 11 HARV. J.L. & PUB. POL'Y 43, 44 (1988). (emphasis added) Senator Hatch, a prominent conservative active in forging compromises that led to enactment of such legislation targeted by Rehnquist and Roberts Court conservatives as the Americans With Disabilities Act and the Violence Against Women Act, sets out a practical, sensible list of factors which add to, or subtract from, the reliability and usefulness of particular pieces of the legislative history of statutory provisions under review. *Id.* at 48–49.

³² Indeed, Justice Scalia acknowledges that statutes and the Constitution are each a “legal text,” which be interpreted in accord with “what it says or what it was understood to mean;” nevertheless, he refuses to consider the most obvious and pertinent source – legislative history – for determining what a statute “was understood to mean.” A MATTER OF INTERPRETATION 46

³³ The leading paradigm case is *Church Of The Holy Trinity v. United States*, 143 U.S. 457 (1892). Here the Court considered a 1885 statute barring paying for transit to the U.S. of any “alien” intending to “perform labor or service of any kind.” The Court unanimously held the ban inapplicable to a church ‘s recruitment of a minister from abroad – on the theory that Congress’ purpose was to protect American laborers, not to restrict immigration of ministers). *Id.* at 472 (“It is the duty of the courts, under [these] circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute.”). The

in which the literal meaning of drafters' language is clear, but would, in circumstances they failed to anticipate, defeat their purposes or yield otherwise illogical results. Such cases make easy targets for Justice Scalia and his allies. No doubt also they also constitute easy examples for spurring lively law school class discussions. But in the real-world, they are hard cases, and the lessons that textualist advocates purport to draw from them make bad law. Far more typical are cases which involve unclear text and clear statutory purpose, in which one alternative interpretation meshes closely with that purpose and another alternative or alternatives would ignore or defeat it. These are the kinds of cases spotlighted in Senator Leahy's hearings. They are the kinds of cases that blinkered "textualist" analysis gets exactly wrong.

Of the cases examined in the Senate Judiciary Committee hearings, an especially apt example of contemporary conservative textualism in action is *Ledbetter v. Goodyear Tire & Rubber*.³⁴ This Supreme Court decision, which achieved widespread notoriety when it was handed down on May 31, 2007, turned on interpretation of the statute of limitations provision in the employment discrimination title (VII) of the 1964 Civil Rights Act.[cite] The provision requires workers to file suit within 180 days "after the alleged unlawful employment practice occurred." In this case, the plaintiff was tipped off when she retired by a co-worker that, throughout her 20-year career, she had received lower pay than her male counterparts performing identical work. The Supreme Court reversed a jury verdict in favor of Ledbetter, holding it to be time-barred. Ledbetter had contended that her most recent paycheck was the "unlawful employment practice" from which the 180 day limitations period should run. But the majority held that the initial discriminatory decision was the last discriminatory practice within the meaning of the provision.³⁵ As Justice Ginsburg noted in the dissent she read with passion from the bench, the majority's reading rendered the substantive equal pay opportunity guarantee of Title VII unenforceable by, and useless to many, perhaps most of the discrimination victims the law was enacted to protect. Like Ledbetter, she elaborated, employees typically learn of pay discrimination only by happenstance and long after the decisions that triggered their persistent mistreatment.³⁶

opinion recited a principle of statutory construction that today's "conservatives" have left far behind: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character." *Id.* at 461. A second case is *United Steelworkers v. Weber*, 443 U.S. 193 (1979), in which the Court held that a company's affirmative action program aimed at increasing job opportunities for minority workers was not covered by the prohibition in Title VII of the 1964 Civil Rights Act on discrimination on account of "race." See also *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440 (1989) (holding that the ABA was not a committee "utilized" by the President, though the President frequently consulted with the ABA).

³⁴ *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

³⁵ *Id.* at 632-37

³⁶ *Id.* at 643-60.

Ledbetter, which was overridden by Congress in January 2009, with the first bill signed into law by the newly inaugurated President Barack Obama,³⁷ illustrates the bizarre outcomes made possible by textualists' insistence that individual statutory provisions be read in isolation, without reference to their purpose. But the Title VII statute of limitations provision was manifestly not one where the meaning was "clear," and the indicia of purpose attenuated. Quite the contrary, the pertinent phrase from the provision – "unlawful employment practice" – is itself opaque in regard to the issue before the Court. In contrast, the purpose of the employment discrimination title of the Civil Rights Act could hardly be clearer. Especially, as Justice Ginsburg explained in her dissent, in light of "the real-world characteristics of pay discrimination" that Title VII was designed to remedy.³⁸

A second appropriate paradigm case – actually, line of cases – reviewed in the Senate Judiciary Committee hearings involves the remedial provisions of the 1974 Employee Retirement and Income Security Act (ERISA). ERISA was enacted after years of investigation and debate by Congress and the Departments of Labor, Justice, and Treasury, in addition to Presidential commissions. Its purpose was to ensure sound administration of employee retirement and health insurance plans funded with income tax-deductible employer contributions. To ensure that employees and their families actually receive health and similar benefits as required, Congress specified certain remedies and procedures available to beneficiaries in the event that plan administrators failed to meet their obligations. As experts, especially Yale professor John Langbein, have documented, Congress's strategy for securing health care access for American workers was to carry over and "subject these [employer-sponsored health] plans to the pre-existing [state law-based] regime of trust law rather than to invent a new regulatory structure."³⁹ By making plan administrators fiduciaries, Congress imposed on them the traditional duties of loyalty and prudence and provided beneficiaries with traditional remedies for fiduciary violations, including the right of beneficiaries to be "made whole" – to receive whatever is necessary to restore the state in which he or she would have been but for a plan's default. But, in three cases decided in 1985, 1993, and 2002,⁴⁰ Supreme Court majorities held that ERISA, instead of nationalizing and strengthening trust protections for plan beneficiaries, created radically more limited specific remedies in lieu of, not supplementary to, state trust law remedies. A specific catch-all provision in the Act, authorizing courts to award injunctive or "other appropriate equitable relief" was

³⁷ *Obama Signs Lilly Ledbetter Act*, WASHINGTON POST (10:27am Jan. 29 2009), http://voices.washingtonpost.com/44/2009/01/29/obama_signs_lilly_ledbetter_ac.html

³⁸ *Id.* at 655.

³⁹ John H. Langbein, *What ERISA means by "Equitable": The Supreme Court's Trail of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317, 1318 (2003). Professor Langbein's article details the history and purposes of ERISA summarized here.

⁴⁰ *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, (1985); *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993); *Great-West Life & Annuity Insurance Co. v. Knudson*, 434 U.S. 204, (2002).

construed to mean only certain prospective, injunctive relief – not monetary compensation - even though equitable relief had long included restitution.⁴¹

This narrowing interpretation grievously misread Congress’s intent; in dissent from the first of the two decisions in which Scalia articulated his analysis, Justice Byron White called the conservatives’ approach an “anomaly” for “construing ERISA in a way that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted.”⁴² A decade later, after Scalia and his conservative colleagues reaffirmed his anomalous interpretation, Justices Ginsburg and Breyer noted “the rising judicial chorus urging that Congress and [this] Court revisit what is an unjust and increasingly tangled ERISA regime.”⁴³ Justice Scalia, who wrote the opinions for 5-4 majorities in the 1993 and 2002 cases, conceded that his interpretation of ERISA’s remedial provisions – which required courts to decide whether a given form of relief would have been available a century or more ago when courts were divided into courts of law and courts of equity – was “unlikely” in light of the oft-repeated goals of the sponsors of the legislation. But this was irrelevant: “Vague notions of a statute’s ‘basic purpose,’” Scalia charged, “are nonetheless inadequate to overcome the words of its text”⁴⁴ – as if his cramped reading were the only one possible.

3. Conservative Textualists’ Not-So-Hidden Ideological Agenda

Finally, a third brief observation: the disconnect between conservatives’ phobia for considering statutory purpose and drafting history, and their reverence for constitutional original meaning and contemporaneous evidence thereof, underscores both the logical flimsiness and the ideological inspiration behind their statutory “textualism.” The fact is, conservatives have it exactly right, when they insist that, in interpreting open-textured constitutional provisions, statements of the framers and their contemporaries are important, if not exclusive, sources. Increasingly, progressives acknowledge that there is a good deal of sense in that view (so long as it is acknowledged that contemporaneous perspectives need not necessarily be exclusive sources).⁴⁵ But the same common-sense algorithm applies to the interpretation of statutes.

⁴¹ Langbein, *supra* note 39, at 1348-52. The court’s interpretation of the statute has been sharply criticized. *Id.* at 1337-38 (“[M]oney damages were and are as much an equitable remedy as a legal remedy. Justice Scalia was ... flatly wrong to assert that money damages are not equally characteristic of equity when it enforces equity based causes of action such as those arising from breach of trust.”).

⁴² *Mertens v. Hewitt Associates*, 508 U.S. 248, 263 (1993) (White, J., dissenting).

⁴³ *Aetna Health Inc. v. Davila*, 542 U.S. 200, 223 (2004) (Ginsburg, J., dissenting, on behalf of herself and Justice Breyer). The judicial critics included appointees of Republican as well as Democratic presidents. *See, e.g.*, *Difelice v. Aetna US Healthcare*, 346 F.3d 442, 553 (3d Cir. 2004) (“[ERISA has] evolved into a shield that insulates HMOs from liability for even the most egregious acts of dereliction committed against plan beneficiaries, a state of affairs that I view as directly contrary to the intent of Congress.”) (Becker, C.J., dissenting). Judge Becker was nominated to the District Court by President Nixon and to the Third Circuit by President Reagan.

⁴⁴ *Mertens*, 508 U.S. at 261.

⁴⁵ Progressive academics, for their part, have largely accepted the importance of text and history in constitutional interpretation, as widely noted. *See, e.g.*, Simon Lazarus, *Hertz or Avis? Progressives’ Quest*

“Why,” Professor Dworkin coyly asks in his Comment on Justice Scalia’s lead essay in *A Matter of Interpretation*, “does the resolute text-reader, dictionary-minded, expectation-scorner of the beginning of these lectures [the 34 pages devoted to expounding statutory textualism] change his mind when he comes to the most fundamental American statute of them all [the final 10 pages devoted to expounding constitutional originalism]?”⁴⁶ It is hard to resist the common-sense answer: many of the statutes currently before the federal courts were enacted by progressive majorities to serve progressive purposes. Hence, it is not difficult to imagine why judges unsympathetic to such majorities and purposes would prefer interpretive approaches that divorce statutory terms from the context of their enactment. Indeed, Seventh Circuit Judge Frank Easterbrook, the most eminent judicial exponent of contemporary conservative textualism (other than Justice Scalia), makes this result-oriented ideological agenda disarmingly explicit. Without a trace of irony, Judge Easterbrook anchors his case for ignoring statutory purpose and legislative intent, by advancing, as his premise, a familiar (though unsubstantiated) libertarian construct of *the original purpose and intent of the framers of the Constitution*. Defending the textualist maxim that, when statutory provisions do not specifically address a given situation, judges should declare the law inapplicable and dismiss the case, Easterbrook explains:

Those who wrote and approved the Constitution thought that most social relations would be governed by private agreements, customs, and understandings, not resolved in the halls of government. . . . A rule declaring statutes inapplicable unless they plainly resolve or delegate the solution of the matter respects this position.⁴⁷

In effect, Judge Easterbrook’s default rule is an extension of Georgetown libertarian Randy Barnett’s recommendation that, instead of a presumption of constitutionality, judges should apply a “presumption of liberty” when considering constitutional challenges to statutes.⁴⁸

But, however congruent with conservative judges’ ideological leanings, punting in the name of “textualism” flouts the job description they were hired to discharge. As Senator Hatch noted, Congress cannot be expected to have “anticipated every detail of every issue that might arise under a particular statute.” But that is not an excuse for judges to throw up their hands, leave parties in the lurch, and tell legislators to take as long as necessary to try again. “It is,” Hatch explains,

to *Reclaim The Constitution and The Courts* 9–11, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1896449 (forthcoming, 72 OHIO STATE L.J. __ (2011)).

⁴⁶ Ronald Dworkin, *Comment*, in *A MATTER OF INTERPRETATION*, at 126.

⁴⁷ Frank Easterbrook, *Statutes’ Domains*, 50 U.CHI.L.REV. 533, 550 (1983). Judge Easterbrook’s attribution to the framers of contemporary libertarians’ constitutional vision is asserted but unsubstantiated.

⁴⁸ Randy Barnett, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (Princeton University Press 2004).

the role of the Judiciary to discern the standard promulgated by law, and apply it to specific cases . . . [C]areful use of reliable legislative history can often supply the context that enlightens the text of the law.⁴⁹

Even in principle, contemporary conservatives' refusal to acknowledge the context of enacted laws amounts to an abdication of the judge's role. In practice, it has increasingly become a vehicle for partisan and ideological abuse of judicial power. A more precise, if less snappy, label might be "no context textualism," "out of contextualism," or something of the sort.

III. "Unabashed Judicial Lawmaking:" *Ex Cathedra* Canons, Clear-Statement Rules, Presumptions, "Postulates" and Judicial Policies That Expressly Contravene Statutory Text and Intended Meaning.

The concept of textualism deployed by the conservative bloc on the Rehnquist and Roberts courts has enabled them to purport conscientiously to implement democratically enacted laws, while in fact defeating the purposes and understandings which drove their enactment. A second set of interpretive doctrines require no gestures or ritual protestations of deference to legislators or voters. They constitute, as Justice Stevens wrote in 2009, "unabashed judicial lawmaking."⁵⁰ With these "trump-Congress" rules the Court has expressly empowered itself to ignore and counter both legislative purpose (or intent) and the statutory text itself. As with textualism, these doctrines have been extensively debated by academic and judicial experts.⁵¹ Here I will briefly note and comment on four of the most significant of these devices for expressly substituting judicial policy priorities for statutory provisions: "super-strong" clear statement rules; avoiding constitutional questions by narrowly construing statutes; obstructing individual court enforcement of federal statutory rights; and the Rehnquist Court's "federalism" campaign.

A. "Super-Strong" Clear Statement Rules.

Perhaps the most blatant – and most arbitrarily deployed – of the conservatives' trump-Congress devices is the set of doctrines that Professors Eskridge and Frickey labeled two decades ago "super-strong" clear statement rules. Conservatives on the Court have

⁴⁹ Orrin Hatch, *supra* note 31, at 49. The classic scholarly treatment of Senator Hatch's point is by Justice Breyer before his elevation to the Supreme Court. Stephen G. Breyer, *On The Uses Of Legislative History In Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992).

