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Legal Context: Reading Statutes in Light of Prevailing Legal Precedent

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LEGAL CONTEXT: READING STATUTES IN LIGHT OF PREVAILING LEGAL PRECEDENT

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I. INTRODUCTION

An important question is when judges should consider contextual evidence about the meaning of a statute. Judges usually will read a statute's text in light of judicial precedent prevailing at the time of its enactment to understand the contemporary meaning of various words or phrases in the statute.[1] A more difficult issue is whether courts should consider contemporary judicial context if a statute's text is silent about an issue. The use of contemporary context to imply statutory meaning has been especially controversial where the issue is whether courts should imply a private right of action. From approximately 1964 until 1975, the Court applied a relatively liberal standard for implying private rights of action where a statute was silent, but a private remedy advanced the statute's broad purposes.[2] Since 1975, the Court has applied an increasingly restrictive standard and demanded specific evidence that Congress intended to establish a private right of action.[3] For statutes enacted between 1964 and roughly 1975, should courts apply the liberal implication standard prevailing at the time a statute was enacted based on the presumption that Congress probably intended to follow contemporary judicial precedent?[4]

Prior to 2001, the Supreme Court had generally considered the state of the law at the time Congress enacted a statute in deciding whether to imply a private right of action.[5] Furthermore, if prior judicial decisions had recognized that a particular statute included an implied private right of action, and Congress did not affirmatively reject those decisions when it amended that statute, the Court had inferred that Congress probably intended to "preserve" such judicial rights.[6] In sum, for statutes enacted between 1964 and 1975, the Court had usually presumed that Congress was likely to have relied on the liberal implication standards at the time, although contrary evidence might sometimes outweigh the presumption in favor of implied private rights of action.[7]

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1. *See infra* notes 133, 185 and accompanying text.

2. *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S 353, 376–77 & n.56 (1982) (citing cases); *infra* notes 7, 206–212 and accompanying text.

3. *See Curran*, 456 U.S. at 377.

4. *See, e.g.*, Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 173 (1994); *Curran*, 456 U.S. at 375–79; Christopher L. Sagers, Note, *An Implied Cause of Action Under the Real Estate Settlement Procedures Act*, 95 MICH. L. REV. 1381, 1389 (1997).

5. *See Curran*, 456 U.S. at 378; Cannon v. Univ. of Chi., 441 U.S. 677, 696–98 (1979); Sagers, *supra* note 4, at 1388–90.

6. "In such a case, the fact that Congress 'acquiesces' in the existing enforcement rules by not overruling them is significant evidence that Congress intends for those enforcement rules to remain available." Sagers, *supra* note 4, at 1390 n.51 (citing *Curran*, 456 U.S. at 381–82).

7. *See Curran*, 456 U.S. at 378 n.61 (quoting Brown v. GSA, 425 U.S. 820, 828 (1976)).

During 2001, the Supreme Court in *Alexander v. Sandoval*[8] addressed whether there is a private right of action under federal agency regulations issued pursuant to § 602 of Title VI of the 1964 Civil Rights Act.[9] In its brief, the United States argued that the Court should rely on context evidence to presume that Congress intended to follow the liberal judicial approach to implication of private rights of action when Title VI was enacted in 1964.[10] However, Justice Scalia's majority opinion rejected the Government's argument that Title VI must be read in the context of cases that at that time liberally implied private rights of action even where a statute was completely silent on the matter.[11] The Court decisively rejected implication by contemporary context, except where there is textual support for a private right of action.[12] In dissent, Justice Stevens argued that the statute should be interpreted to create an implied right of action for enforcing § 602 regulations because courts in 1964 would have so construed the statute.[13]

Unfortunately, the majority of the Supreme Court adopted Justice Scalia's textualist approach to statutory interpretation in *Sandoval*. While textualists at least implicitly consider some types of contextual evidence when interpreting statutory texts, they typically ignore contextual evidence about the broader purposes and intent behind legislation, including the judicial precedent prevailing at the time. This article will focus on Justice Scalia because he has been the leading proponent of textualism on the Court. Justice Scalia's use of context is highly selective and arbitrary. He is willing to examine certain types of external context, but excludes others. Indeed, Justice Scalia has acknowledged, at times, that contemporary context matters when interpreting a statute's text. However, if a statute's text is silent regarding an issue, he generally refuses to consider the legal context in which Congress enacted the statute.[14]

As a matter of statutory interpretation, courts should consider the legal context in which Congress enacts a statute. While context may in some cases be less persuasive where a statute is merely silent about an issue, it is relevant to consider the judicial precedent prevailing at the time of a statute's enactment, especially if a legal doctrine was then widely accepted and more likely to reflect the probable intentions of the enacting Congress.

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8. 532 U.S. 275 (2001).

9. *Id.* at 287–88; *see* 42 U.S.C. § 2000d-1 (2000); *infra* notes 267–319 and accompanying text.

10. *Sandoval,* 532 U.S. at 287–88.

11. *Id.*

12. *Id.*

13. *Id.* at 315 n.25 (Stevens, J., dissenting).

14. *Infra* Parts II.B–III, IV.C.

Courts should examine external sources whenever they would be helpful in discerning the original intent, purpose, or meaning of a statute.[15]

II. STATUTORY INTERPRETATION AND TEXTUALISM

A. *Introduction to Statutory Interpretation*

All leading theorists of statutory interpretation acknowledge "that the statutory text is the most authoritative interpretive criterion."[16] Nevertheless, there is disagreement about whether and to what extent judges should consider extra-textual sources of authority to interpret text. Furthermore, there is contention about whether meaning derived from extra-textual sources may contradict textual meaning or supply independent meaning that is lacking in the text.

1. Three Theories of Interpretation

There are three main theories of statutory interpretation: "(1) intentionalism, (2) purposivism, and (3) textualism."[17] Intentionalists usually examine both a statute's text and its legislative history to determine the original intent of the enacting legislature.[18] Conversely, purposivists look beyond the legislature's original intent and seek to understand a

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15. *Infra* Parts III–IV.

16. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 354 (1990); Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking is Better than Judicial Literalism*, 53 WASH. & LEE L. REV. 1231, 1239 (1996); *see also* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 408 n.119 (1993) (observing that while many judges are not textualists, all judges are "presumptive textualists" who "follow relatively clear statutory language absent some strong reason to deviate from it").

17. Mank, *supra* note 16, at 1235; *see also* Eskridge & Frickey, *supra* note 16, at 324–25 (arguing that three major theories of statutory interpretation are "foundationalist" because "each seeks an objective ground ('foundation') that will reliably guide the interpretations of all statutes in all situations"). *See generally* WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 131–49, 157–88 (1999) (discussing purposivism and textualism, respectively).

18. Mank, *supra* note 16, at 1235; *see also* Eskridge & Frickey, *supra* note 16, at 326–27. *See generally* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 14–25 (1994) (describing and criticizing intentionalism).

statute's broad purposes, especially if a court must apply a statute to a situation that was unforeseeable by the enacting legislature.[19]

Textualists generally attempt to ascertain the meaning of a statute based on the plain or ordinary meaning of the words constituting its text.[20] Textualists usually reject both purposivist and intentionalist approaches to statutory interpretation because these methodologies provide judges too much discretion in determining the meaning of a statute.[21] Distinguishing between original intent and original meaning, textualists attempt to understand the original meaning of a statute's text rather than the intent of its authors.[22] Textualists believe that judges have a duty to be faithful agents of what the legislature commands in a statute rather than discerning the often conflicting motives or intents that led individual legislators to vote for the statute.[23] For example, Judge Easterbrook of the United States Court of Appeals for the Seventh Circuit has argued that a statute is a public document whose meaning depends on its language rather than the subjective intentions of the legislators who authored the statute.[24]

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19. Mank, *supra* note 16, at 1235; *see, e.g.*, Clinton v. City of New York, 524 U.S. 417, 428–29 (1998) (Stevens, J.) (refusing to apply the plain meaning of an expedited review provision in the Line Item Veto Act where a literal reading was contrary to statutory purpose of establishing "a prompt and authoritative judicial determination of the constitutionality of the Act"); Lewis v. United States, 523 U.S. 155, 160 (1998) (Breyer, J.) (rejecting statute's plain meaning where "a literal reading of the words . . . would dramatically separate the statute from its intended purpose"); ESKRIDGE, *supra* note 18, at 25–34 (describing and criticizing purposivism); Roger Colinvaux, *What Is Law? A Search for Legal Meaning and Good Judging Under a Textualist Lens*, 72 IND. L.J. 1133, 1133; John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 3 n.4 (2001) (stating Justices Stevens and Breyer often take a purposivist approach).

20. *See* POPKIN, *supra* note 17, at 180–81 (discussing and criticizing textualist search for "ordinary meaning" of text when there are often multiple possible meanings); Colinvaux, *supra* note 19, at 1133–34 (same).

21. Mank, *supra* note 16, at 1237; *see also* ANTONIN SCALIA, A MATTTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16–23 (1997) [hereinafter SCALIA, A MATTER OF INTERPRETATION] (arguing judges should look for statutory meaning in statute's text and not seek elusive "intent" or purpose of the legislature); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176 (1989) [hereinafter Scalia, *The Rule of Law*] (same); William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1135–36 (1992). *But see* ESKRIDGE, supra note 18, at 232–33 (criticizing Scalia's argument that textualism imposes more reliable restraints on judicial discretion).

22. Colinvaux, *supra* note 19, at 1149 & n.69; George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 330–32 (1995).

23. Manning, *supra* note 19, at 7.

24. *See, e.g.*, Charles Fried, *Sonnet LXV and the "Black Ink" of the Framers' Intention*, *in* INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 45, 50 (Sanford Levinson & Steven Mailloux eds., 1988) (arguing that interpretation of Constitution should be based on meaning of the text rather than Framer's subjective intentions); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 60–61 (1987)

"[T]extualists argue that a statute's text alone provides the best evidence" of the statute's original meaning.[25] Textualists typically argue that judges should not consult extrinsic sources, such as legislative history, that are primarily concerned with the intent of the authors rather than the text's meaning.[26] As discussed below, textualism has evolved from the assumption that the plain language of the text usually provides a clear meaning to a more sophisticated method of structural analysis of a broader range of textual material.[27]

2. A Brief History of Statutory Interpretation

From the late 19th century until approximately 1940, many judges assumed that most statutes had a "plain meaning" to be discovered in the language of its text and that it was usually not necessary for judges to consider external sources to clarify statutory meaning.[28] For example, in

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("Statutes are not exercises in private language . . . . They are public documents . . . . The words of the statute, and not the intent of the drafters, are the 'law.'"); *see also* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 533 n.2 (1983) [hereinafter Easterbrook, *Statutes' Domains*] (citing Wittgenstein's view that "[t]here is no 'private language;' meaning lies in *shared* reactions to text"); Taylor, *supra* note 22, at 328–32.