⁵⁰ *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2349, 2358 (2009) (Stevens, J., dissenting)

⁵¹ Leading analyses of the conservatives' expressly counter-majoritarian interpretive techniques include: the indispensable treatise by William N. Eskridge, Jr., Philip P. Frickey, and Elizabeth Garrett, *LEGISLATION AND STATUTORY INTERPRETATION* (Second Edition, Foundation Press 2006); John Copeland Nagle, *Waiving Sovereign Immunity In An Age Of Clear Statement Rules*, 1995 WISC. L. REV. 771 (1991); William Eskridge and Philip Frickey, *Quasi-Constitutional Law: Clear Statement Rules As Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992); Richard Posner, *Statutory Interpretation in Classroom and Courtroom*, 50 U. CHI. L. REV. 800 (1983).

wielded such rules, Eskridge and Frickey noted, as if they were “quasi-constitutional” commands, and use[d] them “to confine Congress’ power in areas in which Congress has the constitutional power to do virtually anything.” They further observed that the Court’s clear statement rules for promoting “federalism and other structural values [...] are almost as counter-majoritarian as now discredited *Lochner*-style judicial review.”⁵²

As noted above, these devices are precisely the opposite of traditional “clear statement” rules; the latter require courts to apply a *rebuttable* presumption that Congress did not intend an interpretation of a statutory provision that would transgress some well-established norm or convention, in the absence of a clear Congressional statement endorsing such an interpretation. In practice, “super-strong” versions are Orwellian devices that conservative majorities invoke to contravene and trump the meaning of statutory terms, even when that meaning and Congress’ purpose in enacting them is in fact clear.

The paradigm case is a 1992 decision, *United States v. Nordic Village, Inc.*⁵³ *Nordic Village* held that Congress had not, as required by the applicable clear statement rule, “unequivocally” waived the federal government’s sovereign immunity under the federal Bankruptcy Code, with regard to the recovery from the government of funds embezzled from a bankrupt corporation and used to pay off the embezzler’s federal tax liability. Justice Scalia wrote for the majority and Justice Stevens wrote a blistering dissent.⁵⁴ The waiver provision at issue was, as Justice Stevens observed, about as “straightforward” and clear as human drafters could manage; it provided that, except in cases involving offsets or counter-claims – not present in the instant situation – any provision of the applicable title of the Bankruptcy Code that “contains [the words] ‘creditor,’ ‘entity,’ or ‘governmental unit’ *applies to governmental units*,” and, further, that any judicial determination of an issue arising under such a provision “*binds governmental units*.”⁵⁵ A separate provision of the Code defines the term “governmental unit” to include “the United States” and any instrumentality thereof. Q.E.D., Justice Stevens noted, this literal statutory text “unquestionably forecloses the defense of sovereign immunity.”⁵⁶ In addition, he continued, “The legislative history unambiguously demonstrates that Congress intended the [unambiguous] statute to be read literally.”⁵⁷

Despite Congress’ multiple assertions in the statute’s text and history, that the waiver of sovereign immunity applies to the federal government in precisely the type of disputes at

⁵² *Quasi-Constitutional Law*, *supra* note 51, at 598.

⁵³ *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992)

⁵⁴ *United States v. Nordic Village*, *supra* note 53, at 39, 39-46

⁵⁵ 11 U.S.C. § 106(c); 503 U.S. at 32

⁵⁶ *Id.* at 40-41

⁵⁷ *Id.* floor statements of the sponsors of the waiver provision specifically affirmed that it permitted bankruptcy trustees to recover “preferential transfers” – the type of prohibited transaction involved in the case.

issue in the case, Justice Scalia found these “clear statements” not clear enough.⁵⁸ This was so, he reasoned, because the relevant waiver provisions were “susceptible” to two alternative interpretations other than the literal reading, which, though “assuredly not the only readings,” were nevertheless “plausible;” hence, the waiver was not unambiguous and “therefore should not be adopted.” And as for the legislative history’s confirmation that Congress intended the literal reading, “legislative history has no bearing on the ambiguity point” – even if the legislative history confirms a *literal* reading of a statutory provision.⁵⁹

Two decades later, the Court’s conservative bloc continues to validate the above critiques from Justice Stevens and his allies on the bench and in the academy. And with increasingly disarming candor – as illustrated by Justice Alito’s opinion for the Court in one of the final decisions of the 2005 term, *Arlington Board of Education v. Murphy*.⁶⁰ In that case, the Court held that, under the Individuals with Disabilities Education Act (IDEA), a parent prevailing in an action against a school board was not entitled to reimbursement for consultant’s services as part of the attorney’s fee award mandated by the Act.⁶¹ Justice Alito reached this judgment in the teeth of a statement in the Conference Report meshing the House and Senate bills into the final legislation: “The conferees intend that the term ‘attorneys’ fees as part of the costs’ include reasonable expenses and fees of expert witnesses”⁶² This statement did not matter, he explained, because IDEA is a “spending clause” statute, providing funds to states in exchange for state compliance with specified conditions. Pursuant to the Court’s clear statement jurisprudence, he said, “In a Spending Clause case, *the key is not what a majority of the Members of both Houses intend* but what the States are clearly told [in the statutory text] regarding the conditions that go along with the acceptance of those funds.”⁶³ Alito belittled the instruction to award expert consultants’ fees as merely a snippet of “legislative history.” His dismissive characterization overlooked the fact that the statement was not a mere individual member’s floor statement, nor even a committee report. It was in the final report of the House-Senate conference, signed by all conferees representing both houses, and comprising *both* their final text *and* their explanatory statement.⁶⁴ Anyone knowledgeable about the legislative process would know that such conference report explanatory statements are likely to be more reliable, considered, and precise guides to the intended and appropriate meaning of imprecise statutory text.⁶⁵

⁵⁸ Joining his majority opinion were Chief Justice Rehnquist, and Justices White, O’Connor, Kennedy, Souter, and Thomas. Justice Blackmun joined Justice Stevens’ dissent.

⁵⁹ *Id.* at 34-37

⁶⁰ 548 U.S. 291 (2006).

⁶¹ *Id.* at 2463–64.

⁶² *Id.* at 2463 (quoting H.R. Conf. Rep. No. 99-687, at 5 (1986)) (emphasis added).

⁶³ *Id.* (emphasis added).

⁶⁴ *See id.* at 2466–75 (Breyer, J., dissenting).

⁶⁵ This analysis follows my 2006 article, Simon Lazarus, *Federalism R.I.P.? Did The Roberts Hearings Junk The Rehnquist Court’s Federalism Revolution?*, 56 DEPAUL L.REV. 1 (2006) Not coincidentally, no member of the current conservative bloc has any Congressional or other legislative experience. Former Justice Sandra Day O’Connor, a centrist who sometimes voted with the conservatives

The conservatives' message is simple enough: No statement by Congress, in legislative history, or even in statutory text, can be assured of turning out to be sufficiently "clear," when the law runs up against some policy or principle especially favored by the Court's current majority – as in what Justice Stevens lampooned as "the Court's love affair with the doctrine of sovereign immunity."⁶⁶

B. Avoiding Constitutional Questions By Narrowly Construing Statutes

Another interpretative "canon" that expressly sanctions overriding statutory text and Congressional intent is the maxim that statutes should be narrowly construed to avoid raising a "serious" constitutional question about their validity. On its face, this doctrine appears to promote deference to legislatures and democratic law-making, and no doubt it was so intended, and, presumably, is often so applied. But in practice this canon has been abused by judges to substantially rewrite statutes without bothering to critically analyze the content of the supposedly serious constitutional question at stake. Judge Posner has noted that often, courts have done just that, "only later to hold, when forced to confront the question under a different statute, that the constitutional claim should not prevail."⁶⁷

Recently, Judge Posner's observation was graphically validated in an important 2005 decision on the scope of federal authority under the Clean Water Act (CWA) to regulate wetlands, *Rapanos v. United States*.⁶⁸ In *Rapanos* four justices – conservatives Roberts, Scalia, Thomas, and Alito (Justice Kennedy concurred, but with a different, more moderate rationale) – signed a plurality opinion that would have overridden three decades of interpretation of the CWA by the responsible agencies, EPA and the Army Corps of Engineers under five presidents, three of them Republicans, without objection by Congress. Under the established interpretation, the CWA authorized federal regulation of intermittent streams and wetlands. Scalia's plurality opinion would have limited the CWA to waters with a permanent flow into navigable bodies of water, thereby eliminating federal protection of vast amounts of wetlands. Justice Scalia, who wrote the opinion, asserted, with scant explanation, that this narrow reading was necessary to avoid deciding whether the CWA exceeded Congress' Commerce Clause authority. He derided the long-term bipartisan endorsement of robust wetlands protection, not as a reason for

on the Rehnquist Court, had, before her nomination to the Court by President Reagan, served as Majority Leader of the Arizona state Senate.

⁶⁶ U.S. v. Nordic Village, supra note 53, at 42

⁶⁷ Richard A. Posner, THE FEDERAL COURTS: CRISIS AND REFORM 284-85 (1985) (quoted in Eskridge, Frickey, & Garrett, LEGISLATION, supra note 28, at 364 n. 58. who criticize the "avoidance" canon for encouraging judges to "do a slipshod job of constitutional analysis, failing to think through the constitutional issues because, after all [they are] supposedly avoiding them." Id. at 363

⁶⁸ 547 U.S. 715 (2006).

Chevron deference, but as “entrenched Executive error.”⁶⁹ And he bared both his disdain for Congress and the ideological wellspring for that scorn, shrugging off Congress’ failure to overturn the Corps’ interpretation, as “perhaps” due “simply to their unwillingness to confront the environmental lobby.”⁷⁰ This pell-mell rush by Scalia and his co-signatories, to read vigorous wetlands protection out of the Clean Water Act, drew little public or media attention – far less, one imagines, than would have been the case had they not couched their argument in “mere” statutory terms, and instead held the Act unconstitutional and beyond Congress’ power to enact.

C. Obstructing Individual Court Enforcement of Federal Statutory Rights

A third doctrine, or set of doctrines, that Rehnquist-Roberts Court conservative justices have invented to override Congressional intent, and weaken the impact of progressive statutes, is the implementation of a strong, often a “super-strong” policy against permitting private individuals to enforce federal statutory rights in court. This judge-made policy pops up ubiquitously as the driving force behind an expanding family of rules. In cases where individuals allege that state governments have violated federal statutory rights, the conservatives’ theories for barring court access claim parentage in a states’ rights-oriented conception of “federalism,” discussed briefly below.⁷¹ In an important subset of such cases, suits to enforce rights under “spending clause” statutes such as Medicaid and housing statutes, members of the conservative bloc have created theories that render rights prescribed as conditions attached to federal grants as less robust and less susceptible to court enforcement than rights under other types of federal laws.⁷²

⁶⁹ *Id.* at 752. A mainstay of administrative law jurisprudence is the rule established by Justice Stevens’ landmark opinion in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), that “[I]f [a] statute is silent or ambiguous with respect to the specific question [at issue in a given case], the issue for the court is whether the agency’s answer [i.e., interpretation] is based on a permissible construction of the statute.” The rule is applied so routinely that it is often referred to as “*Chevron* deference” or the “*Chevron* two-step” after the two step formula Stevens applied in his opinion. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 226 (2001) (“We granted certiorari ... in order to consider the limits of *Chevron* deference owed to administrative practice in applying a statute.”); Todd Garvey, *The Jurisprudence of Justice John Paul Stevens: The Chevron doctrine*, Congressional Research Service (2010), available at www.fas.org/sgp/crs/misc/R41260.pdf.

⁷⁰ *Id.* at 2231.

⁷¹ *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (holding that nondisclosure requirements of the Family Educational Rights and Privacy Act were not privately enforceable rights under 42 U.S.C. § 1983); *Maine v. Thiboutot*, 448 U.S. 1, 11, (1980) (Powell, Burger, & Rehnquist, jj., dissenting) (arguing that not all federal statutory rights should be privately enforceable partly because, “No one can predict the extent to which litigation arising from today’s decision will harass state and local officials”).

⁷² The effectively super-strong clear statement rule applied by Justice Alito in *Arlington County Board of Education*, 548 U.S. 291 (2006), severely obstructs private suits as a practical matter, but does not entirely rule them out in principle. An even stricter bar to suits to enforce “spending clause” statutory rights has been endorsed by Justices Scalia and Thomas, but has not to date been accepted by any other members of the conservative bloc. That, however, could change with the Court’s decision in the first case

While most safety-net statutes do not have express private rights of action, the Court held in 1980 in *Maine v. Thibotot* that such statutes can be enforced by low-income individuals against states utilizing the cause of action in 42 U.S.C. § 1983, which expressly permits the enforcement of “laws.”⁷³ Section 1983 was originally enacted in the Klu Klux Klan Act of 1871.⁷⁴ The conservative minority dissented in *Thibotot*, protesting against reading the word “laws” to mean “all statutes,” for the explicit policy reason that low-income individuals should not be permitted to “harass state and local officials” and “overburden[] courts” with claims that states violated federal law.⁷⁵ After conservative Justices garnered a majority of the Court, they greatly weakened the effectiveness of section 1983. In 2002, the Court held, in *Gonzaga v. Doe* that, even though section 1983 expressly provides for individual suits (to redress state violations of federally prescribed rights), nevertheless suits based on that provision must be rejected, unless they meet difficult criteria the Court had previously imposed on suits based on an “implied” private right of action.⁷⁶ Implied rights of action arose from court decisions interpreting particular laws to authorize private enforcement suits, despite the absence of express authorization. The Court had before never equated any other express right of action with (increasingly disfavored and discouraged) implied rights of action. It gave no justification in *Gonzaga* for why a cause of action passed in the wake of the eradication of American slavery should be treated differently than every other express cause of action. The decision was clearly a fulfillment of the policy objective expressed in the *Thibotot* dissent of keeping low-income individuals from having their day in court to enforce federal law.⁷⁷

Justice Stevens parted company from other liberal Justices who joined in the result in *Gonzaga*. (Justices Breyer and Souter concurred in the judgment, but disagreed with the majority’s rule limiting court access under §1983 on substantially the same very restricted basis applicable in implied right of action cases – so that restrictive rule drew

to be argued in its 2011-2012 term, *Douglas v. Independent Living Center*, [citation to grant of cert. ?]. See Simon Lazarus, *Acting SG To Supremes: Close Courthouse Doors To Safety Net Beneficiaries*, ACS Blog (June 9, 2011), available at: <http://www.acslaw.org/acsblog/acting-solicitor-general-to-supremes-close-courthouse-doors-to-safety-net-beneficiaries>. Professor Samuel Bagenstos has noted that, while *Arlington Central* “ may seem like a narrow case, the “clear notice” principle it adopts could have far-reaching consequences for the enforcement of such important federal laws as the statutes that set up the Medicare and Medicaid programs.” Samuel R. Bagenstos, *Spending Clause Litigation in The Roberts Court*, 58 DUKE L.J. 345, 351 (2008)

⁷³ *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980).

⁷⁴ See Sasha Samberg-Champio, *How to Read Gonzaga: Laying the Seeds of a Coherent Section 1983 Jurisprudence*, 103 COLUM. L. REV. 1838, 1841 (2003); Cass E. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 398-400 (1982).

⁷⁵ *Id.* at 23 (Powell, J., dissenting). Powell’s dissent was joined by Chief Justice Berger and then-Associate Justice Rehnquist. See Rochelle Bobroff, *Section 1983 and Preemption: Alternative Means of Court Access for Safety Net Statutes*, 10 LOY. J. OF PUB. INT. L. 27, 42 (2009).

⁷⁶ *Gonzaga University v. Doe*, 536 U.S. 273, 283 (2002).

⁷⁷ See Bobroff, *Section 1983 and Preemption*, *supra* note 75, at 58–59.

support exclusively from the familiar five-member conservative majority.)⁷⁸ Stevens vehemently dissented from the Court's diminution of rights of disadvantaged individuals, recognizing the significant damage from the Court's treatment of statutory rights.⁷⁹ Barely a year after Justice Stevens' retirement, progressive advocates have noted that something of his razor-sharp grasp of the critical importance of private judicial enforcement has been missing from opinions of his former colleagues among the progressive justices.⁸⁰

In cases where individuals seek to vindicate federal statutory rights against corporations or other non-government defendants, the conservative justices have cited the presumption against private suits – buttressed, sometimes, with references to federalism – as a basis for imposing cramped interpretations of statutory provisions that undermine the capacity of the law to achieve its purposes. In the most far-reaching of these latter cases to date, the 2008 decision *Stoneridge Investment Partners v. Scientific Atlanta*, Justice Anthony Kennedy, writing for the five-justice conservative bloc, held that pension funds and other group and individual investors in companies decimated by fraudulent managers, such as Enron, cannot recoup their losses from third-parties who knowingly facilitated the fraud.⁸¹ Typically such collaborators – contractors, vendors, consultants – are the only culprits left with assets from which compensation is possible. Effectively, the conservative bloc left hundreds of thousands of innocent shareholders holding the bag for the deliberate fraud perpetrated by unscrupulous corporations, like Enron, and their knowing collaborators.⁸² Justice Kennedy made clear that the impetus for this anomalous result was his colleagues' hostility to the private right of action that the Supreme Court has for decades held Congress to have impliedly intended for Section 10b.⁸³ Congress

⁷⁸ 536 U.S. at 291 (Breyer, J., concurring). Justice Stevens' dissent was joined by Justice Ginsburg. *Id.* at 300 (Stevens, J., dissenting). Justice Breyer supported the result on the ground that the individual statute which the plaintiff in *Gonzaga* sought to enforce, the Family Educational Rights and Privacy Act (FERPA) did not manifest Congressional intent to confer a private judicial remedy. Justice Breyer based this interpretation partly on the ground that the vague wording of FERPA had led to legal challenges to myriad routine practices in schools, including peer grading, honor society recommendations, and public bad conduct marks. *Id.* at 291-92. Justice Stevens concluded that FERPA did manifest intent to confer a private a private remedy. *Id.* at 293-99.

⁷⁹ *Id.* at 302.

⁸⁰ See Rochelle Bobroff, *Liberal Justices Miss the Point in Recent Court Access Case*, available at <http://www.acslaw.org/acsblog/liberal-justices-miss-the-point-in-recent-court-access-cases>.

⁸¹ 552 U.S. 148 (2008).

⁸² Franklin A. Gevurtz, *Law Upside Down: A Critical Essay on StoneRidge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 103 NORTHWESTERN UNIV. L. REV. 448, 455 (2009); Adam Reiser, Note, *Compensating Defrauded Investors While Preserving the SEC's Mission of Deterrence: A Call for Congress to Counteract the Troubling Consequences of StoneRidge*, 2009 UTAH L. REV. 257, [PINCITE] (2009); Douglas McCollam, *StoneRidge Ruling Shields Third-party Advisers*, Bloomberg Businessweek (January 15, 2008), http://www.businessweek.com/investor/content/jan2008/pi20080115_844276.htm; David Ivanovich, *Supreme Court Ruling Could Limit Suits by Enron Investors*, HOUSTON CHRON. (January 15, 2008), available at <http://www.chron.com/business/article/Supreme-Court-ruling-could-limit-suits-by-Enron-1786145.php>.

⁸³ *Herman & Maclean v. Huddleston*, 459 U.S. 375, 380 (1983) (The existence of an implied right of action under Section 10(b) is “beyond peradventure.”)

and small investors have long relied on the existence of this remedy for securities fraud.⁸⁴ “Though it remains the law,” Kennedy concluded, “the § 10(b) private right should not be extended beyond its present boundaries.”⁸⁵ Kennedy simply ignored the common-sense alternative view, that liability for co-conspirators in a sham transaction, designed solely to mislead investors, is no extension of §10b but simply a logical application, congruent with the statute’s well-known purposes. His grudging acknowledgement that the §10b private right of action “remains the law” (because Congress subsequently ratified it) makes clear that he and his colleagues would prefer it otherwise, and will continue, as in the case at hand, to emasculate it as much as possible.

The *Stoneridge* majority’s truncation of long-established small investor protections provoked a noteworthy dissent from Justice Stevens. Ever the seasoned legal craftsman and advocate, he began his opinion with an easy-to-grasp, hard-to-answer three-sentence summary of the relevant facts and law:

Charter Communications, Inc., [the principal actor, acknowledged by the majority to be liable under §10b] inflated its revenues by \$17 million in order to cover up a \$15 to \$20 million expected cash flow shortfall. It could not have done so absent the knowingly fraudulent actions of Scientific–Atlanta, Inc., and Motorola, Inc. Investors relied on Charter's revenue statements in deciding whether to invest in Charter and in doing so relied on respondents' fraud, which was itself a “deceptive device” prohibited by § 10(b) of the Securities Exchange Act of 1934. This is enough to satisfy the requirements of § 10(b).⁸⁶

Pushing on to the next level, Justice Stevens targeted the judicial policy driving the decision, namely, “the Court’s continuing campaign to render the private cause of action under §10(b) toothless.”⁸⁷ He powerfully critiqued the conservatives’ hostility towards private rights of action in general, and elaborated how fundamentally in conflict that hostility sits with long-established law and legal practice. Targeting Justice Scalia’s acerbic assertion (in another case) that implied statutory causes of action are “merely a ‘relic’ of our prior ‘heady days,’” Stevens countered that “Those ‘heady days’ persisted for two hundred years.” Justice Stevens went on to show the long-established, widespread acceptance of the principle that “every wrong shall have a remedy.” This principle, scorned by the Rehnquist-Roberts conservative justices, was, he noted, endorsed in 1801 by Chief Justice Marshall in *Marbury v. Madison*, guaranteed by three quarters of state constitutions, and specifically applied to the interpretation of federal statutes by the Supreme Court and lower federal courts, following English practice derived from the Magna Carta.⁸⁸

⁸⁴ Joseph A. Grundfest, *Is There an Express Section 10(b) Private Right of Action? A Response to Professor Prentice*, Stanford Law and Economics Olin Working Paper No. 352 at 5 (December 1, 2007) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1077437

⁸⁵ *Stoneridge*, 552 U.S. at 165.

⁸⁶ *Id.* at 167.

⁸⁷ *Id.* at 175.

⁸⁸ *Id.* at 177–78.

D. “Fundamentally Inconsistent With The Framers’ Conception Of The Constitutional Order:” The Conservative Bloc’s “Federalism” Campaign And Justice Stevens’ Response

As is apparent from this review of contemporary trump-Congress doctrines, “federalism” ubiquitously pops up as an asserted basis for countermanding the text and purpose of federal progressive statutes. Notably, the notion of federalism reflexively invoked by the conservative justices and their allies is a one-sided caricature of the actual federalist design reflected in the Constitution, and contemplated by its framers. In fact that design pushes in two directions, and emphasizes the economic, national security, and liberty-securing benefits of federal power. This textured vision was spelled out in *Federalist #10* and other manifestations of the original 1789 understanding, implemented in the iconic decisions of Chief Justice John Marshall, and substantially strengthened by the Reconstruction and Progressive Era amendments.⁸⁹ After all, the framers, authors of *The Federalist*, and Chief Justice Marshall were known as “federalists,” precisely because they, and the Constitution they had drafted and supported, radically enhanced federal authority vis-à-vis the states, compared to its predecessor Articles of Confederation. However clear that may be from relevant constitutional provisions and familiar indicia of their original meaning, conservatives ritualistically cite “federalism” as a self-evident basis for limiting the reach of progressive statutes, and, especially, obstructing the ability of private individuals to enforce them in court.

The most aggressive instance of the conservative justices’ anti-government activism in the name of federalism involved an express resort to the Constitution. In the late 1990s, a series of bitterly contested 5-4 decisions drastically circumscribed Congress’ authority to (among other things) “enforce” the Fourteenth Amendment, as expressly prescribed by Section Five of that amendment⁹⁰, and expanded Eleventh Amendment restrictions on the

⁸⁹ The Federalist No. 10 (James Madison) (explaining how a republic comprised of a central government presiding over constituent states can limit the harmful effects of partisanship); *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 187–89, 194–95, 196–98 (1824) (explaining the Constitution grants Congress a broad power to regulate “commerce which concerns more states than one, which 'extend[s] to or affect[s] other States” and not simply commerce that crosses states’ borders); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 366–67 (1819) (stating that “necessary” in the Necessary and Proper Clause should be read broadly to allow Congress to act by means that are “convenient” or “expedient”).

⁹⁰ Section 5 of the Fourteenth Amendment provides that “Congress shall have the power to enforce this article [the amendment] by appropriate legislation.” The Thirteenth and Fifteenth Amendments have identical enforcement provisions. In *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), the Court announced that legislation implementing its authority expressly granted by §5 of the Fourteenth Amendment would be evaluated under a means-ends test far stricter than the deferential “rational basis” standard long applicable for legislation enacted pursuant to Congress’ general authority to enact laws “necessary and proper” to “carry into execution” the powers enumerated in the 1789 Constitution. This innovation was reaffirmed and interpreted in highly stringent terms in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), and *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001). In *Garrett*, Justice Breyer, writing for the four progressives, impugned the legitimacy of the majority’s “congruent and proportional” test in stern terms similar to Justice Stevens’ *Seminole Tribe* rejection of the majority’s counter-textual expansion of Eleventh Amendment sovereign immunity. 531 U.S. at 388

ability of private individuals to sue state governments for violating federal rights.⁹¹ These decisions acknowledged that their expansive curtailment of state accountability contradicted the actual text of the Eleventh Amendment, which prohibits only diversity of citizenship suits against states by citizens of “another state” or foreign countries. But, the conservative majority held, the amendment “stand[s] not so much for what it says, but for the presupposition . . . which it confirms.” This “presupposition,” they claimed, constitutes a blanket bar to private suits against states: “It is inherent in the nature of [state] sovereignty not to be amenable to the suit of an individual without its consent.”⁹² Thus, the conservative bloc here simply displaced the plain meaning of constitutional text with an asserted contemporaneous understanding directly contradicted by that text. This should certainly qualify as an outstanding example of chutzpah, given the same justices’ oft-repeated celebration of strict adherence to the actual text of the Constitution, not to mention their adamant rejection of considering any extrinsic evidence to overcome, or in many instances, even to interpret, statutory text.

In dissent, Justice Stevens spotlighted the vast scope and reactionary impact of the majority’s position: the new rule would, he noted, prevent “Congress from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy”⁹³ – a forecast quickly validated by subsequent 5-4 rulings.⁹⁴ And he skewered their attempt to find historical justification for contravening the text of the Constitution. Far from being a “postulate” embedded by the framers in the original design of the Constitution, he wrote, sovereign immunity in eighteenth century jurisprudence was “entirely the product of [English] judge-made [common] law” derived from royalist and established religion precepts. Such notions were anathema to the revolutionary generation, he noted. And he added that Chief Justice Marshall had expressly confirmed that the Amendment should not be read broadly to enact an amorphous concept of protecting states’ sovereign “dignity.”⁹⁵

(observing that §5 overrides federalism-based obstacles to congressional authority, that the majority’s position serves no “constitutionally based federalism interest,” and that “The Court, through its evidentiary demands, its non-deferential review, and its failure to distinguish between judicial and legislative competencies, improperly invades a power that the Constitution assigns to Congress”).

⁹¹ *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

⁹² *Id.* at 54.

⁹³ *Id.* at 77.

⁹⁴ *Alden v. Maine*, 527 U.S. 706 (1999) (Eleventh Amendment sovereign immunity bars private suits in *state* courts prescribed by federal statute for enforcement of federal statutory rights – even though the Eleventh Amendment text references only the “judicial power of the United States”); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) (Eleventh Amendment bars suit by faculty members of Florida State University against the University for violating the Age Discrimination in Employment Act); *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Board*, 527 U.S. 627 (1999) (Eleventh Amendment renders state entity issuing tuition prepayment contacts immune from suit by private competitor for patent infringement); *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) (Americans with Disabilities Act did not validly abrogate Eleventh Amendment Sovereign Immunity for individual claiming disability-motivated employment discrimination).

⁹⁵ *Seminole Tribe*, 517 U.S. at 95–97 (Stevens, J., dissenting).

In the years immediately following *Seminole Tribe*, Justice Stevens led his progressive colleagues in taking the extraordinary step of refusing “to accept *Seminole Tribe* as controlling precedent,”⁹⁶ to underscore what they perceived as an historic threat to eviscerate Congress’ constitutional authority and individuals’ citizenship rights.[cite] Justice Stevens explained that the conservatives’ open-ended doctrinal barrier to ensuring state compliance with federal law is “so fundamentally inconsistent with the Framers’ conception of the constitutional order that it has forsaken any claim to the usual deference or respect owed to decisions of this Court.”⁹⁷ In the same vein, he emphasized the constitutional imperative of deference to Congress that the five member majority had abandoned:

There is not a word in the text of the Constitution supporting the Court’s conclusion that the judge-made doctrine of sovereign immunity limits Congress’ power to authorize private parties, as well as federal agencies, to enforce federal law against the States. The importance of respecting the Framers’ decision to assign the business of lawmaking to the Congress dictates firm resistance to the present majority’s repeated substitution of its own views of federalism for those expressed in statutes enacted by the Congress and signed by the President.⁹⁸

Finally, Justice Stevens linked his text-and-original meaning-and framers’-intent arguments to judicial restraint, and sealed them together as a package spotlighting the conservative justices’ “radical judicial activism.”

The kind of judicial activism manifested in cases like *Seminole Tribe*, *Alden v. Maine*, *Florida Prepaid Postsecondary Ed. Expense Bd. V. College Savings Bank* [citation omitted], and *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.* [citation omitted], represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises.”⁹⁹

The uncompromising stand by Justice Stevens and his progressive colleagues quickly bore fruit. In 2003, 2004, and 2005, the conservative bloc fractured in several cases that brought the “federalism revolution” to an abrupt halt.¹⁰⁰ In this turnabout, Justice

⁹⁶ Kimel v. Florida Bd. of Regents, 528 U.S. 62, 97 (2000) (Stevens, J., dissenting in part and concurring in part).