25. Mank, *supra* note 16, at 1237; *see also* SCALIA, A MATTER OF INTERPRETATION, *supra* note 21, at 16–23; CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 113 (1990) (describing textualist view that "the statutory language is the only legitimate basis for interpretation"); *id.* at 113–17 (criticizing textualist statutory interpretation). *See generally* ESKRIDGE, *supra* note 18, at 34–47, 232–33 & *passim* (describing and criticizing textualism); Eskridge & Frickey, supra note 16, at 340–45 (same).

26. INS v. Cardoza-Fonseca, 480 U.S. 421, 452–53 (1987) (Scalia, J., concurring) (arguing that if statutory text has "plain meaning" it is unnecessary to examine statute's legislative history); SCALIA, A MATTER OF INTERPRETATION, *supra* note 21, at 29–37 (criticizing legislative history as unreliable and arguing that it is inappropriate to use such history to seek for statute's intent; instead, judges should focus on statute's meaning); SUNSTEIN, *supra* note 25, at 113–17 (discussing and criticizing textualist approach that "the statutory language is the only legitimate basis for interpretation"); Mank, *supra* note 16, at 1237.

27. *See* SCALIA, A MATTER OF INTERPRETATION, *supra* note 21, at 23 ("Textualism should not be confused with so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute.").

28. *See, e.g.*, United States v. Mo. Pac. R.R. Co., 278 U.S. 269, 278 (1929) (stating "where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended"); Caminetti v. United States, 242 U.S. 470, 485 (1917) (citing Hamilton v. Rathbone, 175 U.S. 414, 421 (1899)); United States v. Hartwell, 73 U.S. (6 Wall.) 385, 396 (1867) ("If the language be clear it is conclusive. There can be no construction where there is nothing to construe."); William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 812–13 (1985) (discussing 19th century use of the plain meaning rule and tracing the plain meaning rule to Blackstone); Bradley C. Karkkainen, *"Plain Meaning:" Justice Scalia's Jurisprudence of Strict Statutory*

Caminetti v. United States,[29] the Supreme Court stated that "[w]here the language is plain and admits of no more than one meaning the duty of interpretation does not arise . . . ."[30] Justice Oliver Wendell Holmes argued for a textualist approach to statutory interpretation and contended "that courts should be concerned only with what Congress said and not what it meant."[31] During the early twentieth century, American courts sometimes consulted a statute's legislative history to ascertain its purpose or congressional intent, but far less often than they would after 1940.[32]

During 1940, the Supreme Court, in the seminal *United States v. American Trucking Ass'ns*,[33] decision took a new approach to statutory interpretation by broadly considering a statute's legislative history to determine its intent or purposes rather than focusing on the plain meaning of the text.[34] The Supreme Court's broader approach to legislative history likely reflected a recognition of the broader social legislation that Congress began adopting during the 1930s as part of the so-called "New Deal."[35] From 1940 until the mid-1980s, the Supreme Court regularly examined a

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Construction, 17 HARV. J.L. & PUB. POL'Y 401, 433–37 (1994); Manning, *supra* note 19, at 104–05 (arguing courts in late 19th century generally focused on letter of statute and only departed in "exceptional" cases); Taylor, *supra* note 22, at 355.

29. 242 U.S. 470 (1917).

30. *Id.* at 485.

31. Mank, *supra* note 16, at 1236–37; *see also* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 120 (Mark DeWolfe Howe ed., 1963); Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899). However, Justice Holmes in his judicial role sometimes examined a statute's purposes. *See, e.g.*, In re House Bill No. 1,291, 60 N.E. 129, 130 (Mass. 1901) (finding that statute's requirement of "written votes" allowed use of voting machines which used no paper at all because general purpose of statute was to prevent oral or hand voting); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 267 (1990); Mank, *supra* note 16, at 1237 n.19.

32. In 1892, the Supreme Court used evidence from a committee report to conclude that a statute's general prohibition against labor contracts to assist immigration did not apply to clergy. *See* Church of the Holy Trinity v. United States, 143 U.S. 457, 464–65 (1892); *see also* ESKRIDGE, *supra* note 18, at 208–10; POPKIN, *supra* note 17, at 121–25 (arguing courts began using legislative history in late 19th century, but only used such information 'freely' by New Deal "revolution" during 1930s); Karkkainen, *supra* note 28, at 434 ("By the late 19th century, however, American judges had begun to consult legislative history with some regularity."). However, by the early 20th century, many academics and jurists such as Justice Oliver Wendell Holmes, Jr., argued judges should focus on a statute's text rather than its legislative history. *See* ESKRIDGE, *supra* note 18, at 210–12.

33. 310 U.S. 534, 543–44 (1940) (stating that courts may consult extrinsic materials such as legislative history even if statute's text has clear meaning after "superficial examination").

34. *Id.*; ESKRIDGE, *supra* note 18, at 213–25 (discussing increasing use of legislative history from 1930s to 1986); POPKIN, *supra* note 17, at 124–25 (arguing courts began using legislative history "freely" by 1937); Karkkainen, *supra* note 28, at 436.

35. POPKIN, *supra* note 17, at 121–25 (arguing courts began using legislative history "freely" as result of New Deal "revolution" during 1930s).

statute's legislative history to determine its purpose or intent and rarely employed the plain meaning rule.[36] In 1983, Judge Patricia Wald remarked that "[n]o occasion for statutory construction now exists when the [Supreme] Court will *not* look at the legislative history."[37] Some commentators have argued that courts can misuse legislative history by using selective or ambiguous snippets of congressional materials to support a judge's pre-determined conceptions of a statute's intent or purpose.[38]

By the 1940s, the growing use of legislative history led many judges to adopt purposive or intentionalist approaches to statutory interpretation and to reject the plain meaning method.[39] Many commentators criticized the plain meaning approach, arguing that texts often have complex and different meanings for readers from different perspectives.[40] Thus, an increasing number of judges and commentators contended that the plain meaning school of interpretation was flawed because it ignored the importance of

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36. Karkkainen, *supra* note 28, at 435–36.

37. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 195 (1983). *See generally* Jorge L. Carro & Andrew R. Brann, *Use of Legislative Histories by the United States Supreme Court: A Statistical Analysis*, 9 J. LEGIS. 282, 291–303 (1982) (presenting statistical study showing Supreme Court increasingly used legislative history from 1938 to 1979 and that increase in usage was especially rapid after 1970).

38. *See* ACLU v. FCC, 823 F.2d 1554, 1583 (D.C. Cir. 1987) (Starr, J., dissenting) ("We in the judiciary have become shamelessly profligate and unthinking in our use of legislative history. . . ."); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 751 (1995) (arguing that revival of textualism during 1980s was counter-reaction to over-use of legislative history); Wald, *supra* note 37, at 197, 214 (acknowledging dangers of judicial misuse of legislative history).

39. *See, e.g.*, Friedrich v. City of Chicago, 888 F.2d 511, 514 (7th Cir. 1989) (Posner, J.) ("[J]udges realize in their heart of hearts that the superficial clarity to which they are referring when they call the meaning of a statute 'plain' is treacherous footing for interpretation."); REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 230 (1975) ("[T]he plain meaning rule does not have a single, agreed-on content. It has taken many forms, most of which are ambiguous."); ESKRIDGE, *supra* note 18, at 213–18 (discussing increasing judicial use of legislative history during 1940s and 1950s to ascertain intent and purpose of statute); POPKIN, *supra* note 17, at 131–49 (arguing courts began using purposivism during 1930s, and began using broader "full-bodied purposivism" during 1940s and 1950s); POSNER, *supra* note 31, at 262–69 (criticizing "the plain meaning fallacy"); Frederick J. de Sloovere, *Textual Interpretation of Statutes*, 11 N.Y.U. L. REV. 538, 548 (1934) ("The books and decisions . . . reiterate the canon that a plain and explicit statute needs no interpretation, without a hint as to what is the test of explicitness."); Taylor, *supra* note 22, at 356–57 n.162–63 (citing sources criticizing plain meaning approach to interpretation).

40. *See* Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 320 (1985) (arguing plain meaning school of interpretation "is (plainly) a mistake"); Taylor, *supra* note 22, at 355 (same).

context in interpreting statutory language.[41] Increasingly, the Supreme Court recognized that most statutes do not have a plain meaning.[42] In *United States v. Turkette*,[43] the Supreme Court stated: "[T]here is no errorless test for identifying or recognizing 'plain' or 'unambiguous' language."[44]

From the late 19th century until the 1930s, most judges sought to find the "plain meaning" of a statute in its text and consulted external sources such as legislative history only to a limited extent, usually to confirm their reading of the text.[45] By contrast, from the 1940s until the mid-1980s, judges often examined a statute's legislative history to find its broader purposes or intent, although judicial interpretation of the text has always remained most important.[46] Beginning in the mid-1980s, however, Justice Scalia challenged purposive and interpretive methods of statutory interpretation, criticized reliance on legislative history, and tried to win other judges to his new textualist approach to interpretation.[47]

B. Textualism and Its Critics

1. "New Textualism"

Since the mid-1980s, an increasing number of judges and commentators have supported textualist interpretive methods, but most have used more sophisticated methods of interpretation that go beyond plain meaning analysis and are often referred to as "new textualism."[48] In 1986, President Reagan appointed Justice Scalia to the Supreme Court. Since joining the Court, Justice Scalia has sought to make a statute's text the primary factor in statutory interpretation. Justice Scalia's "new textualist" approach to statutory interpretation is more sophisticated than traditional plain meaning

41. Richard A. Posner, *Legislation and Its Interpretation: A Primer*, 68 NEB. L. REV. 431, 442 (1989) (arguing against "a contextual[]" interpretation); Taylor, *supra* note 22, at 355.

42. Taylor, *supra* note 22, at 356 n.162 (citing twenty-one Supreme Court cases from the 1993 term).

43. 452 U.S. 576, 580 (1981) (interpreting the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c) (1988)).

44. *Id.* at 580.

45. *See* POPKIN, *supra* note 17, at 121–25.

46. *See* ESKRIDGE, *supra* note 18, at 214–25; Karkkainen, *supra* note 28, at 436.

47. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (describing Justice Scalia's approach to statutory interpretation as the "new textualism").

48. *Id.*; Taylor, *supra* note 22, at 359 (arguing modern textualists examine broader range of textual meaning than traditional plain meaning approach).

interpretation in examining the internal context and structure of the text, but is likewise adamantly opposed to the use of legislative history.[49] Most controversially, he has argued that courts should generally ignore a statute's legislative history because it is the text alone that is enacted by Congress and presented to the President for his signature or veto.[50] Additionally, Judge Easterbrook and other textualists have argued that it is impossible to find a single intent within a large collective body such as Congress, and therefore courts should not use legislative history to determine a statute's intent or purposes.[51] Furthermore, Justice Scalia and other textualists are often concerned that some legislators or congressional staff may insert materials into committee reports or other legislative history materials that do not reflect the views of the majority of Congress, and that courts indirectly, yet inevitably, encourage such behavior when they rely on legislative history.[52] Accordingly, Justice Scalia maintains that the text alone provides the most reliable guide to a statute's meaning.[53] Because a judge can use legislative history or statutory purposes to fit her political

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49. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 452 (1987) (Scalia, J., concurring) (advocating textualist approach to statutory interpretation); Gregory E. Maggs, *Reconciling Textualism and the Chevron Doctrine: In Defense of Justice Scalia*, 28 CONN. L. REV. 393, 397–98 (1996) (defending Justice Scalia's textualist method of interpretation).

50. *See, e.g.*, W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98–99 (1991); Thompson v. Thompson, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring); Manning, *supra* note 19, at 70–78 (discussing argument of textualists that a statute's text is controlling because it alone is presented to President for signature or veto); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1300–01 (1990) (discussing textualist view that Presentment Clause limits judges to statute's text); Mank, *supra* note 16, at 1237 n.26 (same); *cf.* INS v. Chadha, 462 U.S. 919, 925–32 (1983) (holding one-house legislative veto violates requirements of bicameralism and presentment set forth in Article I). *But see* ESKRIDGE, *supra* note 18, at 230–32 (criticizing Scalia's bicameralism and presentment arguments for excluding legislative history).

51. William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 230 n.212 (2000) (arguing Judge Easterbrook has emphasized impossibility of ascertaining single intent in collective bodies); Easterbrook, *Statutes' Domains*, *supra* note 24, at 547 ("Because legislatures comprise many members, they do not have 'intents' or 'designs,' hidden yet discoverable."); Popkin, *supra* note 21, at 1135–36 (discussing textualist critique of finding single legislative intent among dozens of legislators); *see also* POPKIN, *supra* note 17, at 166–67 (discussing Judge Easterbrook's view that it is difficult for judges to determine legislative intent because most legislation includes mixed public and private motives).

52. *See* SCALIA, *supra* note 21, at 29–37 (criticizing misuse of legislative history); Buzbee, *supra* note 51, at 222–23, 230 n.212 (arguing Justice Scalia emphasizes misuse and manipulation by legislators, their staff, and judges interpreting such history).

53. *See Cardoza-Fonseca*, 480 U.S. at 452–53 (Scalia, J., concurring) (arguing that if statutory text has "plain meaning" it is unnecessary to examine statute's legislative history); Mank, *supra* note 16, at 1237. *But see* SUNSTEIN, *supra* note 25, at 113–17 (questioning textualist method of statutory interpretation).

biases, Justice Scalia contends that textualism provides a more objective approach for ascertaining statutory meaning.[54]

The "new textualist" approach considers a wider range of contextual sources than the traditional "plain meaning" approach.[55] Justice Scalia initially seeks to understand the "ordinary meaning" of statutory language based on its common definition in dictionaries and thesauruses.[56] Additionally, compared to traditional textualists, new textualists such as Justice Scalia "examine[] not only the specific statutory language which is the subject of litigation, but the entire statute as reflected by other legislation enacted by the same legislature."[57] While new textualists focus on the statutory text itself, they also are willing at times to examine additional criteria including the statute's internal structure, the statute's relationship to other statutes, the various canons of statutory construction, administrative principles governing the statute's implementation, comparisons with the accepted interpretations of comparable statutory language, and the dictionary meanings most consistent with ordinary English usage and relevant law.[58]

Justice Scalia's textualist approach quickly became a significant influence on the Supreme Court because he gained key allies with the appointments of Justice Kennedy in 1987 and Justice Thomas in 1991.

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54. *See* Scalia, *The Rule of Law*, *supra* note 21 at 1176. *But see* ESKRIDGE, *supra* note 18, at 232–33 (criticizing Scalia's argument that textualism provides better limits on judicial discretion than other methods of statutory interpretation); POPKIN, *supra* note 17, at 172–73 (discussing Judge Easterbrook's view that it is difficult for judges to recreate legislative intent because of danger judges will substitute their own views when attempting to reconstruct legislative intent).

55. *See infra* note 57 and accompanying text.

56. Karkkainen, *supra* note 28, at 407.

57. Robert J. Araujo, *The Use of Legislative History in Statutory Interpretation: A Look at* Regents v. Bakke, 16 SETON HALL LEGIS. J. 57, 73 (1992); Bradford C. Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 534 (1998); *see also* Eskridge, *supra* note 47, at 661–62, nn.156, 160 (citing Kungys v. United States, 485 U.S. 759, 770 (1988) and United States v. Fausto, 484 U.S. 439, 449–51 (1988)); Popkin, *supra* note 21, at 1140–52; Taylor, *supra* note 22, at 359–60.

58. MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 225–29 (1994) (Scalia, J.) (using dictionary definitions of "modify" to determine statute's meaning); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring) (arguing judges should choose a method of statutory interpretation "(1) most in accord with context and ordinary usage . . . and (2) most compatible with the surrounding body of law into which the provision must be integrated . . . ."); Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 280, 321, 330–31, 334–35 & *passim* (1998) (emphasizing Justice Scalia's use of dictionary as aid to textualist interpretation); Eskridge, *supra* note 47, at 623–24 (discussing Justice Scalia's approach to textualist interpretation); Popkin, *supra* note 21, at 1136 (same); Mank, *supra* note 57, at 534 (same); Mank, *supra* note 16, at 1237–39 (same).

Initially, Justice Anthony Kennedy frequently supported textualist interpretation, but subsequently his opinions have sometimes adopted non-textualist approaches.[59] Conversely, Justice Thomas has consistently applied a textualist approach.[60] While a majority of the Justices will still consider non-textual sources such as legislative history, the Court is less likely to do so largely because of Justice Scalia's influence.[61]

2. Criticisms of Textualism

Numerous commentators have criticized the textualist method of statutory interpretation and "argued that judges should examine extrinsic sources, such as legislative history, as a means to reconstruct congressional intent" or purposes "in enacting a statutory provision, especially if the textual terms are ambiguous."[62] Some critics of textualism argue that it is a flawed method of interpretation because Congress expects judges to consider a statute's intent and purpose in applying and interpreting them.[63] Accordingly, textualist judges who focus solely on the language of a statute

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59. *See, e.g.*, Pub. Citizen v. United States Dep't of Justice, 491 U.S. 440, 472–77 (1989) (Kennedy, J., concurring). While initially he was Justice Scalia's closest ally on the Court, Justice Kennedy has in recent years been willing on some occasions to join opinions relying upon legislative history. *See, e.g.*, Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 610–12 n.4 (1991); Mank, *supra* note 57, at 532.

60. *See* Bank Am. Trust & Sav. Ass'n v. 203 N. Lasalle St. P'ship, 526 U.S. 434, 458 (1999) (Thomas, J., joined by Scalia, J., concurring in judgment); Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992) (Thomas, J.) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there . . . . When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" (quoting Rubin v. United States, 449 U.S. 424, 430 (1981)); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 226 & n.22 [hereinafter Manning, *The Nondelegation Doctrine*]; Manning, *supra* note 19, at 4 n.5 (identifying Justices Scalia and Thomas as the Court's leading textualists); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 363 (1994) (stating that Justice Thomas generally approves Justice Scalia's textualist approach to interpretation); Mank, *supra* note 57, at 532–33 & n.20 (same).

61. *See* Karkkainen, *supra* note 28, at 401 ("Only Justices Anthony Kennedy and Clarence Thomas can be called adherents of Justice Scalia's plain meaning approach."); Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235, 263–64, 283 (stating majority of Supreme Court continues to consider legislative history despite Justice Scalia's criticisms); Mank, *supra* note 57, at 533.

62. *See* Mank, *supra* note 16, at 1240; Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, 386; 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, 309 (1990).

63. *See* Melvin Aron Eisenberg, *Strict Textualism*, 29 LOY. L.A. L. REV. 13, 22–25 (1995) (arguing that strict textualism is both intellectually incoherent and illegitimate because it renders the judiciary unfaithful to the legislature).

may disregard the intent or purposes of most members of Congress.[64] On the other hand, textualists often interpret the meaning of a statute's words in light of related statutes without evidence that Congress intended the statutes to be read together.[65] Accordingly, critics contend that textualist interpretation arbitrarily focuses on textual evidence and ignores other information without considering what Congress intended.[66]

Critics of textualism argue that the texts of statutes are ambiguous far more often than textualists are willing to concede.[67] While more sophisticated than judges who applied the plain meaning approach before 1940, Justice Scalia likewise attempts to find an answer to a statute's meaning within its text whenever possible.[68] Because he dislikes using legislative history, Justice Scalia often strains to find a clear meaning within the text even if others might question whether the text is ambiguous.[69] Critics of textualism argue that the texts of statutes are often ambiguous and that a judge is more likely to reach a full understanding of statutory meaning by consulting external sources such as legislative history.[70]

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64. *See, e.g.*, W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 102 (1991) (Marshall, J., dissenting) (arguing that "the Court uses the implements of literalism to wound, rather than to minister to, congressional intent"); Michael Herz, *Judicial Textualism Meets Congressional Micromanagement: A Potential Collision in Clean Air Act Interpretation*, 16 HARV. ENVTL. L. REV. 175, 204 (1992); Mank, *supra* note 16, at 1241.

65. Buzbee, *supra* note 51, at 174–76, 221–23 & *passim* (criticizing Justice Scalia for assuming multiple statutes enacted at different times should be interpreted as if enacted by one draftsman or Congress); Eisenberg, *supra* note 63, at 23–24 (same); Popkin, *supra* note 21, at 1148 (same).

66. *See* Eisenberg, *supra* note 63, at 23–24.

67. *See* Karkkainen, *supra* note 28, at 403–04, 428–30, 445–50 (questioning Justice Scalia's use of grammatical and structural canons to clarify ambiguous statutory text); Mank, *supra* note 16, at 1238–39 (contending Justice Scalia's textualist approach unfairly finds clear meaning in ambiguous statutory language).

68. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 259–60 (1991) (Scalia, J., concurring) (finding agency interpretation of statute contradicted its textual meaning); INS v. Cardoza-Fonseca, 480 U.S. 421, 452–53 (1987) (Scalia, J., concurring) (stating that if a statute has "plain meaning" it is unnecessary to consider its legislative history); Karkkainen, *supra* note 28, at 403–04, 428–30, 445–50 (discussing Justice Scalia's textualist methodology); Mank, *supra* note 16, at 1238–39 (same).