⁹⁷ *Id.* at 97–98.

⁹⁸ *Id.* at 96.

⁹⁹ *Id.* at 97–98.

¹⁰⁰ Nev. Dep’t of Human Res. V. Hibbs, 538 U.S. 721 (2003) (6-3 decision, opinion by Chief Justice Rehnquist, joined by Justice O’Connor and the four progressive justices, ruling that Congressional findings of systematic gender discrimination justified applying a statutory private right of action against state governments to enforce the Family & Medical leave Act); Tennessee v. Lane, 549 U.S. 509 (5-4 decision with Justice O’Connor joining the four progressive justices to hold that a quadriplegic could enforce the Americans with Disabilities Act against a state government which provided no elevator access to a

Stevens played a decisive role, deploying his lawyerly skill at assembling majorities and writing opinions with broad and enduring precedential impact.¹⁰¹ In *Tennessee v. Lane*, Justice Stevens' opinion for the Court accepted the conservative bloc's "congruent and proportional" framework for defining Congress' 14th amendment, §5 enforcement authority – presumably, essential to win Justice O'Connor's vote – but then reduced the evidentiary hurdles that Congress must meet under that framework so that they do not obviously differ materially from traditional "rational basis" deference in "necessary and proper" clause precedents.¹⁰² This shift provoked Justice Scalia, in dissent, to renounce his prior acceptance of the "congruent and proportional" framework.¹⁰³

While the conservative bloc's "federalism" campaign surfaced expressly constitutional arguments, it nevertheless fits in with the other, purportedly non-constitutional doctrinal initiatives considered here. On all these fronts, to date at least, the conservative justices have avoided frontal challenge to the post-New Deal regime broadly defining substantive Congressional domestic authority. Instead, their strategy has been to obstruct the exercise of that authority, especially by curtailing private enforcement suits. Behind the glaring contradictions among these obstructionist doctrinal initiatives, and with other supposedly fundamental conservative jurisprudential tenets, the common feature they share is clear enough: simple ideological hostility to the substance of the progressive statutes they undermine. As acknowledged by American Enterprise Institute Scholar

courtroom in which he was being tried for an alleged crime; *Gonzales v. Raich*, 545 U.S. 1 (2005) (6-3 decision with Justice Kennedy joining the five progressives and Justice Scalia concurring separately, holding that the commerce clause authorized application of the Controlled Substances Act to prosecute an individual for growing marijuana on her property for her own medicinal use). Conservative commentators saw these decisions as "the end of the federalism revolution." Ramesh Ponnuru, *The End of the Federalism Revolution*, NAT'L REV. ONLINE, July 4, 2005. See also Michael S. Greve, *Down with Dope. Up with Hope?*, Am. Enter. Inst. Federalism Project, June 7, 2005, <http://www.federalismproject.org/supremecourt/?p=9>.

¹⁰¹ Immediately after stepping down as President George W. Bush's Solicitor General in July 2004, Ted Olson observed that "conservatives have every reason to weep," because they "lost virtually every important and controversial case" of the 2002-03 and 2003-04 Supreme Court terms, a progressive shut-out in which "The crafty and genial hand of Justice Stevens was everywhere evident." Theodore B. Olson, "Supreme Court Roundup, October 2003 Term, speech to the Federalist Society, District of Columbia chapter, July 9, 2004, quoted in BILL BARNHART AND GENE SCHLICKMAN, JOHN PAUL STEVENS: AN INDEPENDENT LIFE 227 n. 15 (Northern Illinois University Press 2010) (Barnhart and Schlickman do not provide a citation for accessing a copy of Olson's speech, but I was present at the luncheon where he spoke, and heard his appraisal of Justice Stevens' role.)

¹⁰² *Tennessee v. Lane*, 541 U.S. 509, 522-34 (2004)

¹⁰³ In 2005 Justice Stevens delivered the *coup de gras* to the "federalism revolution, writing for the Court in a 6-3 decision that reaffirmed Congress' broad authority to regulate interstate commerce, despite 1995 and 2001 5-4 decisions that seemed to erect new limits to that source of power. *Gonzales v. Raich*, 545 U.S. 1 (2005). Justice Stevens' sweeping majority opinion also prompted then-Judge John Roberts, during his confirmation hearings after being nominated to serve as Chief Justice, to state that the 1995 and 2001 decisions did not "junk" the Court's prior post-1937 Commerce Clause precedents. *Transcript of Nomination of John G. Roberts, of Maryland, to be Chief Justice of the United States*, at 271-72, 356 (Sept. 13, 2005)

Michael S. Greve, an admirer of the Court's "federalism" jurisprudence, these disparate rules, whether purportedly constitutional or interpretational, are in reality "*anti-entitlement doctrines*," which are "*connected, such that plaintiffs who manage to evade one obstacle are bound to stumble over another.*"¹⁰⁴

IV. Fair-Weather Federalism and Fair-Weather Textualism: Conservatives' Doctrinal Initiatives to Invalidate State Progressive Statutes

As noted above, Justice Stevens' dissents in the late 1990s "federalism" constitutional cases illumine how starkly his conservative colleagues' "sovereign immunity" jurisprudence conflicts with the most fundamental axioms of both their originalist approach for interpreting the Constitution and their textualist approach to interpreting statutes. They expressly scuttle the plain meaning of the relevant legal text (the Eleventh Amendment), and summarily shunt aside persuasive extrinsic evidence of contemporaneous meaning.¹⁰⁵ But this logical and philosophical incoherence reaches greater heights still, with two sets of doctrinal initiatives that the conservative bloc has aggressively promoted to invalidate progressive *state* laws. These two initiatives are, first, expansive interpretation of criteria for finding state laws "preempted" by federal laws, pursuant to the Constitution's Supremacy Clause; and, second, conversion of the 1925 Federal Arbitration Act (FAA), into a platform for roving judicial immunization of businesses from private judicial remedies under state (and federal) laws protecting customers, retirees, depositors, workers, and other individuals.

While these initiatives run counter to the conservatives' textualism and federalism credos, they harmonize with strategic advice offered by Justice Scalia to members of the fledgling Federalist Society in 1982 (when he was still Professor Scalia). Scalia reminded his audience that their underlying goal was "market freedom," and that, hence, they should avoid reflexive support for states' rights in all contexts. On the contrary, he urged, conservatives should "fight a two-front war" against overzealous regulation at the

¹⁰⁴ Michael S. Greve, *Federalism, Yes. Activism, No.*, Federalist Outlook, July 1, 2001, http://www.aei.org/publications/pubID.15851/pub_detail.asp (emphasis added). Greve continues:

Plaintiffs who escape from restrictive statutory interpretation into Section 1983 will find that route, too, strewn with obstacles. They may find that their purported right was unrecognized in 1871. Or, they may find that their claims for monetary damages *which are often the only effective means of forcing state and local governments into compliance* are blocked by a slew of Supreme Court decisions granting the states sovereign immunity. . . . Let plaintiffs argue that the state has waived its immunity by accepting federal funds, and they will lose. Let plaintiffs seek to obtain relief by naming a state's officers, rather than the state itself, as a defendant, and they will find that this so-called *Ex Parte Young* rule, once readily available, has become the exception.

¹⁰⁵ In *Seminole Tribe*, Justice Souter elaborated Justice Stevens' case in an 85 page opinion. [cite and pincite] He exhaustively reviewed the debates in the 1787 Philadelphia convention, the post-convention ratification debates, Chief Justice Marshall's key decisions, and other contemporaneous sources. [cite and pincite] He also noted that "plain text" should necessarily trump the allegedly implicit "background principle[s]" and "postulates" on which the conservative majority purported to ground the new doctrinal weapon it had handed itself to hem in Congress' legislative authority. *Id* at 100-85.

state no less than the federal levels.¹⁰⁶ In the intervening years, Justice Scalia and his colleagues have been carrying out that recommendation. Professor Ernest Young has observed that driving this two-faced regime is a “libertarian vision” that “sees federalism as a tool of deregulation with the potential to keep both national and state governments within relatively narrow bounds.”¹⁰⁷

A. Squelching State Regulatory Laws Via Supremacy Clause-Based Preemption

Under both Chief Justice Rehnquist and Chief Justice Roberts, a major preoccupation of the Court has been with suits to “preempt” state laws as inconsistent with federal laws which must prevail as the “supreme law of the land” under the Constitution’s Supremacy Clause.¹⁰⁸ As noted above, during Chief Justice Rehnquist’s tenure, from 1986 to 2004, preemption cases accounted for a staggering 8% of the Court’s civil docket, according to the American Enterprise Institute.¹⁰⁹ Most of these cases are brought by business interests seeking to overturn state regulatory laws. Frequently, Supreme Court majorities have granted such requests, striking down state statutes and common-law remedies in fields spanning, for example, pharmaceuticals, medical devices, pesticides, auto safety, cigarette labeling, predatory lending, pensions, health insurance, and many others.¹¹⁰ Neither the five ordinarily conservative justices nor the four ordinarily progressive

¹⁰⁶ Simon Lazarus, *Justice Scalia’s Two-Front War*, THE AMERICAN PROSPECT (March 6, 2008) http://prospect.org/cs/articles?article=justice_scalias_two_front_war.

¹⁰⁷ Ernest A. Young, *Federal preemption and State Autonomy*, in Richard A. Epstein & Michael S. Greve (eds.), FEDERAL PREEMPTION: STATES’ POWERS, NATIONAL INTERESTS 249 (2007). To the same effect, see Richard Fallon, *The Conservative Paths of the Rehnquist Court’s “Federalism” Decisions*, 69 U.CHI.L. REV. 428, 462–63 (2002).

¹⁰⁷ Ernest A. Young, *Federal preemption and State Autonomy*, in Richard A. Epstein & Michael S. Greve (eds.), FEDERAL PREEMPTION: STATES’ POWERS, NATIONAL INTERESTS 249 (2007). To the same effect, see Richard Fallon, *The Conservative Paths of the Rehnquist Court’s “Federalism” Decisions*, 69 U.CHI.L. REV. 428, 462–63 (2002).

¹⁰⁸ The clause, in Article VI of the Constitution, provides that the “Constitution and the laws of the United States...shall be the supreme law of the land...anything in the constitutions or laws of any State to the contrary notwithstanding; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.”

¹⁰⁹ Out of 1,302 civil cases decided by the Rehnquist court over that time, 105 were preemption cases. Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP. CT. ECON. REV. 43, 50 (2006).

¹¹⁰ See, e.g., *PLIVA, Inc. v. Mensing*, 131 S.Ct. 2567 (2011) (finding FDA requirements for drug labeling preempted state tort law that would have imposed a stricter duty to warn users of risks); *Aetna Health Inc. v. Davila*, 542 U.S. 200, 204 (holding ERISA preempted state law for remedies against health insurance provider whose wrongful denial of coverage caused serious physical injury); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008) (FDA medical device regulations preempt state remedies for negligent manufacture); *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) (U.S. Department of Transportation regulations preempt state tort remedies for failure to install airbags prior to D.O.T.-prescribed phase-in date); *Lorillard Tobacco Co. v. Reilly*, 535 U.S. 635 (2002) (federal cigarette labeling rules preempt wrongful death claims against cigarette manufacturers); *Watters v. Wachovia Bank*, 550 U.S. 1 (2007) (federal banking regulations preempt state predatory lending and other consumer protection laws).

justices have voted with rigid consistency on preemption issues, though, in recent years, 5-4 polarization has appeared with increasing frequency on this as on other fronts.¹¹¹

Justice Stevens, however, was consistent on preemption issues over these matters for more than two decades. He was passionately committed to keeping the law in line with the same first principle that animated his statutory jurisprudence generally: deference to legislators.[cite] Over and over, he reminded his colleagues that courts' authority to invalidate state laws on Supremacy Clause grounds derives entirely and exclusively from the text and purpose of the federal statutes alleged to require such a radical invasion of state prerogatives.[cite] Invariably, his opinions scrupulously winnowed federal statutes and their legislative histories for meaningful indications as to whether preemption was required to achieve statutory goals. This principle of deference has always been the bedrock of preemption doctrine. But often it has been observed as much in the breach as in fact. In particular, the Court has been notably inconstant in applying the "presumption against preemption" designed to promote Congressional supremacy and ensure respect for state autonomy. Justice Stevens was consistently the Court's leading champion of retaining and giving scope to the presumption.

Towards the middle of the Court's 2008-2009 term, the conservative bloc appeared set to drive from preemption doctrine even lip-service acknowledgement of the presumption against preemption, and to turn preemption into an open-ended warrant for canceling state common law and statutory protections in all areas touched by federal regulatory statutes. In *Riegel v. Medtronic*, the Court on February 20, 2009 held manufacturers of unsafe medical devices exempt from state tort suits, on the ground that such suits were preempted by a 1976 federal law requiring pre-screening by the federal Food & Drug Administration before such devices could be marketed. Writing for the Court, Justice Scalia overtly scorned state common-law protections, derided the irrationality of piecemeal jury determinations, and, in the teeth of Congress' evident design in 1976 to strengthen, not weaken, consumer protections from defective medical devices, he fairly sneered that it is "not our job to speculate" on Congress' purpose.¹¹² In a case raising related issues, argued five days later, *Warner-Lambert v. Kent*, the Court deadlocked 4-4,

¹¹¹ Among the conservative justices, Justice Kennedy and Justice Thomas in particular have appeared alternatively on the "business" and "consumer" side, though for somewhat different reasons. Among the progressives, Justice Breyer has sometimes appeared to give greater weight to promoting uniform regulatory standards for economic efficiency reasons than to promoting state autonomy via strict adherence to the presumption against preemption. Justice Kennedy, the least reliable member of the conservative bloc, joined Justice Stevens' majority opinion ruling against preemption in *Wyeth v. Levine*, 555 U.S. 555, 129 S.Ct. 1187 (2009) (discussed below at notes 116-18 and accompanying text, perhaps because the case featured a highly sympathetic plaintiff and received intense publicity; Justice Thomas also concurred in the judgment in *Wyeth*, but with a separate concurrence reiterating his frequently expressed aversion to overbroad preemption on states' rights grounds. 129 S.Ct. at 1204-05. Justice Breyer's separate concurrence in *Wyeth* emphasized (Id. at 1204) that "State tort law will sometimes interfere with the FDA's desire to create a drug label" with uniform nationwide application, a concern that has prompted him (and others of the progressive justices) to vote in favor of preemption against plaintiffs seeking recovery under state tort provisions, such, for example, as *Riegel v. Medtronic*, supra note 110.

¹¹² *Riegel v. Medtronic Inc.*, 552 U.S. 312, 326 (2008)

because Chief Justice Roberts was recused.¹¹³ But the oral argument appeared to presage further erosion of deference to state autonomy and Congress' statutory objectives or directions – so much so that a website for product liability defense lawyers speculated, only half in jest, that their line of work might soon disappear.¹¹⁴

However, just months later, this strong tide turned, as Justice Stevens startled observers by assembling majorities to rebuff business litigants seeking immunity from state law in two widely noted cases. In both cases, *Altria Group, Inc. v. Good*¹¹⁵, and *Wyeth v. Levine*¹¹⁶, Stevens' opinion for the Court emphatically restored Congressional purpose and the presumption against preemption as lodestars for preemption doctrine. In *Altria*, decided December 15, 2008, he began his argument asserting that “[t]he purpose of Congress is the ultimate touchstone in every preemption case,” adding that “Congress may indicate preemptive intent through a statute’s express language or through its structure and purpose.”¹¹⁷ In *Wyeth*, he elaborately reaffirmed that “In all preemption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”¹¹⁸

Whether Justice Stevens' restoration of statutory text-and-purpose discipline in administering preemption doctrine will hold remains to be seen. In the 2010-11 term, the Court, in one of two business-consumer preemption cases, unanimously declined to preempt state tort law alleged by a manufacturer-defendant to conflict with National Highway Traffic Safety Act regulations – evidently signaling retrenchment from a 1992 decision holding that not hugely different provisions of the same regulation preempted a similar state law.¹¹⁹ But in the second case, *PLIVA, Inc. v. Mensing*, a 5-4 majority ruled in favor of preemption in circumstances quite similar to those in which, two years earlier, Justice Stevens had mustered six votes against preemption.¹²⁰ *Wyeth* ruled preemption inapplicable in a case where an original brand-name drug manufacturer, whose warning label conformed to FDA requirements but failed to meet state tort law reasonable care standards, could have requested FDA permission to change the label. *PLIVA* preempted state tort law in a similar case involving a generic drug manufacturer, distinguishing *Wyeth* on the ground that statutorily prescribed procedures for requesting a label change for generic manufacturers are more complex, hence, less certain to succeed, than for brand-name manufacturers. In dissent, on behalf of herself and the other progressive justices, Justices Sotomayor understandably noted that the distinction “makes no

¹¹³ Warner-Lambert v. Kent, 552 U.S. 440 (2008) (affirmed by an equally divided court).

¹¹⁴ Simon Lazarus, *Justice Scalia's Two-Front War*, supra note 106.

¹¹⁵ 555 U.S. 70 (2008).

¹¹⁶ 555 U.S. 555 (2009).

¹¹⁷ *Altria*, supra note 115, at 76.

¹¹⁸ *Wyeth*, 129 S.Ct. at 1194-95.

¹¹⁹ *Williamson v Mazda Motor of America, Inc.*, 131 S.Ct. 1131 (2011).

¹²⁰ 131 S.Ct. 2567 (2011) .

sense.”¹²¹ Justice Thomas’ opinion for the majority prompted at least one Supreme Court expert to conclude that it signaled “the disappearance of the historic ‘presumption against preemption,’” which Justice Stevens appeared to have emphatically reaffirmed but two years before in *Altria* and *Wyeth*.¹²²

B. “An Edifice of The Court’s Own Creation:” Transmutation Of The Federal Arbitration Act Into A Platform For Big Business Immunity From State And Federal Protections for Employees, Consumers, and Other Individuals.

In July 2008, Harvard Professor Elizabeth Bartholet, testifying before the Senate Judiciary Committee, was asked what sorts of corrective measures would be most effective to “fix” various erroneous narrowing interpretations imposed by the courts on workplace antidiscrimination laws. Professor Bartholet advised the senators that their top priority “fix” should not be to amend any of the civil rights provisions that the Court had misconstrued and weakened. Instead, she testified, the single most effective measure that Congress could enact to reinvigorate employment discrimination safeguards would be to overturn the Court’s expansive interpretations of the 1925 Federal Arbitration Act (FAA).¹²³ Under the FAA as the Court’s conservative bloc has construed it, employers can require all employees as a condition of employment to agree to submit all claims, under any federal or state law, to binding mandatory arbitration utilizing fora and arbitrators prescribed by the employment contract.[cite] For numerous reasons, extensively catalogued and documented by courts and scholars, such forced arbitration procedures, especially as they have been constrained and defined in recent 5-4 Supreme Court decisions, render unenforceable legal guarantees such as workplace discrimination protections – or protections of any sort for individuals obliged to sign non-negotiable contracts imposed by businesses or other large organizations – such as consumers, patients, nursing home residents, depositors, retirees, or investors.[cite] Thus, Professor Bartholet’s appraisal of the destructive impact of the Court’s FAA jurisprudence on equal employment opportunity guarantees applies with equal force to literally all types of individual legal protections from corporate abuse, state and federal.¹²⁴

¹²¹ *Id.* at 2590.

¹²² Patricia Millett, head of Akin Gump’s Supreme Court practice, in “From High Court To Heavyweights, Highlights of the 2010 Term, National Law Journal, 29 June 2011, <http://www.mayerbrown.com/litigation/article.asp?id=11240&nid=258>.

¹²³ *Courting Big Business: The Supreme Court’s Recent Decisions on Corporate Misconduct and Laws Regulating Corporations*: Hearing Before the S. Comm. on the Judiciary, 110th Cong. (statement of Elizabeth Bartholet) (“Nothing that Congress does to ‘fix’ Court decisions in the civil rights area ... will succeed in recreating civil rights law as important public law if civil rights cases are being decided in arbitration and not in courts.”), available at http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da13e81c7&wit_id=e655f9e2809e5476862f735da13e81c7-1-2.

¹²⁴ Joshua M. Frank, *Stacked Deck: A Statistical Analysis of Forced Arbitration*, Center for Responsible Learning (May 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1457229; Martha Nimmer, Note, *The High Cost of Mandatory Arbitration*, 12 CARDOZO J. CONFLICT RESOL. 183 (2010).

The Court has derived this truly extraordinary power – to degrade or override so vast a swath of important legislation – by torturing the text of this near-century-old law, and disregarding its legislative history. “Over the past decade,” Justice Sandra Day O’Connor wrote in a 1995 concurring opinion, “the Court has *abandoned all pretense* of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, *an edifice of its own creation.*”¹²⁵ As soon as the Court launched itself on this course, Justice Stevens consistently objected to its decisions that had “effectively rewritten the statute to give it a pre-emptive scope that Congress certainly did not intend.”¹²⁶ For some time, as the Court continued its gradual expansion of the scope and impact of the FAA, divisions were neither rigid nor ideological. In 1984, Justice O’Connor, joined by then-Associate Justice Rehnquist, dissented from the majority’s ruling that the FAA applied to state as well as federal courts, as “judicial revisionism . . . unfaithful to congressional intent, unnecessary, and . . . inexplicable.”¹²⁷ In 1995, Justice Thomas, in an elaborate opinion joined by Justice Scalia, dissented from the Court’s decision to require state as well as federal courts to comply with the FAA, noting that the Act was “ambiguous,” and hence should not be construed “to displace state law.”¹²⁸ Justice Breyer wrote the opinion for the Court. Justice O’Connor issued a separate concurrence, supporting the result on *stare decisis* grounds, but voicing her agreement with the merits of Justice Stevens’ dissents from the Court’s earlier precedents, which stressed deference to Congressional intent and to states’ prerogatives as a basis for opposing the Court’s expansion of the FAA.¹²⁹

In 2001 the Court’s persistent campaign to broaden the FAA jelled into the rigid, ideologically polarized shape it has displayed since then. At that point, business advocates showed the urgent priority they attached to converting the FAA, originally enacted simply to ensure federal court enforcement of voluntary commercial arbitration

¹²⁵ Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 283 (1995) (O’Connor, J., concurring) (emphasis added). *Allied-Bruce* held that the FAA provision covering, with certain exceptions, all arbitration agreements “involved in commerce” to reach the full extent of Congress’ interstate commerce power as defined post-1937, not as far more narrowly defined by Supreme Court doctrine extant in 1925. *Id.* at 278

¹²⁶ Perry v. Thomas, 482 U.S. 483, 493 (1987) (Stevens, J., dissenting). The decision preempted a California law providing that wage collection actions could be maintained without regard to a private agreement to arbitrate such disputes. *Id.* at 492. Justice Stevens’ dissent observed that, for more than the first half-century of the existence of the FAA, neither courts nor litigants “even considered the possibility that the Act had preempted state-created rights.” *Id.* at 493.

¹²⁷ Southland Corporation v. Keating, 465 U.S. 1, 36 (1984) (O’Connor, J., dissenting).

¹²⁸ Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. at 292. Justice Thomas added, “We must be absolutely certain that Congress intended such displacement before we give preemptive effect to a federal statute,” and noted specifically that, “In 1925, the enactment of a ‘substantive’ arbitration statute along the lines envisioned by *Southland* i.e., the ‘substantive’ arbitration statute effectively created by that decision of the Court] would have displaced an enormous body of state law” *Id.* at 292-93 (internal citations omitted). In other words, Justice Thomas and Justice Scalia acknowledged – and in this 1995 opinion, strongly regretted – that even at that point in time, the Court’s expansion of the FAA displaced “an enormous body of state law,” which Congress in 1925 would not have intended.

¹²⁹ See *supra* note 102 and accompanying text.

agreements between companies, into a litigation ban to be imposed on individuals with no realistic leverage to resist. Instantly, the Court’s conservatives shed the states’ rights, fidelity-to-text, and strict constructionist misgivings they had voiced at earlier points. Likewise, the progressives recognized that this increasingly intense battle was not so much about facilitating voluntary alternative dispute resolution options as enabling big businesses to avoid accountability to customers and workers and the like; they fell into line, solidly behind Justice Stevens.

The watershed case was *Circuit City Stores, Inc. v. Adams*.¹³⁰ The 5-4 decision held that the FAA permitted employers to include binding mandatory arbitration requirements into employment contracts, and preempted state laws banning or regulating such provisions. In dissent, Justice Stevens methodically reviewed the “extensive and well documented . . . history of the Act.” He demonstrated in detail that “[N]either the history of the drafting of the original bill by the ABA, nor the records of the deliberations in Congress during the years preceding the ultimate enactment of the Act in 1925, contain any evidence that the proponents of the legislation intended it to apply to agreements affecting employment.”¹³¹ Justice Kennedy’s majority opinion avoided confronting Stevens’ exegesis of the legislative history, by invoking Scalian “textualist” logic: “As the conclusion we reach today is directed by the text,” Kennedy wrote, “we need not assess the legislative history”¹³²

Justice Stevens skewered the majority’s excuse for “[p]laying ostrich to the substantial history behind [the provision of the statute on which the decision turned].” Kennedy’s opinion asserted that §1 of the Act, which excluded from its coverage labor agreements of “seamen, railroad employees, and *any other class of workers engaged in foreign or interstate commerce*,” to so unambiguously limit its exemptive scope exclusively to transportation workers that resort to legislative history was inappropriate. Justice Stevens spotlighted that credibility-straining claim as illustrating how, in practice, the conservatives’ textualist algorithm can be manipulated into a cover for displacing statutory purpose with their own agenda: “A method of statutory interpretation that is deliberately uninformed, and hence unconstrained,” he wrote, “may produce a result that is consistent with a court’s own views of how things should be, but it may also defeat the very purpose for which a provision was enacted.” Finally, Stevens spotlighted the real-world issues at stake: the Court’s “refusal to look beyond the raw statutory text” constituted “misus[e] of its authority,” for in doing so, it avoids acknowledging the policy concern behind the Act’s exclusion for employment agreements – namely, fear of “the potential disparity in bargaining power between individual employees and large employers.” He concluded, “When the Court simply ignores the interest of the unrepresented employee, it skews its interpretation with its own policy preferences.”¹³³

¹³⁰ 532 U.S. 105 (2001).

¹³¹ *Id.* at 125–26.

¹³² *Id.* at 119. Justice Kennedy also avoided responding to Justice Souter’s compelling elaboration of the legislative history of the FAA in his lengthy dissent.

¹³³ *Id.* at 128–33.

In the decade since *Circuit City*, the floodgates that decision opened have yielded a veritable tidal wave. Now, for most Americans, mandatory binding arbitration provisions pop up, or more often lie hidden in fine print, in every conceivable sort of agreement they are obliged to sign – to take a job, obtain telephone service, enroll a parent in an assisted living facility, visit a hospital emergency room, purchase a product, open a bank account, and the list could go on and on.¹³⁴ And the Court’s conservatives have kept pace. They have continually ratcheted up their commitment, in Justice Stevens’ terms, to “skew” FAA jurisprudence into a tool of their own pro-corporate “policy preferences.” Not only has the majority worked to eliminate all forms of state restrictions on companies’ power to make binding arbitration the exclusive mode of enforcing legal rights. The conservative justices have even sought to micro-manage the actual conduct of arbitration, and prevent arbitrators from interpreting agreements in ways that run seriously counter to the interests of the companies which drafted them.

Thus, in the 2009 case of *14 Penn Plaza LLC v. Pyett*, the conservative justices confirmed their indifference to whether victims of law violations have in fact meaningfully consented to forego a judicial remedy. *14 Penn Plaza* held that individual lawsuits under federal and state workplace antidiscrimination laws must be dismissed, when a governing collective bargaining agreement prescribes union-employer arbitration as the exclusive remedy for individual members’ grievances;¹³⁵ the case effectively overruled precedents which recognized that entrusting to unions exclusive power to vindicate statutory individual and minority rights was tantamount to leaving the fox to guard the henhouse.¹³⁶ In dissent, Justice Stevens seared “the Court’s subversion of precedent to the policy favoring arbitration”¹³⁷ In 2010, during Justice Stevens’ last term, the familiar five justice majority reversed a Second Circuit decision that had affirmed an arbitration panel’s (the panel was selected by the parties themselves) interpretation, over strenuous objections from the business defendant in the controversy, of an arbitration agreement to provide for class arbitration of multiple related antitrust claims; the agreement’s text did not expressly address the class arbitration issue.¹³⁸ While thus constraining arbitrators’ authority to interpret the terms of arbitration agreements, the conservative bloc went to the opposite extreme in another case during the same 2009-2010 term. In *Rent-A-Center, West, Inc., v. Jackson* they held that the arbitrator, rather than a court, should resolve a party’s claim that the arbitration agreement was invalid – hence, the arbitrator without legal authority to preside or decide

¹³⁴ Theodore Eisenberg & Elizabeth Hill, *Employment Arbitration and Litigation: An Empirical Comparison*, Public Law and Legal Theory Research Paper Series, 2 (2003) (“From 1995 to 1997, the General Accounting Office found that the percentage of employers using arbitration for employment disputes increased from ten percent to nineteen percent. From 1997 to 2001, the number of employment cases filed with the American Arbitration Association (“AAA”) increased from 1,347 to 2,159, an increase of 60%.”), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=389780.

¹³⁵ *14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456 (2009)

¹³⁶ 129 S.Ct. at 1476-81 (Souter, J., dissenting)

¹³⁷ *Id.* at 1475.

¹³⁸ *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S.Ct. 1758 (2010).