69. *See* Eisenberg, *supra* note 63, at 34; Karkkainen, *supra* note 28, at 403–04, 428–30, 445–49 (discussing and criticizing Justice Scalia's use of grammatical and structural canons to resolve apparent ambiguities in statutory language); Mank, *supra* note 16, at 1238–39 (arguing that Justice Scalia tries to find clear meaning in statutory texts that others would consider ambiguous).

70. Mank, *supra* note 16, at 1271–78 (arguing legislative history is often a useful tool in statutory interpretation); Arthur Stock, Note, *Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses*, 1990 DUKE L.J. 160, 190–92 (criticizing Justice Scalia for ignoring legislative history in most circumstances).

Textualists often use the dictionary as the principal means for understanding the so-called "ordinary" meaning of statutory terms.[71] However, in many cases, critics contend that the key words in a statute do not have a single clear meaning, and, therefore that it is essential to examine Congress's intent or purpose to select the most likely meaning.[72] Because there are often multiple plausible meanings to a word in a dictionary or thesaurus, a judge's biases may affect which definition he or she chooses and how the definition is applied to the statute.[73]

Additionally, by ignoring a statute's intent or purposes, textualist judges may adopt a literal interpretation of a statute that no longer serves societal interests if there have been significant changes in social circumstances since Congress enacted it.[74] Modern textualists, including Justice Scalia, recognize that it is occasionally necessary to deviate from a text's meaning if its literal meaning would produce absurd results.[75] Yet the very effort of textualist judges to apply limited exceptions to avoid absurd results may make their approach to the law more arbitrary and selective rather than less.[76] Perhaps because he recognizes that the absurd results exception could lead judges to make political judgments about what is absurd, Justice

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71. *See* Aprill, *supra* note 58, at 280, 330–31 & *passim*; A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 71, 71–72 (1994); Lawrence Solan, *When Judges Use the Dictionary*, 68 AM. SPEECH 50, 50 (1993); Note, *Looking it Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1441–44 (1994); Taylor, *supra* note 22, at 375–76.

72. *See* MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 240–45 (1994) (Stevens, J., dissenting) (criticizing Justice Scalia's majority opinion for using dictionary definitions when it is essential to examine "what words mean as used in a particular statutory context"); Aprill, *supra* note 58, at 281–82, 330–31 & *passim* (criticizing Justice Scalia's over reliance on dictionary definitions and refusal to consider other important information such as legislative history); Mank, *supra* note 16, at 1240 (same). *See generally* Randolph, *supra* note 71, at 75–77; Note, *Looking it Up: Dictionaries and Statutory Interpretation*, *supra* note 71, at 1452–53.

73. Aprill, *supra* note 58, at 281–82, 330–31 & *passim*; Colinvaux, *supra* note 19, at 1146 n.56; Taylor, *supra* note 22, at 375–76.

74. *See* ESKRIDGE, *supra* note 18, at 125–28 (arguing judges should read statutory language in light of changed circumstances if it is impractical to achieve purpose original Congress intended); Mank, *supra* note 16, at 1240–41 & n.41 (discussing Eskridge's approach to statutory interpretation and changed circumstances).

75. *See* K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 324 n.2 (1988) (Scalia, J., concurring in part and dissenting in part) ("[I]t is a venerable principle that a law will not be interpreted to produce absurd results."); Manning, *supra* note 19, at 115–16 (discussing Justice Scalia's use of absurd results exception); Popkin, *supra* note 21, at 1163 (same).

76. *See* ESKRIDGE, *supra* note 18, at 134 ("[B]y allowing an 'absurd result' exception to his dogmatic textualism, Scalia allowed for just as much indeterminacy, and just as much room for judicial play, as he accused Brennan of creating with his context-dependent approach to statutory meaning."); Manning, *supra* note 19, at 116 (observing that willingness of textualists to depart from statutory text if literal interpretation would produce absurd results leaves them open to criticism that they lack principles).

Scalia has departed from a statute's text based on the absurd result's exception only in rare cases, usually involving "scrivener's errors."[77]

Because most legislators probably do not expect judges to interpret a statute based solely on its text, there is some evidence that Congress is more likely to disagree with judicial decisions based on textualist interpretation. While Congress rejects only a small number of judicial decisions each year by enacting legislation that clearly repudiates a specific holding, some evidence supports Justice Stevens' contention that textualist decisions by the Supreme Court are disproportionately rejected by Congress.[78] Accordingly, some commentators contend that it is often inappropriate to use textualist methods of statutory interpretation if Congress generally disagrees with that methodology.[79] Furthermore, there is a good argument that courts should not apply textualist statutory construction methods to statutes enacted when Congress expected courts to consider the statute's legislative history or broader purposes.[80]

III. TEXTUALISM AND CONTEXT

Textualism is a flawed method of interpretation because it selectively weighs external information related to the meaning of words in the text, but rejects sources of information that are sometimes more pertinent to understanding Congress's intended meaning because they address the

77. *See* Union Bank v. Wolas, 502 U.S. 151, 163 (1991) (Scalia, J., concurring) (rejecting claim of absurd result where plaintiff made "no contention of a 'scrivener's error'"); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527–30 (1989) (Scalia, J., concurring) (concluding term "defendant" in Federal Rule of Evidence 609(a)(1) refers only to criminal defendants and suggesting that drafters had inadvertently left out qualification "criminal" defendant); SCALIA, A MATTER OF INTERPRETATION, *supra* note 21, at 20 (recognizing exception from textualism for "'scrivener's error'"); Manning, *supra* note 19, at 116–17.

78. *See* W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 112–16 (1991) (Stevens, J., dissenting) (arguing that Congress is more likely to pass legislation overriding textualist interpretations of statutes and that textualist interpretation is often inconsistent with how Congress intends courts to read statutes); *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, app. I at 424–41, app. III at 415–17, 450–55 (1991) (concluding Congress is more likely to pass legislation to reject textualist Supreme Court decisions); Mank, *supra* note 16, at 1231, 1273 (discussing whether textualist decisions are more likely to be rejected by Congress); Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425, 448–51 (1992) (providing statistical evidence that Congress is more likely to override Supreme Court's decisions applying "plain meaning" interpretation using random sample of eighty Court decisions).

79. *See generally* Eskridge, *supra* note 78.

80. *See* Eisenberg, *supra* note 63, at 38 (arguing that strict textualism should not be applied to statutes that were drafted when it "was not the official methodology for statutory interpretation").

broader purposes or intent behind the statute.[81] Textualist judges consider some types of external context such as dictionaries or related statutes to determine the meaning of words in a statute, but arbitrarily refuse to consult other contextual information such as legislative history that is sometimes more pertinent.[82] For example, Justice Scalia has considered evidence regarding the contemporary meaning of words, including prevailing judicial interpretation of those words, at the time Congress enacted a statute.[83] Conversely, if a statute's text is silent regarding an issue, he generally refuses to consider the broader legal context or framework that may have shaped Congress's assumptions about how courts would interpret the statute.[84]

A. Context Is Essential to Interpretation

Most modern commentators maintain that words do not have a single clear meaning, but rather that a word's meaning changes based on context.[85] While judges still occasionally invoke the plain meaning rule, since the 1940s, most judges have usually interpreted a statute in light of the context in which it was enacted, including contemporary legal and cultural values that may affect the meaning of the words at issue.[86] For example, the Supreme Court has frequently concluded that the meaning of words in statutes depends on their context.[87]

In a few cases, context may be relatively unimportant. Some simple texts have a relatively plain meaning. For example, the Constitution contains the straightforward requirement that the President be at least thirty-five years old.[88] While some scholars have tried to show that there could be multiple meanings to even this requirement,[89] most would agree that the

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81. *See infra* notes 91–93, 157, 177 and accompanying text.

82. *See infra* notes 91–93, 95, 99, 160–164 and accompanying text.

83. *See infra* notes 95, 100–104, and accompanying text.

84. *See infra* notes 111–121, 165–172, 181–183 and accompanying text.

85. *See* Moore, *supra* note 40, at 320 (arguing "plain meaning" rule does not reflect realities of language); Taylor, *supra* note 22, at 355 (same).

86. *See* Popkin, *supra* note 21, at 1170–71.

87. *See, e.g.*, Brown v. Gardner, 513 U.S. 115, 118–119 (1994) (unanimous Court) ("Ambiguity is a creature not of definitional possibilities but of statutory context . . . ."); Smith v. United States, 508 U.S. 223, 229 (1993) ("Language, of course, cannot be interpreted apart from context."); King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991) (unanimous Court) ("[T]he meaning of statutory language, plain or not, depends on context."); Solan, *supra* note 61, at 252 n.61.

88. Popkin, *supra* note 21, at 1140–41.

89. *See* Anthony D'Amato, *Aspects of Deconstruction: The "Easy Case" of the Under-Aged President*, 84 NW. U. L. REV. 250, 250–51 (1989) (suggesting circumstances which might

text can be interpreted based on the ordinary or plain meaning of words in the text.[90]

Although many early textualists sought the "plain meaning" of a statute in its words, more sophisticated textualists are willing to consider contextual evidence as long as it relates to the meaning of the statute's text rather than the subjective intentions of the legislators who enacted the statute.[91] For instance, Justice Holmes, perhaps the most brilliant textualist during the early twentieth century, acknowledged that a legal document "does not disclose one meaning conclusively according to the laws of language."[92] He then suggested that courts should consider contextual evidence about the ordinary meaning of the words in the text. "Thereupon we ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used . . . ."[93]

Similarly, Justice Scalia has acknowledged that statutory language must be read in context.[94] Frequently, Justice Scalia examines related statutes or contemporaneous dictionary definitions to understand the context in which Congress enacted a statute and to ascertain the text's most likely meaning.[95] Accordingly, textualists, like most other judges, consider context when they interpret legal documents. What is controversial about textualism is that textualists often use dictionaries or canons of construction to choose among different possible statutory meanings, but generally decline to evaluate legislative intent or purpose in deciding which interpretation is most appropriate, especially external evidence based on legislative history.[96]

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create uncertainty in applying age of President requirement defined in Constitution); Popkin, *supra* note 21, at 1140–41 (citing age of President in Constitution as issue most commentators believe can be resolved by plain meaning approach).

90. Popkin, *supra* note 21, at 1140–41.

91. *See generally* Taylor, *supra* note 22, at 328–32 (discussing the "original meaning" approach to statutory construction).

92. Holmes, *supra* note 31, at 417; Taylor, *supra* note 22, at 362.

93. Holmes, *supra* note 31, at 417–18; Taylor, *supra* note 22, at 362–63 n.181.

94. *See* Karkkainen, *supra* note 28, at 403, 406–10 (arguing Justice Scalia considers several types of context when interpreting statutes, but not legislative history).