– under applicable (and not preempted) state law;¹³⁹ otherwise stated, the arbitrator, however qualified or however balanced the method of her selection, has final authority to decide on her authority to decide. The common pattern here appears to be that the conservative justices will zealously protect the authority of arbitrators, except when the arbitrators interpret agreements in ways significantly adverse to business interests, such, for example, as permitting small claimants to aggregate claims to make it economically feasible to assert them.

In 2011, Justice Scalia, writing for the Court in that term’s most significant arbitration decision, delivered an opinion that is a virtual rogues’ gallery of the conservatives’ manipulative interpretive techniques for “skewing” statutes to match their “policy preferences.” The decision, *AT&T Mobility LLC v. Concepcion*, involved the question, whether the FAA preempts a California statute which authorizes state courts to refuse to enforce any contract found “to have been unconscionable at the time it was made,” or to “limit the application of any unconscionable clause.” The Ninth Circuit had determined that California’s state law, as construed by its Supreme Court, required invalidation of a class action-waiver provision in the mandatory arbitration agreement that plaintiff *Concepcion* had signed in 2006, when obtaining wireless phone service from defendant AT&T Mobility; the waiver required consumer signatories to submit all claims in arbitration, and as individuals not class representatives or members, and it forbade arbitrators to “consolidate more than one person’s claims,” or to “otherwise preside over any form of a representative or class proceeding.” Further, the Ninth Circuit upheld this state law, on the ground that it fell within an exemption in the FAA expressly providing that arbitration agreements covered by the Act can be invalidated, revoked, or not enforced “upon such grounds as exist at law or in equity for the revocation of any contract.” Unconscionability, as in the California statute, the Ninth Circuit reasoned, was precisely the sort of equitable basis for revoking or declining to enforce contracts that the drafters of the FAA had in mind when they adopted that proviso. And *AT&T Mobility* involved the sort of facts precisely targeted by the California law; plaintiffs in the case alleged that they had purchased wireless service advertised by AT&T Mobility to include the provision of free handsets, with no warning that they would be charged \$30.22 in sales tax.¹⁴⁰ The California Supreme Court had held the California unconscionability law specifically applicable when a class-action waiver, like the one in *AT&T Mobility*’s arbitration form agreement, is:

“found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large number of consumers out of individual small sums of money . . . the waiver becomes in practice the exemption of the party ‘from responsibility for [its] own fraud, or willful injury to the person or property

¹³⁹ *Rent-A-Center, West, Inc., v. Jackson*, 130 S.Ct. 2772 (2010).

¹⁴⁰ *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1745-46 (2011).

of another.’ Under these circumstances, such waivers are unconscionable under California law and should not be enforced.”¹⁴¹

Justice Scalia did not dispute the Ninth Circuit’s conclusion that unconscionability is, as prescribed by the text of the FAA, a ground existing “at law or in equity for the revocation of any contract.” Nor did he deny that the California law rests squarely within that statutory exemption. Evidently, the text of this exemption is so clear that Scalia chose not to use the tactic he has in other instances where the most plausible and intended meaning of text produces a disagreeable result – i.e., go to imaginative lengths to conjure an alternative interpretation of that text.¹⁴² Instead, he went over to what, for a devout conservative textualist, is the heart of the dark side: ignoring the plain meaning of statutory words for “The *overarching purpose* of the FAA.” This “purpose,” which, Justice Scalia asserted without so much as a gesture of explanation, is “evident in the text” of three sections of the FAA, he described as “to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. *Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.*”¹⁴³

Here, Justice Scalia, who has been reported to be the first member of the Court to use the term “chutzpah” in an opinion, certainly confirms that he understands what that word means.¹⁴⁴ He has attributed a purpose of empowering all businesses to bar anyone with whom they deal from seeking any form of class remedy, whether judicial or arbitral, to a near century-old statute, enacted before class actions, let alone class arbitrations, were known – certainly to the members of Congress that enacted it. And he conjures this extravagant interpretation in the face of an express provision in the statute itself, which plainly authorizes state laws, like California’s, that preserve class remedies on unconscionability grounds.

Further, Scalia emphasizes that the vice of the California statute is not that the contract of adhesion evils it addresses are not real or widespread. On the contrary, Scalia writes, “the times in which consumer contracts were anything other than adhesive are long past.” And it is precisely because contracts of adhesion are ubiquitous, he continues, that the FAA’s “overarching purpose” precludes states from undertaking any measures to remedy their acknowledged evils which could give companies “less incentive” to continue to use case-by-case arbitration as their preferred approach to “resolving potentially duplicative

¹⁴¹ *Id.* at 1746 (quoting from the California Supreme Court’s Discover Bank decision). The policy behind the California statute – protecting individual consumers in contract-of-adhesion situations – is precisely the policy attributed by Justice Stevens to the FAA’s employee agreement exclusion provision in his dissent in *Circuit City*. See text at note 133 *supra*.

¹⁴² See, e.g., Rochelle Bobroff, *The Supreme Court Majority Ignores the Text of the Federal Arbitration Act*, ACS blog, available at <http://www.acslaw.org/acsblog/the-supreme-court-majority-ignores-the-text-of-the-federal-arbitration-act>.

¹⁴³ *Id.* at 1748 (emphasis added).

¹⁴⁴ Jack Achiezer Guggenheim, *The Supreme Chutzpah*, JEWISH LAW COMMENTARY <http://www.jlaw.com/Commentary/SupremeChutzpah.html>.

claims.” Noting that “class arbitration greatly increases risks to [corporate] defendants,” Scalia effectively rules that alleviating those risks must offset the benefits that class relief options could bring for consumers and other individuals. Defending this naked policy preference, he acknowledges, without disputing, the observation of Justice Breyer, who wrote the dissent on behalf of the four progressive justices, “that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system.” To that point, Scalia responds, “States cannot require a procedure that is inconsistent with the FAA, *even if it is desirable for unrelated reasons.*”¹⁴⁵ Scalia recognizes that the sweeping preemption contemplated in this dictum – of any state law that might reduce the desirability or frequency of arbitration procedures, or impose requirements inconsistent with the conservative bloc’s notions of the inherent nature and attributes of arbitration – cannot be based on actual conflict between the text of the FAA and hypothetical state laws not even before the Court. So Justice Scalia resorts to the branch of preemption jurisprudence that is least tethered to identifiable statutory prescription – “obstacle preemption.”¹⁴⁶ “Because,” Justice Scalia concludes his opinion, California’s rule “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress [citation omitted] [it] is preempted by the FAA.”¹⁴⁷

In sum, the conservative bloc’s conversion of the FAA into a radically pre-emptive “edifice of its own creation” appears at this point to be perhaps their single boldest and most far-reaching doctrinal weapon for undermining progressive legislation. It may also be the sector where manipulation and even subordination of their own, supposedly most sacred jurisprudential principles, is most vividly on display, when necessary to impose results that match conservative policy preferences and favor conservative constituencies. Certainly, that is the teaching of *AT&T Mobility*, *Circuit City*, and other major arbitration decisions over the past decade.

V. Contempt For Congress: The Conservative Bloc Sets “Rules Of Engagement” That Make Congress Fail.

Thus far this Article has reviewed the multiple ways in which the Supreme Court’s conservative justices have, in Justice Stevens’ words, “skewed” their approaches to interpreting individual statutory provisions in order to “defeat the very purpose for which a provision was enacted,” and substitute their own “view of how the world should be.”

¹⁴⁵ *Id.* at 1750, 1753 (emphasis added).

¹⁴⁶ The doctrine of “obstacle preemption” allows the Supreme Court to strike down state laws that stand as “an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The doctrine has split Justice Thomas from his conservative allies on the court; while Justices Alito, Roberts and Scalia, have promoted the rule, Justice Thomas has called the doctrine a “freewheeling judicial inquiry into whether a state statute is in tension with federal objectives” that “undercut[s] the principle that it is *Congress* rather than the *courts* that pre-empts state law”. *Pharma v. Walsh*, 538 U.S. 644, 682 (2003) (Thomas, J., concurring); Catherine M. Sharkey, *Against Freewheeling, Extratextual Obstacle Preemption: Is Clarence Thomas the Lone Principled Federalist?*, 5 N.Y. J. OF L. & LIBERTY 63, 66 (2010).

¹⁴⁷ *Id.* at 1753.

As might be expected, given the scope and systematic character of these efforts, not far from the surface of the conservatives' penchant for twisting and undermining specific laws enacted by Congress, resides hostility to Congress itself. It is unsurprising that these men of the Right would feel, and from time to time, manifest antagonism toward the Congresses and legislators responsible for enacting laws out of sync with their own policy preferences. More significant perhaps, they also display hostility to the institution itself and to the process through which legislative decisions are made. As noted above, early in Justice Stevens' career, and before he joined the Court, the view he consistently stressed of the Court's role vis-à-vis Congress was the prevailing view; the Court must be the "faithful agent" to Congress' principal, assigned to discover, interpret, and faithfully execute its purposes. That is not so clearly a consensus view any more. Increasingly, the conservative bloc appears to see Congress as a political adversary and institutional rival, and to manipulate the relationship not only by giving short shrift to individual pieces of Congress' handiwork, but by adopting strategies that impair Congress' institutional capacity to perform its function or make its will prevail. This section will sketch the Court's prosecution of this undeclared, but currently escalating turf war.

The conservative justices' skepticism toward Congress has been encouraged, reinforced, and, indeed, rationalized by academic conservatives, significantly through the propagation of public choice theory. Public choice theory casts legislatures, not as instruments for expressing the popular will, but as arenas in which self-seeking legislators and organized special interests rig an inherently irrational process to serve their own ends.¹⁴⁸ To the extent that this picture is accurate, judges need not obsess about their "counter-majoritarian difficulty," as they were encouraged to do by the conventional wisdom in the middle of the 20th century. Just because Congress' members are elected, judges need not defer to them as inherently the more reliable exponents of the popular will or the public interest. Specifically, public choice theory appears to mesh well with the contempt that Justice Scalia in particular frequently voices for taking seriously, let alone faithfully prioritizing in his decisions, the noble purposes attributed to statutes in preambles to bills or sponsors' speeches.

This section will briefly identify and summarize several manifestations of the conservative justices' hostility to Congress and their pattern of undermining Congress' capacity to perform its democratic role effectively.

¹⁴⁸ Robert D. Tollison, Symposium on the Theory of Public Choice: *Public Choice and Legislation*, 74 VA. L.REV. 339 (1988) (describing the evolution and principles of public choice theory); Richard A. Posner, Essays Commemorating the One-Hundredth Anniversary of the Harvard Law Review: *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L.REV. 761, 774 (1987) (acknowledging that judges no longer think of legislatures as acting with a "single mind" but recognize they comprise many conflicting interest groups); William H. Riker, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE (1982); (arguing that public choice theory exposes the flaws of democratic governance); compare Daniel A. Farber & Philip P. Frickey, Symposium on the Theory of Public Choice: *Legislative Intent and Public Choice*, 74 VA. L.REV. 423 (1989) (arguing that although public choice theory identifies problems with the legislative process, it is still possible to use legislative history to inform statutory interpretation).

A. Conservatives’ Refusal To Consider Legislative History Prevents Congress From Providing Guidance For Implementing Complex Statutes, And Impedes Congress’ Ability To Rely on Specialized Committees And Staff.

As noted above, conservative textualists insist that judges not consider any explanations of statutory provisions in committee reports or other reliable forms of legislative history. By so doing, they not only confer on themselves a method of interpretation that is, in Justice Stevens’ terms, “deliberately uninformed, and hence, unconstrained;”¹⁴⁹ in addition, they oblige Congress to fill the text of statutes with granular details of anticipated contingencies and dictate their resolution. Even if this were a sensible mode of governance for either courts or legislatures – which, manifestly, it is not – it would be infeasible. Congress’ *modus operandi* must realistically accommodate the limits on legislators’ and staffs’ time, the demands of other priorities, and inherent limits of human imagination and language. All these inherent constraints require that, to achieve the purposes of laws intended to manage often complex, long-term problems, legislators have no option but to identify the general purposes behind statutory provisions, to spotlight types of circumstances in which they expect the legislation to be applied, and to provide such guidance as seems appropriate to citizens, administrators, and judges who will be responsible for implementing the law. This essential function cannot be performed without committee reports and other authoritative materials not found in the text of statutes. Conservative textualists’ across-the-board hostility to legislative history in all forms impairs Congress’ capacity to perform that function.

In addition to undercutting Congress’ capacity to provide appropriate guidance for implementation of laws, conservative textualists’ blanket hostility to legislative history deprives Congress of the ability that any organization, let alone one charged with Congress’ massive political and substantive challenges, must have to delegate to sub-groups of its members, and to staffs, and to rely on their specialized expertise. In a remarkable passage in *A Matter Of Interpretation*, Scalia not only disapproves of the manner in which Congress goes about its business, but also shows his contempt for the competence, conscientiousness, and work ethic of its members:

In earlier days, when Congress had a smaller staff and enacted less legislation, it might have been possible to believe that a significant number of senators or representatives were present for the floor debate, or read the committee reports, and actually voted on the basis of what they heard or read. Those days, if they ever existed, are long gone. . . . [A]s for committee reports, it is not even certain that the members of the issuing *committees* have found time to read them¹⁵⁰

Justice Scalia’s remedy is to require Congress to operate without reliance on these new-fangled expert committees and staffs. And he considers this view not simply a matter of

¹⁴⁹ *Circuit City v. Adams*, supra note 133 and accompanying text.

¹⁵⁰ SCALIA, *A MATTER OF INTERPRETATION*, supra note 13, at 32.

personal taste in internal organizational management methods, nor an indulgence of his own personal libertarian nostalgia for those simpler “earlier days.” For Congress to “leave to its committees the details of its legislation,” he says, is “unconstitutional,” because Article I legislative authority is “nondelegable.” In fact, of course, it is impossible to imagine how Congress could – now or ever – operate without delegating to its committees the details of legislation.

Of course, the committees’ products do not become law until the members of both houses vote for them and the President signs the bill. And of course, as Scalia states, committee reports are not, at least not ordinarily, voted on by the full House or Senate, and therefore cannot be “binding” as statements of law. But this is a red herring. No one contends that committee reports constitute the law themselves, or create un rebuttable interpretations of the law. All that Justice Stevens, Justice Breyer, Senator Hatch, and Scalia’s many other thoughtful critics claim is simple and limited, but sensible and essential: as all involved in the legislative process accept, ordinarily, committee reports can, when used responsibly, be an authoritative exposition of the committee majority’s broader and/or more detailed understanding of the purposes and background of legislation. As such, they can provide useful guidance for those charged with implementing it. By insisting that he and his conservative colleagues will only grudgingly, rarely, and arbitrarily look to committee reports or other legislative history for such guidance, Justice Scalia hampers Congress’ ability to delegate rationally and embrace the work of specialized committees and staffs, as sound exposition of its objectives and expectations.