95. *See* Aprill, *supra* note 58, at 281, 321, 330–31, 334–35 (discussing Justice Scalia's use of dictionaries in some cases and external context in others); Buzbee, *supra* note 51, at 174–76 & *passim* (criticizing Justice Scalia's use of related statutes as guide to interpreting ambiguous language in statute where there is no historical evidence Congress intended courts to make such comparisons).

96. *See* Popkin, *supra* note 21, at 1141–42 (criticizing textualism for considering some forms of external context, but refusing to consider legislative history); Taylor, *supra* note 22, at 377–84 (arguing textualists should consider legislative history because a words external context are essential in understanding its meaning).

B. *Internal Context and Related Statutes*

Most judges, both textualists and those applying purposivist or intentionalist methods, consider the internal context of a word based on the relationship of words to other words in close proximity.[97] Modern textualist judges are more willing to acknowledge that a word or phrase in a text may have more than one plausible meaning and that context may affect meaning.[98] In evaluating a statute's internal context, both textualists and non-textualists frequently consider many similar sources such as dictionaries or canons of construction, but textualists generally refuse to consider legislative history.[99]

Justice Scalia often compares the use of a word in one statute to its use in related statutes as a means to determine its most reasonable meaning.[100] In *Smith v. United States*,[101] Justice Scalia in his dissenting opinion argued that a defendant who offered to give an unloaded gun in return for drugs should not be subject to higher penalties for "use" of a gun in a drug trafficking crime.[102] He argued that the "fundamental principle of statutory construction (and, indeed, of language itself) [is] that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used."[103] In *Smith*, Justice Scalia criticized the majority for relying too much on dictionary definitions and instead argued that words must be read in light of external sources, especially the United States Sentencing Guidelines.[104]

There are differences among judges about whether they interpret statutory language in view of everyday speech patterns or more formal grammatical rules.[105] For instance, Justice Stevens interprets statutory

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97. *See* Popkin, *supra* note 21, at 1142–43.

98. *See* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 61 (1994); Merrill, *supra* note 60, at 352; Mank, *supra* note 16, at 1238.

99. *See* Popkin, *supra* note 21, at 1142–43; Solan, *supra* note 61, at 237 & *passim*.

100. *See* Popkin, *supra* note 21, at 1148–52.

101. 508 U.S. 223 (1993).

102. *Id.* at 241–44 (Scalia, J., dissenting).

103. *Id.* at 241 (Scalia, J., dissenting) (quoting Deal v. United States, 508 U.S. 129, 132 (1993)); *see* Manning, *supra* note 19, at 110–11 (discussing Justice Scalia's use of contextual evidence in *Smith v. United States*).

104. *Smith*, 508 U.S. at 242–44 (Scalia, J., dissenting); *see also* SCALIA, A MATTER OF INTERPRETATION, *supra* note 21, at 23–24 (discussing *Smith v. United States* and arguing that a "good textualist" looks for reasonable meaning of a statute rather than literal meaning); Aprill, *supra* note 58, at 319 (discussing Justice Scalia's use of contextual evidence in *Smith v. United States*); Manning, *supra* note 19, at 110–11 (same).

105. *See* Popkin, *supra* note 21, at 1142–48.

language in light of contemporary language usage.[106] By contrast, Justice Scalia presumes that Congress applies strict rules of grammar or legal canons of construction in drafting statutes even if most people would not follow them in ordinary speech.[107] In *Green v. Bock Laundry Machine Co.*,[108] Justice Scalia stated in his concurring opinion:

> The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated – a compatibility which, by a benign fiction, we assume Congress always has in mind.[109]

Justice Scalia assumes that the "whole Congress" is composed of legislators that both use words based on their most common or ordinary usage, and that these legislators are cognizant of related statutes and judicial decisions.[110]

Some commentators have argued that Justice Scalia and some other modern textualists apply a "structural textualist" or "super textualist" methodology that examines the relationship of the statutory language at issue to a larger group of related statutes or "super-text" that are presumed to be part of an integrated body of law to ascertain its meaning even though there is often no historical evidence in the statute's legislative history that Congress intended the statutes to be read as a whole.[111] This approach builds on the traditional "*in pari materia*" canon of statutory interpretation in which judges interpret a statute in light of prior interpretations of related

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106. Popkin, *supra* note 21, at 1142–43.

107. Popkin, *supra* note 21, at 1143–48.

108. 490 U.S. 504 (1989).

109. *Id.* at 528.

110. James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 78 (1994).

111. *See* Buzbee, *supra* note 51, at 174–76 & *passim* (criticizing Justice Scalia's use of related statutes as guide to interpreting ambiguous language in statute where there is no historical evidence Congress intended courts to make such comparisons); Popkin, *supra* note 21, at 1140–52; Taylor, *supra* note 22, at 359–60; Colinvaux, *supra* note 19, at 1133–34; *see also* POPKIN, *supra* note 17, at 183–85 (discussing difficulty of knowing when it is appropriate to read different statutes as though they are one text). However, in *Gustafson v. Alloyd Co.*, Justice Thomas's dissenting opinion suggested that judges should look at neighboring words "only in cases of ambiguity." 513 U.S. 561, 586 (1995) (Thomas, J., dissenting); POPKIN, *supra* note 17, at 182–83 & n.74.

statutes.[112] In *United Savings Ass'n v. Timbers of Inwood Forest Ass'ns*,[113] Justice Scalia stated that statutory interpretation is a "holistic endeavor" in which a judge may need to consult the context of the larger statutory framework.[114] In *United States v. Fausto*,[115] Justice Scalia concluded: "This classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute."[116] In *Bennett v. Spear*,[117] Justice Scalia compared the Endangered Species Act of 1973's citizen suit provision[118] to other statutory provisions for citizen suits, including several environmental statutes enacted after 1973.[119] Justice Scalia has criticized other members of the Court for not examining how a particular statute fits with a broader range of related statutes.[120] Yet Justice Scalia has also warned that the interpretation of a statute should depend upon its meaning when Congress enacted it rather than how subsequent Congresses might prefer to interpret it.[121] There can be a contradiction between textualism's focus on the original meaning of a

112. *See* Buzbee, *supra* note 51, at 221–25 (discussing *in pari materia* canon, especially its use by Justice Scalia); Mank, *supra* note 57, at 550 (same); *see also* POPKIN, *supra* note 17, at 140–42, 184 (discussing Justice Frankfurter's reading statutory meaning from multiple statutes).

113. 484 U.S. 365 (1988).

114. *Id.* at 371.

115. 484 U.S. 439 (1988).

116. *Id.* at 453 (Scalia, J.) (arguing that the Civil Service Reform Act precludes judicial review of disciplinary action against certain federal employees, despite provisions of Back Pay Act to the contrary); Karkkainen, *supra* note 28, at 408–09.

117. 520 U.S. 154 (1997).

118. 16 U.S.C. § 1540(g) (1994).

119. *See* Bennett v. Spear, 520 U.S 154, 164–66 (1997); Buzbee, *supra* note 51, at 180–88 (discussing Justice Scalia's use of environmental statutes in *Bennett* to define scope of Endangered Species Act's citizen suit provision).

120. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 29 (1989) (Scalia, J., concurring in part and dissenting in part) (debating that portions of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and Superfund Amendments and Reauthorization Act ("SARA") should be read together to hold states accountable for damages in private actions concerning hazardous waste sites and criticizing Justice White for reading CERCLA separately from SARA); Karkkainen, *supra* note 28, at 409 & n.24 (discussing Justice Scalia's opinion in *Union Gas* and arguing Justice Scalia is critical of justices who do not consider related statutes when interpreting a statute); Nicholas S. Zeppos, *Chief Justice Rehnquist, the Two Faces of Ultra-Pluralism, and the Originalist Fallacy*, 25 RUTGERS L.J. 679, 694–97 (1994) (discussing Justice Scalia's opinion in *Union Gas* and arguing Justice Scalia's "coherent textualism" that examines entire law is better than Chief Justice Rehnquist's originalist approach to interpretation).

121. *See* W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 101 n.7 (1991) ("The 'will of Congress' we look to is not a will evolving from Session to Session, but a will expressed and fixed in a particular enactment."); POPKIN, *supra* note 17, at 180 (observing that textualists generally focus on original meaning of statute, but arguing judges should consider contemporary understanding of language).

statute and efforts to understand textual meaning in light of related statutes if those statutes were enacted at different times, which is often the case.

Recently, the Court, including some justices who are not generally considered textualists, has considered subsequent related statutes when interpreting the meaning of a prior enacted statute. In *FDA v. Brown & Williamson Tobacco Corp.*,[122] the Court interpreted a 1938 statute, the Food, Drug, and Cosmetic Act (FDCA),[123] in light of several statutes enacted beginning in 1965 to regulate tobacco advertising even though none of the later statutes referred to the 1938 statute.[124] The Court states that "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand."[125] In particular, Justice O'Connor argued:

> In determining whether Congress has spoken directly to the FDA's authority to regulate tobacco, we must also consider in greater detail the tobacco-specific legislation that Congress has enacted over the past 35 years. At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings. The "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." *United States v. Fausto,* 484 U.S., at 453. This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand. As we recognized recently in *United States v. Estate of Romani,* "a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended." 523 U.S., at 530-531.[126]

A number of legal commentators have questioned *Brown & Williamson*'s use of subsequent statutes, including their legislative history.[127] It is possible that *Brown & Williamson* is a peculiar decision

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122. 529 U.S. 120 (2000).

123. *See* 21 U.S.C. §§ 360j(e), 393(b)(2) (1996).

124. *See Brown & Williamson*, 529 U.S. at 137–39, 143–56 (discussing six post-1964 statutes); Buzbee, *supra* note 51, at 219.

125. *Brown & Williamson*, 529 U.S. at 133 (citing United States v. Estate of Romani, 523 U.S. 517, 530–531 (1998); United States v. Fausto, 484 U.S. 439, 453 (1988)).

126. *Id.* at 143 (citing *Estate of Romani*, 523 U.S. at 530–31; *Fausto*, 484 U.S. at 453).