B. Conservatives Scuttle Rational-Basis-Deference And Override Congressional Fact-Finding.

A particularly telling manifestation of the conservative bloc’s interest in reducing Congress’ stature, and undermining its effectiveness as an institution, has been their departures from the strong post-New Deal precept that courts must respect legislative policy choices, when they have a “rational basis” in terms of serving constitutionally valid goals. The most overt, and flagrant, instance of this trend occurred as part of the late 1990’s “federalism” campaign. As noted above, the Court held that, when carrying out its express authority to “enforce” the Fourteenth Amendment, Congress must enact laws that are “congruent and proportional” to the goals they target and the problems which they purport to address. This standard appeared to give Congress less latitude to choose means to implement the Reconstruction amendments – and likewise to give courts broader authority to reject those means – than the “rational basis” standard long applicable to legislation implementing constitutional provisions other than the Reconstruction amendments.¹⁵¹ Assigning Congress comparatively less authority under the Reconstruction amendments seems an improbable conclusion to derive from their text, since they specifically empower Congress to “enforce” them via “appropriate legislation.” [cite] In contrast, other constitutional powers are implemented by Congress under a general grant of authority to enact laws “necessary and proper to carry [them]

¹⁵¹ See *supra* notes 90-103 and accompanying text.

into execution.”¹⁵² And, indeed, through 2002, in every one of the Court’s decisions applying its new congruent and proportional standard, all but one of them decided by a 5-4 margin, the Court struck down the federal law under review.¹⁵³

Because, as noted above, the Court has not for the past several years extended its constitutional federalism doctrines, the status of “congruent and proportional” test is not entirely clear. (Also, as noted above, Justice Stevens in 2004 effectively reinterpreted “congruent and proportional” so that it no longer appeared necessarily to differ materially from “rational basis.”)¹⁵⁴ However that may be, as an index of the conservatives’ willingness to cut back Congress’ historic discretion, and micro-manage its policy-choices. The Rehnquist Court’s “congruent and proportional” exercise remains highly portentous. Justice Stevens was by no means engaging in hyperbole when he wrote that this and other incidents of the Rehnquist Era federalism jurisprudence were “fundamentally inconsistent with the framers’ conception of the constitutional order.”¹⁵⁵

The same indifference to the reasonableness of Congress’ policy choices has appeared in the conservatives’ cavalier treatment of its fact-finding. A flagrant example was *Board of Trustees of the University of Alabama v. Garrett*, discussed above, in which the five conservatives reinforced draconian application of their congruent and proportional test with tendentious dismissal of Congress’ factual basis for the Americans With Disabilities Act (ADA), the legislation under review.¹⁵⁶ Chief Justice Rehnquist’s opinion for himself and his four colleagues on the Court’s Right conceded that the record Congress assembled in enacting the ADA “includes many instances to support” its finding that “historically, society has tended to isolate and segregate individuals with disabilities, and . . . discrimination against individuals with disabilities continues to be a serious and pervasive social problem.” But, Rehnquist asserted, this “general” finding did not support subjecting state government entities to suits by victims of disability discrimination, because “the great majority of these incidents [in Congress’ record] do not deal with the activities of States [as opposed to private sector employers].”¹⁵⁷

As Justice Breyer caustically observed in his dissenting opinion, Rehnquist’s reasoning was patently specious, since “state agencies form part of that same larger society” in which the record showed disability-based discrimination was pervasive, and [t]here is no particular reason to believe that they are immune from the ‘stereotypic assumptions’ and pattern of ‘purposeful unequal treatment’ that Congress found prevalent.” Underscoring the majority’s institutional disrespect for Congress, Justice Breyer observed that they “review[ed] the congressional record as if it were an administrative agency record, and

¹⁵² U.S. CONST. art. I, § 8; U.S. CONST. amend. XIV § 5.

¹⁵³ *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Kimel v. Fl. Bd. of Regents*, 528 U.S. 62 (2000); *Bd. of Trustees of the U. of Alabama v. Garrett*, 531 U.S. 356 (2001); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999). *United States v. Morrison*, 529 U.S. 598 (2000)

¹⁵⁴ See note 103 supra and accompanying text.

¹⁵⁵ See note 97 supra and accompanying text.

¹⁵⁶ 531 U.S. 356 (2001).

¹⁵⁷ *Id.* at 369.

noted that they simply brushed aside a “vast legislative record,” comprising 13 congressional hearings, its own prior experience over 40 years enacting less far-reaching but similar legislation, and the creation of a special task force that held hearings in every state, attended by more than 30,000 people.¹⁵⁸

The conservative majority’s high-handed result and rationale in *Garrett* induced *The New York Times*’ Linda Greenhouse to observe that “the Supreme Court’s real concern with the way power is allocated in the American political system [is] less the balance between the federal government and the states than that between the Supreme Court and Congress.” Greenhouse noted that, unlike some of the other laws rejected by the Rehnquist Court on federalism grounds, the ADA was “the most important civil rights law of the past quarter-century, was the highly visible product of a bipartisan legislative process,” and the product of “years compiling a record of the extent of discrimination against people with disabilities” The bottom-line, this veteran Supreme Court correspondent concluded, was:

The exercise of power is a zero-sum game, and the court, defining the rules of engagement to give itself the last word, is winning at the expense of Congress.¹⁵⁹

Similar disrespect for Congress’ fact-finding bristled from the Court’s 2009 decision to impose a strained construction of the 1965 Voting Rights Act (avoiding a determination that the statutory section at issue, containing the Act’s “pre-clearance” provisions, was unconstitutional).¹⁶⁰ The decision provoked bipartisan anger at a House Judiciary Committee oversight hearing on the case. Rep. Jim Sensenbrenner (R-Wis.), who had chaired the Committee when it voted to reauthorize the Act in 2006, testily asked witnesses what more Congress could do, after holding 21 hearings with 16,000 pages of testimony.¹⁶¹ Indeed, Chief Justice Roberts’ opinion acknowledged Congress’ “sizable” factual demonstration of persistent voting discrimination in the (predominantly Southern) jurisdictions covered by the original VRA. But, he said, Congress should have considered writing an altogether different law covering other regions with possible similar voting discrimination deficiencies.¹⁶² In other words, Congress had a rational basis for the

¹⁵⁸ *Id.* at 378–79. Justice Breyer also noted that the majority simply ignored “300 examples of discrimination by state governments themselves. In the legislative record.”

¹⁵⁹ Linda Greenhouse, *The Nation: The High Court’s Target: Congress*, THE NEW YORK TIMES, February 25, 2001, <http://www.nytimes.com/2001/02/25/weekinreview/the-nation-the-high-court-s-target-congress.html?pagewanted=print&src=pm>.

¹⁶⁰ *Northwest Austin Municipal Utility District Number One v. Holder*, 129 S.Ct. 2504 (2009). The VRA’s preclearance provisions, contained in Section Five of the Act, apply to states that had used a forbidden discriminatory test or device in the November 1972 election and had less than 50% voter registration in that election – subject to a “bail-out” procedure whereby a covered jurisdiction can demonstrate that it has been free from voting discrimination for 10 years. 129 S. Ct. at 2509–10

¹⁶¹ Simon Lazarus, *Congress Pushes Back As Congress Oversteps*, ROLL CALL (November 17, 2009) http://www.rollcall.com/issues/55_57/-40637-1.html.

¹⁶² *Northwest Austin Mun. Utility Dist. No. One v. Holder*, 129 S. Ct. at 2512–13.

solution it chose to enact. But the Chief Justice and the Court ruled that Congress should have picked a different problem to solve.¹⁶³

“Things have changed in the South,” Roberts proclaimed in his opinion, repeating an insight he initially offered during the oral argument.¹⁶⁴ Although apparently important to him, this judgment about contemporary political sociology is manifestly one not for the Court but for Congress to make. (In Congress, of course, the South is strongly represented, and Southern representatives had overwhelmingly voted for reauthorization of the Act and the preclearance provision, notwithstanding Roberts’ insistence that it was no longer needed.)¹⁶⁵ Further, Roberts’ pronouncement was quite beside the point. The relevant legal question was not whether African-American ballot access had improved since 1965, but whether Congress had evidence that persistent racial polarization in covered jurisdictions carried continued risk of racially motivated manipulation of election procedures. On that point, Roberts himself indulged in manipulation of the record before the Court. To buttress his attack on continued preclearance of election law changes in the covered jurisdictions, he quoted out of context from a 2007 law review article by Columbia election law expert Nathan Persily.¹⁶⁶ At the same time, he declined to mention an amicus curiae brief filed in the case itself by Professor Persily. After exhaustively reviewing data from the 2008 elections, this brief concluded that “the 2008 election revealed the intransigence of racial differences in voting patterns.” Specifically, the brief stated that, in this election, with an African-American presidential candidate on the ballot, racial polarization in the covered jurisdictions grew relative to non-covered jurisdictions: “[W]hites of every partisan affiliation in the covered jurisdictions were less likely to vote for Obama than were their copartisans in the noncovered jurisdictions,” adding that “In several of the covered states, he did worse among white voters than the Democratic nominee four years earlier.”¹⁶⁷

In sum, Congress’ factual findings matched up well with facts on the ground and provided more than ample rational basis for its bipartisan 2006 decision to retain

¹⁶³ Id. at 2512; *Congress Pushes Back*, *supra* note 161.

¹⁶⁴ 129 S.Ct. at 2511.

¹⁶⁵ The 2006 reauthorization was approved by 390-33 vote in the House and a 98-0 vote in the Senate.

¹⁶⁶ Id. at 2512 (quoting from Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 208 (“The most one can say in defense of the [coverage] formula is that it is the best of the politically feasible alternatives or that changing the formula would . . . disrupt settled expectations.”)). Justice Roberts cited to Persily to support his claim that discrimination against minorities has diminished over the years and Section Five of the VRA is no longer necessary. But Persily was making a very different point. According to his article, the coverage formula for identifying problematic jurisdictions has always been imperfect, but it was the best compromise that Congress could reach. This feature of the act is hardly new; it “was the case in 1965 and remains so today.” Id. at 208. Justice Roberts claimed that society has changed, but Persily only argued that the Act has not.

¹⁶⁷ Northwest Austin Municipal Utility District Number One v. Holder, Brief for Nathaniel Persily, Stephen Ansolabehere, and Charles Stewart III as Amici Curiae On Behalf of Neither Party (Nathaniel Persily, Counsel of Record) (February 26, 2009), available at http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=151457.

preclearance for previously covered jurisdictions, in reauthorizing the Voting Rights Act. As Representative Sensenbrenner suggested, Roberts here demonstrated that he and his colleagues are not averse to making it literally impossible for Congress to find and marshal facts sufficient to justify legislation promoting policies that a majority of the Court strongly disapproves. As Justice Stevens observed, if Congress' facts don't match the Court's preferences, the justices will simply go with their own "view of how the world should be."

C. Moving The Goal Posts To Defeat Congress' Reasonable Expectations

When crafting adversarial interpretive "rules of engagement," as Linda Greenhouse aptly put it, the Court has not infrequently compounded damage to Congress' ability to function effectively, by changing those rules abruptly, unpredictably, and retroactively – often applying them to congressional actions taken decades before. The conservative justices have upended rules that they themselves have recently put in place, and on which Congress has expressly relied. By thus constantly reformulating applicable tests, stiffening old requirements and inventing new ones, the Court has armed itself with a highly effective weapon – "moving the goal posts" to defeat congressional objectives and intent, and in the process further undermining Congress' ability to legislate effectively.

Professors Eskridge, Frickey, and Garrett, in their treatise, have noted the emergence of this "moving the goal posts" pattern, which they label "bait and switch."¹⁶⁸ They cite a particularly egregious instance, in which Congress in 1986 amended the abrogation provision in the Education of the Handicapped Act, valid under standards prevailing when it was enacted in 1975. Congress clarified the provision to meet the Court's new "clear statement" test, prescribed in a 1985 decision, for specifying Congress' intent to abrogate state sovereign immunity in connection with legislation enforcing the Fourteenth Amendment. In 1989, the Court determined that this amendment was not sufficient to abrogate sovereign immunity with respect to matters arising prior to 1986, when the clarifying amendment was added to the law – although its own decision stiffening abrogation clear statement requirements post-dated the situation that gave rise to the litigation!¹⁶⁹

Such zeal for defeating Congress' reasonable expectations was not always characteristic of the Court's posture toward the legislative branch. In the 1970s and early 1980s, for example, the Court, with the concurrence of liberal as well as conservative justices, sought to establish workable criteria for determining when private judicial remedies would be permitted in the absence of express statutory rights of action.¹⁷⁰ Initially, the Court avoided retroactive imposition of such new standards. In 1982, Justice Stevens made the common-sense observation that, if the goal is to effectuate Congress' intent "[w]hen Congress acts in a statutory context in which an implied private remedy has

¹⁶⁸ Eskridge, Frickey, & Garrett, *supra* note 28, at 373.

¹⁶⁹ *Id.* at 373 n. 98. The case is *Dellmuth v. Muth*, 491 U.S. 223 (1989).

¹⁷⁰ *Cort v. Ash*, and the Philadelphia case. [please provide citations]

already been recognized by the courts, . . . the question is whether Congress intended to preserve the pre-existing remedy.”¹⁷¹

But that notion of respecting Congress’ actual intent in such cases did not survive succeeding rounds of Republican appointments to the Court. In 2001, Justice Scalia dismissed Stevens’ 1982 solicitude as a relic of the discarded *ancien régime* of presumptive hospitality to federal rights of action.[cite] Scalia shrugged off 1980s precedents honoring the “‘expectations’ that the enacting Congress had formed ‘in light of the contemporary legal context.’”¹⁷² He brusquely denied that the Court had ever given such expectations, however reasonable, “dispositive weight.”¹⁷³ Justice Stevens continued to spotlight the conservative majority’s double-crossing approach. In 1999, Justice Stevens targeted the conservative majority’s invention of a new, unanticipatable barrier to legislation carefully drafted to surmount the hurdle the Court had previously imposed:

It is quite unfair for the Court to strike down Congress’ Act based on an absence of findings supporting a requirement this Court had not yet articulated. The legislative history . . . makes it abundantly clear that Congress was attempting to hurdle the then-most-recent barrier this Court had erected in the Eleventh Amendment course . . .¹⁷⁴

In June 2009, at the end of Justice Stevens’ second-to-last term, the conservative bloc added what one might call a “gotcha” wrinkle to their practice of defeating Congressional purposes and intent with unpredictable retroactive interpretive approaches. This 5-4 decision, *Gross v. FBL Financial Services*, erected a new procedural obstacle for plaintiffs seeking to prove workplace age discrimination under the 1967 Age Discrimination in Employment Act (ADEA).¹⁷⁵ The new rule gravely weakened age discrimination protections; many or possibly most age discrimination victims will find the new barrier insurmountable, and many potentially valid claims will never be filed.¹⁷⁶ The decision startled observers on all sides, because the new ADEA standard differed from a more lenient standard applicable to other, non-age-based types of employment discrimination claims under Title VII of the 1964 Civil Rights Act; Title VII had served as Congress’ model in drafting the relevant ADEA provision.¹⁷⁷

¹⁷¹ *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378–79 (1982) (emphasis added).

¹⁷² *Alexander v. Sandoval*, 532 U.S. 275, 287–88 (2001).

¹⁷³ *Id.* at 287. In addition to *Merrill Lynch*, other Supreme Court decisions honoring Congressional “expectations” regarding an implied private right of action, and derided by Justice Scalia in *Sandoval*, include *Cannon v. University of Chicago*, 441 U.S. 677 (1979) and *Thompson v. Thompson*, 484 U.S. 174 (1988).

¹⁷⁴ *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 654 (1999) (Stevens, J., dissenting). The Eleventh Amendment hurdle to which he referred was “the ‘clear statement’ rule of *Atascadero State Hospital v. Scanlon*,” 473 U.S. 234 (1985).

¹⁷⁵ 129 S.Ct. 2343 (2009).

¹⁷⁶ 129 S.Ct. at 2358–59 (Breyer, J., dissenting).

¹⁷⁷ *Id.* at 2353 (Stevens, J. dissenting).

The reason given by Justice Thomas’ majority opinion, for thus uniquely obstructing age discrimination claims, was that, when, in 1991, Congress inserted language into Title VII codifying a 1989 Supreme Court decision, it did not include a reference to the ADEA. Up till then – indeed, until the Court’s decision nearly two decades later in *Gross* – applicable standards under Title VII and the ADEA were identical.¹⁷⁸ Under this novel interpretive method, legislation strengthening any one federal law, or merely codifying in that statute any existing case law, would be deemed to weaken all other federal laws dealing with the same type of issue, *e.g.*, employment discrimination.

In his vigorous dissent, in which he characterized the majority’s decision as “unabashed judicial law-making,” “irresponsible,” and in “utter disregard” of the Court’s own precedents and “Congressional intent,” Justice Stevens observed that weakening employment discrimination protections was the opposite of what Congress intended in adopting the 1991 Civil Rights Act.¹⁷⁹ Apart from its specific impact on the ADEA, Justice Thomas’ interpretive approach could complicate exponentially the already daunting challenge of drafting legislation. In every instance in which Congress amends any one law, to avoid the risk of unintended consequences pursuant to the *Gross* rule, committees will have to scour the United States Code for all the other laws which would have to be similarly amended.

D. The Ultimate Snub: The Conservative Bloc Exhumes Decisions That Congress Overrides.

The *Gross* majority aggressively manipulated a legislative “fix” for Title VII in the 1991 Civil Rights Act, as tantamount to a direction by Congress to weaken identical language in the ADEA. Specifically, *Gross* read into the ADEA an interpretation of Title VII proposed by Justice Kennedy *in dissent* from the 1989 decision;¹⁸⁰ Kennedy was a member of the *Gross* majority. This case does not, however, represent the conservative justices’ most extreme level of misreading Congressional responses to the Court’s statutory interpretations. When overridden, the conservative justices have construed the legislative fix under review as narrowly as possible, treating it as revising the law only for purposes of the precise circumstances and result of the targeted decision. Without missing a beat, they have kept right on treating overridden decisions as precedent, and applied the same rationale rejected by Congress in equivalent (if not precisely identical) contexts.

The most notorious example of this zeroing out of Congressional overrides is the 2007 *Ledbetter* decision discussed above.¹⁸¹ In *Ledbetter*, not only did the conservative majority give the Title VII statute of limitations provision a cramped interpretation

¹⁷⁸ *Id.* at 2349. The 1989 decision was *Price Waterhouse v. Hopkins*, 490 U.S. 228.

¹⁷⁹ *Id.* at 2353, 2358.

¹⁸⁰ *Price Waterhouse v. Hopkins*, 490 U.S. at 286-93. *Gross*, 129 S.Ct. at 2349-50

¹⁸¹ See Section II(A)(2) above.

calculated to defeat the statute's substantive purpose, as noted above. They also imposed this crippling interpretation, despite the fact that, in the 1991 Civil Rights Restoration Act, Congress had overridden a 1989 decision that adopted precisely the same interpretation of the same statute of limitations provision. The overridden 1989 decision was *Lorance v. AT&T Technologies*.¹⁸² In *Lorance*, a group of women employees challenged a seniority system that, they alleged, discriminated against women and was adopted for discriminatory reasons. Several years after the system was put in place by AT&T, lay-offs occurred based on its provisions. The women's Title VII challenge was rejected by the Supreme Court, on the same theory invoked in *Ledbetter*, that the statutory 180 day limitation period ran from initial discriminatory decision (establishing the seniority system), not from the last injury-causing act generated by the unlawful decision.¹⁸³ Here is the override language Congress wrote into the 1991 Act:

For the purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of that system.¹⁸⁴

The "Senate Sponsors Memorandum," a bipartisan equivalent of a committee report describing the Senate floor compromise version of the bill that was ultimately passed by both houses and signed by President George H.W. Bush, said that "the legislation should be interpreted as disapproving the extension of [*Lorance*] to contexts outside of seniority systems." The House Committee Report contained similar language.¹⁸⁵ Despite this express direction to eliminate as precedent the truncated statute of limitations approach *Lorance*, reinforced by other elements in the legislative history of the 1991 Act, the conservative bloc largely based its *Ledbetter* result on *Lorance*. Justice Thomas' opinion for the Court dismissed the 1991 override *in a footnote* as merely designed "to cover . . . liability arising from an intentionally discriminatory seniority system both at the time of its adoption and at the time of its application."¹⁸⁶

¹⁸² 490 U.S. 900 (1989).

¹⁸³ 490 U.S. at 902.

¹⁸⁴ Civil Rights Act of 1991, [Pub. L. No. 102-166, § 112, 105 Stat. 1071](#), 1079 (codified at [42 U.S.C. § 2000e-5 \(2000\)](#)). (emphasis added)

¹⁸⁵ The legislative history is thoroughly reprised and analyzed in Deborah Widiss, *Shadow Precedents and The Separation Of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 543–46 (2009).

¹⁸⁶ 550 U.S. at 627 n.2. Portions of the legislative history reinforcing the conclusion that the 1991 Act eliminated the precedential status of *Lorance*'s "original discriminatory practice" approach are marshaled by Widiss, *supra* note 185, at 543–44.

In her recent survey of the frequency of the courts' raising overridden decisions from their intended graves, Professor Deborah Widiss shows that this practice – which she labels “shadow precedents” – is not unique to *Ledbetter*. Nor is it random that this extreme form of defiance of Congress appears in an employment discrimination case.[cite] On the contrary, she observes: “Employment discrimination is an area where this problem often takes center stage because Congress frequently disagrees with Supreme Court interpretations of Title VII and other employment discrimination laws.” Further, she notes that, since “in recent decades the Supreme Court’s interpretations in this area have tended to be far more conservative than those of Congress . . . judges may use shadow precedents as something of a fig leaf for advancing their own policy preferences.”¹⁸⁷

Often, the significance of Supreme Court “mistakes” in interpreting statutes is downplayed, because, as it is said, unlike the case of invalidating statutes outright on constitutional grounds, Congress can always correct interpretive decisions with which it disagrees. And, indeed, sometimes, it does. The 1991 Civil Rights Act overrode 12 separate Supreme Court decisions narrowly interpreting federal employment discrimination laws, as noted by Professor Eskridge in a massive empirical study of statutory overrides two decades ago.¹⁸⁸ Very recently, in 2008, as noted by Professor Widiss, Congress overrode several decisions narrowly construing the Americans With Disabilities Act, and in 2009, the Lilly Ledbetter Fair Pay Act overrode the *Ledbetter* decision as the first bill that President Barack Obama signed into law.¹⁸⁹

But for reasons these and other scholars have identified, and veteran participants in the legislative process have experienced many times over, it is very difficult for Congress to overturn statutory interpretation decisions, no matter how egregiously antithetical they may be to the purposes of the enacting Congress. This is especially the case, when Court’s “mistakes” coincide with the policy preferences of even a significant minority of the contemporary Congress, or the White House, or with the interests of highly mobilized interest groups – such, for example, as businesses affected by employment discrimination issues.¹⁹⁰ (Not that willful disdain for Congress’ products would be defensible, even if

¹⁸⁷ Widiss, *supra* note 185, at 544–45, 537.

¹⁸⁸ William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 332 n. 4 (1991);

¹⁸⁹ Widiss, *supra* note 185 at 516, n. 12; Pub. Law 111-2, 123 STAT 5 (2009)

¹⁹⁰ Even with the unusual Democratic majorities and control of the White House produced by the 2008 elections, and strong reactions to several interpretive decisions, including *Gross v. FBL Financial Services*, 129 S.Ct. 2349 (2009), bills to overturn *Gross* and other decisions, though introduced with some level of fanfare, never reached the floor of either house before Democrats lost all or most of those big majorities in the 2010 elections. Examples were bills introduced with fanfare to reverse the Court’s 5-4 decision in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), The Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009), and the Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009). *Ashcroft v. Iqbal: Access to Justice Denied*, Hearing before the H. Subcomm. on the Constitution, Civil Rights and Civil Liberties, H. Judiciary Comm., 111th Cong. (Oct. 27, 2009), available at http://judiciary.house.gov/hearings/hear_091027_1.html *Has the Supreme Court Limited Americans’ Access to Courts?* Hearing before the S. Judiciary Comm., 111th Cong. (Dec. 2, 2009), available

the cliché of comparatively easy correction were accurate.) But the *Ledbetter* majority's penchant for stifling Congress, even when Congress manages to overcome the standard obstacles to overriding the Court's misinterpretations, lights up their view of Congress as a political adversary and institutional rival. The flippancy on display in *Ledbetter* also blazons the conservative justices' recognition of Congress' inherent weakness in sustained duels. The result underscores the extremes to which they are prepared to go to exploit – and intensify – Congress's institutional vulnerabilities, in trumping its enacted policy preferences with their own.

Conclusion: Conservatives' Jekyll & Hyde Statutory Jurisprudence And The Constitutionality Of Health Reform

As noted above, in their treatment of 20th and 21st century progressive statutes, mainstream judicial conservatives have sustained a Jekyll & Hyde performance. On issues of substantive constitutional authority, they have adhered to the post-New Deal/ early 19th century regime prescribing broad congressional discretion to implement Article I powers, judicial restraint, and, in particular, deference to Congress' choice of means to execute its powers. On issues of statutory interpretation, and to a limited extent on structural constitutional issues pertaining to “federalism,” the conservative justices and their allies on the lower courts have embraced .aggressive strategies to defeat progressive statutory purposes no less “activist” than the conservative doctrines of the *Lochner* era Court.

Will these two contradictory strains continue to co-exist, or will one dominate or replace the other? In all likelihood we should get a good look at the answer to this question before the end of the 2011-12 term. By then the Court is expected to rule on the lawsuits challenging the constitutionality of the Affordable Care Act. The pertinent constitutional precedents, including major and recent opinions by members of the conservative bloc, all point strongly toward rejection of the challenges. Many observers, including eminent conservative scholars and judges, have confidently argued from this perspective that the ACA should and will be

at <http://judiciary.senate.gov/hearings/hearing.cfm?id=4189>. Another example was H.R. 1020, the Arbitration Fairness Act of 2009, which would have overturned the Supreme Court's Federal Arbitration Act jurisprudence, discussed above in Section IV(B), and made the FAA applicable (as originally intended) only to “disputes between commercial entities of generally similar sophistication and bargaining power.” The bill garnered 118 co-sponsors but was never reported from committee.
<http://www.govtrack.us/congress/bill.xpd?bill=h111-1020>

upheld.¹⁹¹ But if, when contemplating the signature legislative accomplishment of President Barack Obama and the Democratic 111th Congress, the conservative justices feel inclined to let ideology trump precedent, their statutory jurisprudence provides a roadmap of how they could go about giving vent to that impulse. The bag of interpretive tricks examined in this article includes approaches necessary to rule against the ACA, in particular its mainly targeted provision, the individual mandate to carry health insurance or pay a penalty. We have seen how ready and willing the conservative bloc has been to unsheathe such activist weapons as: scuttling rational basis deference to Congress' selection of means to achieve lawful goals; overriding Congressional fact-finding, factual, and policy judgments; and selective and unsympathetic reading of Congress' legislative record. If those approaches metastasize from the Court's statutory interpretation precedents to its constitutional jurisprudence, the nation will find itself living under a very different Constitution than the one we thought we had for many decades.

The outcome is uncertain. But one thing is quite certain. If the conservative justices uphold the ACA individual mandate, sticking with established precedent and their oft-professed commitment to judicial restraint, a large share of the credit will rest with what Ted Olson termed the "genial and crafty hand of Justice Stevens." Specifically, the single strongest precedent for upholding the mandate as a proper exercise of Congress' interstate commerce power is *Gonzales v. Raich*, the 2005 6-3 decision upholding a prosecution under the Federal Controlled Substances Act of a California resident growing marijuana for her own consumption for medicinal purposes.¹⁹² As noted above, Justice Stevens' opinion for the Court detailed the long line of cases establishing Congress' authority to reach all matters that, it has a "rational basis" for concluding, "substantially affect" commerce.¹⁹³ In elaborately reprising this history, his manifest purpose was to ensure that the Court's long-standing commerce clause jurisprudence would not be seen as having been displaced by two 5-4 commerce clause-limiting decisions during the Rehnquist Court's "federalism" campaign. And he succeeded. As Chief Justice Roberts explained in his confirmation hearing, barely two months after the *Gonzales v. Raich* decision was released, the Court's opinion meant that these two cases, *United States v. Lopez* (1995) and *United States v. Morrison* (2001), were merely:

two decisions in [the] more than 200-year sweep of decisions in which the Supreme Court has . . . recognized extremely broad authority on Congress's part, going way all the way back to *Gibbons v. Ogden* and

¹⁹¹ Simon Lazarus, *Framing The Debate Over Health Reform*, NEWSWEEK, October 4, 2010, available at <http://www.thedailybeast.com/newsweek/2010/10/04/opinion-conservatives-mislead-in-health-debate.html>

¹⁹² *Gonzales v. Raich*, 545 U.S. 1 (2005)

¹⁹³ *Gonzales v. Raich*, supra note 188 at 15-25

Chief Justice John Marshall, when those Commerce Clause decisions were important in binding the Nation together as a single commercial unit.¹⁹⁴

Seven years later, as Chief Justice, John Roberts will decide whether to frame this momentous issue the same way that he did during his job interview with the Senate. Justice Stevens will no longer be on the court. But his constitutional vision and democratic commitment will be omnipresent as the historic case is argued and decided.

¹⁹⁴ United States Senate Committee on the Judiciary, *Hearing on the Nomination of John G. Roberts to be Chief Justice of the United States, Transcript at* 225 (Questioning by Senator Feinstein) (September 13, 2005), available at <http://www.asksam.com/ebooks/releases.asp?file=JGRHearing.ask&b=Day%20%20%2d%20Feinstein%20%2d%20Interpreting%20Congressional%20Authority%20to%20Enact%20Laws...>