127. *See* Buzbee, *supra* note 51, at 194–200 (criticizing *Brown & Williamson's* use of subsequent legislative history); Manning, *The Nondelegation Doctrine*, *supra* note 60, at 226–228 (observing that *Brown & Williamson*'s use of subsequent legislative developments is "puzzling" in light of Supreme Court's increasingly textualist approach to interpretation).

resting on its own unusual facts and that the Court would be reluctant in other cases to rely so heavily on subsequent legislative developments.[128] Nevertheless, in *Amoco Production Co. v. Southern Ute Indian Tribe*,[129] Justice Kennedy interpreted two statutes governing reservations of mineral rights in light of subsequent statutory developments, stating that "the limited nature of 1909 and 1910 Act reservations is confirmed by subsequent congressional enactments."[130]

Some critics contend that it is often inappropriate to use related statutes as a guide to meaning because such statutes were frequently enacted at different times and there is usually no specific evidence that Congress intended to rely on the meaning of words in those statutes to define the words in other statutes.[131] Many intentionalists would argue that judges should examine the intent of Congress to determine whether it wanted courts to use related statutes to explicate meaning in another statute.[132] Before making interstatutory textual comparisons, courts should carefully evaluate whether a comparison is appropriate in light of the statute's legislative history, the historical content in which Congress enacted the statutes, and relevant judicial precedent.[133]

In *West Virginia University Hospitals v. Casey*,[134] Justice Scalia's majority opinion considered the meaning of similar language in related statutes,[135] but ignored contrary evidence in the statute's legislative history and purpose. Justice Scalia argued that the Court should examine related statutes to find the meaning of an ambiguous statute.[136] He stated: "Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and

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128. *See* Manning, *The Nondelegation Doctrine*, *supra* note 60, at 226–27 (arguing that *Brown & Williamson*'s use of subsequent legislative probably resulted from unstated nondelegation concerns).

129. 526 U.S. 865 (1999).

130. *Id.* at 877–78.

131. *See* Buzbee, *supra* note 51, at 237 (arguing interstatutory references are "prone to judicial abuse" if there are no limits on which statutes may be cross-referenced); Popkin, *supra* note 21, at 1149–50 (criticizing Justice Scalia's assumption that statutes can be compared in the absence of any historical evidence Congress intended such a comparison). Of course, if there were strong evidence that Congress intended another statute to serve as a guide to meaning, then there would be a much stronger case for a judge to consider that material.

132. *See* Popkin, *supra* note 21, at 1149–50.

133. *See, e.g.*, Buzbee, *supra* note 51, at 184–88, 190–93, 225, 248–49 (criticizing Supreme Court and especially Justice Scalia's use of statutory comparisons without adequate consideration of historical context, legislative history or judicial precedents).

134. 499 U.S. 83 (1991).

135. *Id.* at 88–89.

136. *See id.* at 88–89 & n.4 (listing "[a]t least 34 statutes" that "explicitly shift attorney's fees *and* expert witness fees"); Buzbee, *supra* note 51, at 189–90.

comfortably into the body of both previously and subsequently enacted law."[137] In his majority opinion, Justice Scalia concluded that the statutory term "attorney's fees" did not consist of fees for experts by comparing the language of the statute at issue with other statutes that referred to both attorneys and experts.[138] By contrast, in his dissenting opinion, Justice Stevens contended that the Court should have examined both the statute's legislative histories and purpose, stating:

> We should look at the way in which the Court has interpreted the text of *this statute* in the past, as well as *this statute's* legislative history, to resolve the question before us, rather than looking at the text of the many other statutes that the majority cites in which Congress expressly recognized the need for compensating expert witnesses.[139]

Justice Stevens' dissent argued that there was abundant evidence in the legislative history that Congress wanted to provide attorney's fees to civil rights plaintiffs.[140]

C. *External Context*

A more controversial question is to what extent judges should consider the "external context" in which a statute was enacted, including material such as legislative history, prevailing judicial doctrines at the time a statute was enacted, or broader social or cultural issues.[141] Especially if a statute's text is ambiguous, many commentators argue that judges should at least consider the external circumstances in which Congress wrote a statute, including the dominant cultural ideas of the time, contemporaneous definitions of words, and leading judicial doctrines.[142] Professor Sunstein writes:

> [W]ords are not self-defining; their meaning depends on both *culture* and *context*. There is no such thing as a preinterpretive text, and words have no meaning before or without interpretation. Statutory terms are indeterminate standing by themselves. Moreover, they never stand by themselves. They derive their

137. *Casey*, 499 U.S. at 100.

138. *Id.*, 499 U.S. at 86–89 & n.4; Buzbee, *supra* note 51, at 189–90; Popkin, *supra* note 21, at 1149.

139. *Casey*, 499 U.S. at 103 (Stevens, J., dissenting); *see id.* at 103–111; Buzbee, *supra* note 51, at 191; Popkin, *supra* note 21, at 1149.

140. *Casey*, 499 U.S. at 103–11 (Stevens, J., dissenting); Buzbee, *supra* note 51, at 191.

141. Taylor, *supra* note 22, at 362–66.

142. *Id.* at 364–65.

> meaning from the context and their background in the relevant culture.[143]

Likewise, Judge Richard Posner argues, "[N]o text is really 'clear on its face.' . . . A text is clear only by virtue of linguistic and cultural competence."[144] According to Professor Eisenberg, "[P]urposeful words, like those of statutes, have no intelligible meaning out of the context of the applicable legal, social, and historical propositions in which the words were written. Words out of context are like fish out of water—dead or dying."[145]

D. Judicial Context

There are many types of external contexts that a court could consider. For example, a court could consider the cultural or social background in which a statute was enacted to understand the meaning of its text, its intent or purposes.[146] This article next focuses on when judges consider the state of the law at the time a statute was enacted. Courts often consider the predominant legal principles at the time of a statute's enactment when interpreting words or phrases in a statute.[147] The Supreme Court stated in *Astoria Federal Savings & Loan Ass'n v. Solimino*,[148] "Congress is understood to legislate against a background of common-law adjudicatory principles. Thus, where a common-law principle is well-established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply 'except when a statutory purpose to the contrary is evident.'"[149]

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143. SUNSTEIN, *supra* note 25, at 114; *see also* Cass R. Sunstein, *Principles, Not Fictions*, 57 U. CHI. L. REV. 1247, 1247 (1990) (discussing importance of context in interpretation); Taylor, *supra* note 22, at 364–65 (same).

144. Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 190–91 (1986–87); *see also* RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 219–20 (1988) (stating "[W]ords have meaning only by virtue of context."); Taylor, *supra* note 22, at 364–65.

145. Eisenberg, *supra* note 63, at 35.

146. *See* Popkin, *supra* note 21, at 1170–71; Taylor, *supra* note 22, at 362–66.

147. Molzof v. United States, 502 U.S. 301, 307 (1992); Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 786–88 (1991); Nancy Eisenhauer, Comment, *Implied Causes of Action Under Federal Statutes: The Air Carriers Access Act of 1986*, 59 U. CHI. L. REV. 1183, 1192–93 (1992); Sagers, *supra* note 4, at 1388 n.43.

148. 501 U.S. 104 (1991).

149. *Id.* at 108 (citations omitted); *see also* Thompson v. Thompson, 484 U.S. 174, 180–81 (1988) (examining "the context of the [Parental Kidnapping Prevention Act] with an eye toward determining Congress's perception of the law that it was shaping or reshaping"); California v. Sierra Club, 451 U.S. 287, 296 n.7 (1981) (considering historical context relevant but finding none to support respondent's claim); United States v. Wise, 370 U.S. 405, 411 (1962) stating that the "statutes are construed by the courts with reference to the circumstances existing at the

During 1991, in *Blatchford v. Native Village of Noatak*,[150] the Supreme Court addressed an Alaskan native tribe's argument that Eleventh Amendment sovereign immunity was no bar to its claim against the State of Alaska because the federal statute at issue had implicitly abrogated such immunity.[151] In 1989, just two years earlier, the Court had adopted the current standard that "[the] power to abrogate [sovereign immunity] can only be exercised by a clear legislative statement."[152] Nevertheless, the Court examined the state of the law prevailing at the time of the statute's enactment in order to determine whether the enacting Congress had intended to abrogate state sovereign immunity by relying on the pre-1989 legal standard for abrogating sovereign immunity, which was arguably less stringent. The Court presumed Congress was aware of Supreme Court decisions concerning sovereign immunity, even though it was quite possible that many members of Congress were not aware of the prevailing judicial precedent. In *Blatchford*, Justice Scalia stated, "We shall assume for the sake of argument (though we by no means accept) that Congress must be presumed to have had . . . [the Court's previous sovereign immunity decision] in mind as a backdrop to all its legislation."[153] In the end, the *Blatchford* Court found that the contemporary legal context did not provide a clear answer and relied on the clear statement rule,[154] but its willingness to consider context still is significant.[161]

E. Textualism's Selective Use of Context

While they are willing to consider some types of contextual evidence, textualists are often very selective about which sources they will consult. These differences in emphasis are rooted in the differing principles governing the three main approaches to statutory interpretation: textualism,

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time of the passage [of the statute]"); Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 NOTRE DAME L. REV. 861, 888 (1996).

150. 501 U.S. 775 (1991).

151. *Id.* at 786–88. In *Blatchford*, native Alaskan tribes attempted to sue the State of Alaska under a jurisdiction statute granting the tribes access to federal courts. The State argued that the Eleventh Amendment barred the suit. The tribes maintained that the statute implicitly abrogated state sovereign immunity, allowing them to sue the state. *Id.*; *see also* Eisenhauer, *supra* note 147, at 1192 & n.69; Sagers, *supra* note 4, at 1388 n.43.

152. *Blatchford*, 501 U.S. at 786 (citing Dellmuth v. Muth, 491 U.S. 223 (1989)); *see also* Eisenhauer, *supra* note 147, at 1192–93; Sagers, *supra* note 4, at 1388–89 & n.43.

153. *Blatchford*, 501 U.S. at 787; *see also* Eisenhauer, *supra* note 147, at 1192–93; Sagers, *supra* note 4, at 1388–89 & n.43.

154. *Blatchford*, 501 U.S. at 786–88.

155. *See Blatchford*, 501 U.S. at 786–88.

purposivism, or intentionalism.[156] Textualists are more likely to consider contextual evidence, such as dictionaries or related statutes that address the meaning of particular words, than broader contextual evidence relating to statutory intent or purpose.[157] Conversely, purposivists and intentionalists are much more likely to consult the external context of legislative history than textualists to ascertain Congress's intent or purpose in enacting the statute.[158] Nevertheless, structural textualists sometimes examine related statutes to understand the meaning of common words in these statutes, and, therefore, consider external context to some extent.[159] The divisions among the three main schools explain many differences in how judges consider contextual evidence, but individual judges often use more than one approach and cannot always be easily pigeon-holed into these three categories.

Despite their emphasis on the internal relationship among statutory language, textualists sometimes consult external sources in their search for statutory meaning. A dictionary is a form of external context, especially if the focus is on the historical meaning of a word.[160] In *Molzof v. United States*,[161] the Supreme Court addressed the meaning of the term "punitive damages" in the Federal Tort Claims Act.[162] Section 2674 of that Act expressly prohibits awards of punitive damages against the United States.[163]

> To determine whether the damages sought by the *Molzof* plaintiff were "punitive", the Court considered the definition of that term in legal dictionaries in existence at the time the statute was enacted. The Court noted that when Congress uses legal terms of art in statutes, it is presumed to "'know[] and adopt[] the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken . . . .'"[164]

Because they often examine contemporary dictionary definitions from the time a statute was enacted, textualists are in effect considering external context to some extent even if they generally oppose consideration of external contextual evidence.

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156. *See supra* note 17 and accompanying text.
157. *See generally* Colinvaux, *supra* note 19, at 1133–34.
158. *See generally* Colinvaux, *supra* note 19, at 1133–34.
159. *See generally* Colinvaux, *supra* note 19, at 1133–34.
160. *See generally* Colinvaux, *supra* note 19, at 1146.
161. 502 U.S. 301 (1992).
162. 28 U.S.C. §§ 2671– 2680 (1994).
163 *Id.*
164. Sagers, *supra* note 4, at 1388 n.43 (citing *Molzof*, 502 U.S. at 307 (quoting Morissette v. United States, 342 U.S. 246, 263 (1952))) (internal citations omitted).

Beyond using contemporary dictionary definitions, textualists sometimes will consider the historical context in which a statute was enacted to understand the "contemporaneous meaning of textual terms."[165] In *Moskal v. United States*,[166] Justice Scalia, in his dissenting opinion, relied on contemporaneous usage to define the meaning of what is a "falsely made" document for purposes of the federal forgery statute.[167] He stated: "Commentators in 1939 [when the statute was enacted] were apparently unanimous in their understanding that 'false making' was an element of the crime of forgery, and that the term did not embrace false contents."[168] Citing legal dictionaries, he argued that the term "falsely made" had a "specialized legal meaning" different from the layman's definition that he argued that the majority had wrongly used.[169]

Additionally, Justice Scalia has recognized that legislation should be interpreted in light of the "background" legal precedent existing at the time the statute was enacted. In *Holmes v. Securities Investor Protection Corp.*,[170] Justice Scalia in his concurring opinion stated, "Judicial inference of a zone-of-interests requirement, like judicial inference of a proximate-cause requirement, is a background practice against which Congress legislates."[171] At least one commentator has argued that Justice Scalia is more likely to consider external sources in an effort to narrow government power when a dictionary definition would support a broad reading of government power.[172]

In the area of constitutional interpretation, Justice Scalia has been far more willing to consider contextual evidence regarding the meaning of the Constitution's language than he has to consider sources such as legislative history when interpreting statutes.[173] To best determine the original

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165. *See, e.g.*, McCormick v. United States, 500 U.S. 257, 276–80 (1991) (Scalia, J., concurring) (arguing based on contemporaneous usage that the phrase "receipt of money 'under color of right'" in 18 U.S.C. § 1951 does not include taking bribes for purposes of the Hobbs Act); Karkkainen, *supra* note 28, at 440–41; Taylor, *supra* note 22, at 332.

166. 498 U.S. 103 (1990).

167. *Moskal*, 498 U.S. at 122–23 (Scalia, J., dissenting).

168. *Id.* at 125; *see also* Aprill, *supra* note 58, at 320–21; Karkkainen, *supra* note 28, at 440–41.

169. *Moskal*, 498 U.S. at 121–22; *see also* Aprill, *supra* note 58, at 320–21.

170. 503 U.S. 258 (1992).

171. *Id.* at 287 (Scalia, J., concurring) (citation omitted); *see also* Karkkainen, *supra* note 28, at 409.

172. Aprill, *supra* note 58, at 321, 330–31.

173. SCALIA, A MATTER OF INTERPRETATION, *supra* note 21, at 37–38 ("In textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation–though not an interpretation that the language will not bear."); *see also* Aprill, *supra* note 58, at 334 (arguing Justice Scalia's willingness to consider external context in

meaning of the words in the text of the Constitution, he has argued that judges should consult an "unwritten Constitution that encompasses a whole history of meaning in the words contained in the Constitution, without which the Constitution itself is meaningless."[174] Justice Scalia frequently has relied on the contemporaneous meaning of words in the late 18th century when interpreting the Constitution.[175] For example, he stated: "[T]he phrase 'due process of law' would have meant something quite different to a sixteenth-century Tahitian from what it in fact meant to an 18th-century American."[176]

However, in the area of statutory interpretation as opposed to constitutional interpretation, textualists usually try to limit context to issues that directly relate to the meaning of the statutory text rather than potentially broader contextual information such as legislative history that might bring in wider questions of intent or purpose.[177] For example, Justice Scalia's use of context is somewhat narrower in the area of statutory interpretation than constitutional interpretation.[178] Justice Scalia generally "limits the role of statutory context to shedding light on the meaning of specific words."[179] Textualists often use rules or canons of construction to limit the scope of contextual information.[180] While there are undoubted differences between constitutional and statutory interpretation, it is far from obvious that context is less relevant for the latter than the former.

Justice Scalia's use of context is highly selective and arbitrary.[181] If a judge may consult a dictionary listing that often contains multiple

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constitutional interpretation is intellectually inconsistent with his opposition to use of legislative history in statutory interpretation).

174. Antonin Scalia, *Is There an Unwritten Constitution?*, 12 HARV. J.L. & PUB. POL'Y 1, 1 (1989); Taylor, *supra* note 22, at 366.

175. *See, e.g.*, Printz v. United States, 521 U.S. 898, 905 (1997) (Scalia, J.) (relying on contemporaneous understanding of framers); Lee v. Weisman, 505 U.S. 577, 632–36 (1992) (Scalia, J., dissenting) ("[O]ur interpretation of the Establishment Clause should 'compor[t] with what history reveals was the contemporaneous understanding of its guarantees.'") (quoting Lynch v. Donnelly, 465 U.S. 668, 673 (1984)); Karkkainen, *supra* note 28, at 456–57.

176. Scalia, *supra* note 174, at 1 (internal citations omitted).

177. *See generally* Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235, 237.

178. Karkkainen, *supra* note 28, at 456–58; *see also* Popkin, *supra* note 21, at 1137.

179. Popkin, *supra* note 21, at 1137.

180. *See* Karkkainen, *supra* note 28, at 403–04, 428–30, 445–49 (discussing and criticizing Justice Scalia's use of grammatical and structural canons to resolve apparent ambiguities in statutory language); Merrill, *supra* note 60, at 352 (observing that modern textualists contend that their method of examining how ordinary reader of statute would have understood statute's words at time of enactment provides purportedly "objective" method of interpretation); Popkin, *supra* note 21, at 1137; Mank, *supra* note 16, at 1238–39.

181. *See* Aprill, *supra* note 58, at 321, 330–31, 334.

definitions and choose among them, then why cannot a judge also examine a statute's legislative history even if it may contain multiple possible meanings?[182] Judge Patricia Wald has argued that structural textualists are more likely to be influenced by their own biases when they interpret texts because they refuse to consider a statute's legislative history.[183]

Justice Scalia is willing to examine certain types of external context, but excludes others.[184] An important example of Justice Scalia's selective and arbitrary approach to context is his treatment of the legal context in which Congress enacts a statute. In *Holmes* and in *Moskal*, Justice Scalia acknowledged that a statute's text should be read in light of judicial precedent prevailing at the time of its enactment.[185] However, Justice Scalia usually refuses to consider judicial context if a statute's text is silent about an issue, especially where the issue is whether courts should imply a private right of action.

IV. CONTEMPORARY CONTEXT AND IMPLIED RIGHTS OF ACTION

A controversial issue is whether courts should use external context to imply or infer meaning where a statute is silent.[186] In particular, a difficult question is whether courts should imply a private right of action if a statute is silent. For example, if a 1995 court is deciding whether to imply a private right of action for a statute enacted in 1965, should the 1995 court automatically presume congressional intent based on how courts in 1965 viewed implication? Should courts assume that Congress is aware of any significant judicial precedent that exists at the time a statute is enacted that could affect the interpretation of a statute?[187] Instead, should courts

182. *See* Aprill, *supra* note 58, at 321, 330, 334 (criticizing Justice Scalia's selective use of dictionary definitions when multiple definitions are common); Colinvaux, *supra* note 19, at 1146 (criticizing Justice Scalia's selective use of dictionary definitions and refusal to consider legislative history).

183. Wald, *supra* note 62, at 303–05 (suggesting that textualist interpretation is more likely to be influenced by judicial biases because it ignores legislative history); *see also* Taylor, *supra* note 22, at 362.

184. *See* Aprill, *supra* note 58, at 321, 330–31 (arguing Justice Scalia is more likely to invoke external sources in arguing for narrow interpretation of government power).

185. *See* Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 287 (1992) (Scalia, J., concurring); Moskal v. United States, 498 U.S. 103, 122–26 (1990) (Scalia, J., dissenting).

186. *Infra* Parts IV.C.1–D.3.

187. Courts applying the context canon of interpretation generally assume that Congress is aware of Supreme Court decisions. *See, e.g.*, Cannon v. Univ. of Chi., 441 U.S. 677, 696–97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law . . . ."); Siebert v. Conservative Party, 724 F.2d 334, 337 (2d Cir. 1983) ("Congress is presumed to be aware of the judicial background against which it legislates."); Stabile, *supra* note 149, at 889.

examine congressional intent at the time of enactment to determine whether Congress was probably aware that contemporary courts were likely to imply a private right of action?[188] Additionally, if after judicial decisions approving an implied right of action, Congress amends the statute or enacts a related statute and does not disapprove of the court decisions approving the private remedy, is such legislative behavior evidence of congressional intent to allow the implied cause of action by acquiescence or ratification?[189]

Textualists and proponents of purposive methods of statutory interpretation have sharply disagreed about whether courts should liberally imply private rights of action. Justice Stevens, who usually considers a statute's intent and purpose, has consistently maintained that courts have broad inherent common law authority to imply private rights of action.[190] Justice Scalia, however, generally opposes judicial implication of private causes of action because such implication is usually not based on the statute's text and gives judges broad law making powers that are reserved for Congress.[191]

Until recently, courts have generally considered the prevailing legal doctrine at the time a statute was enacted when interpreting it.[192] Before *Sandoval,* the Supreme Court had always at least considered whether Congress had implicitly adopted contemporary legal norms despite a statute's silence.[193] However, in 2001, Justice Scalia's *Sandoval* decision strongly rejected the use of contextual evidence as a basis for implying a private right of action.[194]

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188. *See* California v. Sierra Club, 451 U.S. 287, 299–300 (1981) (Stevens, J., concurring) (arguing Congress that enacted Rivers and Harbors Appropriations Act of 1899 assumed that private parties would have a remedy for any injury suffered by reason of violation of the statute because at the time implication of private causes of action was widely accepted practice at common law and in federal courts); Stabile, *supra* note 149, at 889.

189. *Infra* Part IV.B.

190. Popkin, *supra* note 21, at 1162 n.163; *see generally* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 374–75 (1982); Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 23–24 (1981) (Stevens, J., concurring in part and dissenting in part).

191. Popkin, *supra* note 21, at 1162 n.163; *cf.* Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1109–10 (1991) (Scalia, J., concurring in part) (arguing courts should narrowly interpret implied remedies). *See generally* Thompson v. Thompson, 484 U.S. 174, 188 (1988) (Scalia, J., concurring).

192. *See infra* notes 193–194 and Parts IV.B–D.

193. *E.g.*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 378 (1982) ("In determining whether a private cause of action is implicit in a federal statutory scheme when the statute by its terms is silent on that issue, the initial focus must be on the state of the law at the time the legislation was enacted.").

194. 532 U.S. 275, 286–89, 293 n.8 (2001).

A. *The Rise and Fall of Implied Private Rights of Action*

Before 1964, the Supreme Court rarely allowed a plaintiff to bring an implied cause of action.[195] However, in 1964, the Supreme Court in *J.I. Case Co. v. Borak*,[196] recognized an implied private right of action under the Securities Exchange Act of 1934 (SEC Act).[197] In *Borak*, the Court adopted an expansive approach to implying private rights of action whenever such a remedy would advance the statute's purposes without conflicting with the statute's public enforcement mechanisms.[198] Between 1964 and 1975, the Supreme Court in several cases found an implied private cause of action under various regulatory statutes.[199]

However, during 1975, in *Cort v. Ash*,[200] the Supreme Court refused to imply a private cause of action under a federal statute prohibiting corporations from making contributions or expenditures in connection with presidential elections.[201] More important than its holding regarding that statute, *Cort* announced a four-factor test for deciding whether a private remedy is implicit in a statute that was intended to limit their implication: (1) whether the plaintiff is a member of a class that the statute intends to benefit; (2) whether there is implicit or explicit evidence that Congress intended to grant the proposed private right of action; (3) whether a private right of action would advance the "underlying purposes of the legislative scheme;" and (4) whether the cause of action is one traditionally identified

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195. Cannon v. Univ. of Chi. 441 U.S. 677, 732–35 (1979) (Powell, J., dissenting) (discussing history of Supreme Court decisions allowing or denying private rights of action); Lisa E. Key, *Private Enforcement of Federal Funding Conditions Under § 1983: The Supreme Court's Failure to Adhere to the Doctrine of Separation of Powers*, 29 U.C. DAVIS L. REV. 283, 294 (1996); Bradford C. Mank, *Is There a Private Cause of Action Under EPA's Title VI Regulations?: The Need to Empower Environmental Justice Plaintiffs*, 24 COLUM. J. ENVTL. L. 1, 25–26 (1999).

196. 377 U.S. 426 (1964).

197. *Id.* at 430–33.

198. *Id.* at 433 (stating "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose" expressed by a statute).

199. *See, e.g.*, Rosado v. Wyman, 397 U.S. 397, 401, 420–23 (1970) (implying private right of action in Social Security Act of 1935, as amended in 1967); Allen v. State Bd. of Elections, 393 U.S. 544, 554–57 (1969) (implying private right of action in Voting Rights Act of 1965); Wyandotte Transp. Co. v. United States, 389 U.S. 191, 200–01 (1967) (implying private right of action in Rivers and Harbors Act of 1899); *see* Key, *supra* note 195, at 294–295; Michael A. Mazzuchi, *Section 1983 and Implied Rights of Action: Rights, Remedies and Realism*, 90 MICH. L. REV. 1062, 1073–74 (1992) (observing that between 1964 and 1975 Supreme Court took expansive approach to private rights of action). *But see* Stabile, *supra* note 149, at 866–67 & nn.32 & 34 (contending courts before 1975 were cautious about implying private rights of action, except in securities cases); Mank, *supra* note 195, at 26 & n.155.

200. 422 U.S. 66 (1975).

201. *Id.* at 68–69.

with state law and would a federal cause of action intrude on important state concerns.[202]

Although the Supreme Court probably intended *Cort's* four-part test to limit judicial implication of private rights of action, in the four years after *Cort*, twenty federal appellate decisions implied private actions from federal statutes.[203] However, beginning in the late 1970s, the Supreme Court began to adopt a more restrictive interpretation of the *Cort* standard by emphasizing legislative intent much more than the other three factors and requiring plaintiffs to demonstrate that Congress intended to create a private right of action.[204] Furthermore, the Court has increasingly required textual evidence that Congress intended to establish a private remedy and become less inclined to rely on legislative history to show legislative intent.[205]

B. Pre-Cort Statutes: Using Contemporary Context to Find Private Rights of Action

While *Cort* and subsequent cases have clearly established a more stringent standard for implying a private cause of action, what about statutes that were enacted between 1964 and 1975 when it was common for courts

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202. *Id.* at 78; *see also* Mank, *supra* note 195, at 26–27; Stabile, *supra* note 149, at 867–88 & n.38.

203. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 741–42 (1979) (Powell, J., dissenting) (citing cases).

204. *See, e.g.*, Karahalios v. Nat'l Fed'n of Fed. Employees, Local 1263, 489 U.S. 527, 532–33, 536–37 (1989) (stating courts should concentrate on congressional intent prong in *Cort* when determining whether to imply a private cause of action); Thompson v. Thompson, 484 U.S. 174, 179 (1988) (stating four factors in *Cort* primarily address congressional intent); Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n., 453 U.S. 1, 15, 17–18 (1981) (stating four *Cort* factors are ultimately concerned with congressional intent); California v. Sierra Club, 451 U.S. 287, 292–93 (1981) (same); Univs. Research Ass'n. v. Coutu, 450 U.S. 754, 770, 784 (1981) (same); Transamerica Mortgage Advisers, Inc. v. Lewis, 444 U.S. 11, 15–16, 20, 23–24 (1979) ("[W]hat must ultimately be determined is whether Congress intended to create the private remedy asserted . . . ."); Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979) ("The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law."); Davis v. Passman, 442 U.S. 228, 241 (1979) (*Cort* states the "criteria through which [Congress's] intent could be discerned"); Stabile, *supra* note 149, at 868–71 (arguing Supreme Court beginning in 1979 began shifting away from four-factor *Cort* test to "an exclusive reliance on legislative intent"); Mank, *supra* note 195, at 31–32, 44.

205. *E.g., Karahalios*, 489 U.S. at 533–34 (concluding "neither the language nor the structure of the Act shows any congressional intent to provide a private cause of action to enforce federal employees unions' duty of fair representation"); *Middlesex County Sewerage Auth.*, 453 U.S. at 25 (Stevens, J., concurring in judgment in part and dissenting in part) (contending legislative history rarely provides "affirmative evidence of congressional intent" to establish private remedies that are not explicit in the statute); Mank, *supra* note 195, at 31–32, 44–45.

to imply a private right of action whenever such a right would serve its statutory purposes even where the text of the statute was completely silent on the issue?[206] Should courts automatically presume that Congress between 1964 and 1975 assumed that courts would routinely imply a private right of action? Instead, if there is evidence that Congress relied on judicial implication of private remedies and, therefore, did not bother to include an explicit right of action in a statute, should courts apply the more liberal implication standard prevailing between 1964 and 1975 for statutes enacted during that era?

1. Cannon

In *Cannon v. University of Chicago*,[207] the Supreme Court implied a private right of action under Title IX of the Education Amendments of 1972 because the statute was enacted prior to *Cort*.[208] The *Cannon* Court stated it was appropriate and realistic to "take into account [the] contemporary legal context" in determining whether the Congress that had enacted the statute intended to create a private right of action.[209] In *Cannon*, the plaintiff contended that a medical school receiving federal financial assistance had rejected her application for admission based on her gender in violation of Title IX.[210] While it stated it would normally "adhere to the strict approach followed in . . . recent cases," the Court concluded that its "evaluation of congressional action in 1972 must take into account its contemporary legal context."[211] Between 1964 and 1972, the Supreme Court in six cases had found implied private rights of actions in statutes that contained no explicit evidence of such remedies.[212]

In deciding that a private cause of action could be implied under Title IX, the Court stressed that the Congress that had enacted Title IX was aware of several lower court decisions that had already recognized an implied private right of action under Title VI of the Civil Rights Act of 1964, which

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206. Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 70–73 (1992); *Cannon*, 441 U.S. at 698–99; *see also* Eisenhauer, *supra* note 147 at 1192–93.

207. 441 U.S. 677 (1979).

208. *See id.* at 696–99; Mank, *supra* note 195, at 27–28.

209. *Cannon*, 441 U.S. at 696–99; *see also* Sagers, *supra* note 4, at 1388–90.

210. *Cannon*, 441 U.S. at 680.

211. *Id.* at 698–99.

212. *Id.* at 698 n.23 (citing Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 (1971); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 238 (1969); Allen v. State Bd. of Elections, 393 U.S. 544, 557 (1969); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 414–15 & n. 13 (1968); Wyandotte Transp. Co. v. United States, 389 U.S. 191, 201–02 (1967); J. I. Case Co. v. Borak, 377 U.S. 426, 432 (1964)).

contains language similar to the language of Title IX.[213] The Court stated: "The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years."[214] Because several decisions before Title IX's enactment in 1972 had construed similar language in Title VI to create an implied private right of action and it was reasonable to presume that Congress was aware of these decisions, the Court determined that "[w]e have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination."[215] Additionally, during 1969, in *Allen v. State Board of Elections*,[216] the Supreme Court had interpreted comparable language in § 5 of the Voting Rights Act to authorize a private right of action.[217]

Because Congress explicitly modeled Title IX after Title VI, an important question is whether the *Cannon* Court's use of judicial context was limited to these two related statutes or can be applied more broadly. As will be discussed below, Justices Scalia and Stevens disagree about whether *Cannon* justifies a broad or narrow use of judicial context evidence.[218] Nevertheless, at least some of the reasoning in *Cannon* supports broader application of the context approach. The *Cannon* Court stated as a general proposition that it is reasonable to presume that Congress is generally aware of judicial precedent, and, thus, it is appropriate for courts to consider such contextual evidence:

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213. *Id.* at 696 n.20 (citing Bossier Parish Sch. Bd. v. Lemon, 370 F.2d 847, 852 (5th Cir. 1967); S. Christian Leadership Conference, Inc. v. Connolly, 331 F. Supp. 940, 942–43 (E.D. Mich. 1971); Gautreaux v. Chi. Hous. Auth., 265 F. Supp. 582, 584 (N.D. Ill. 1967)); *see also* Mank, *supra* note 195, at 28–29; Stabile, *supra* note 149, at 891 n.165.

214. *Cannon*, 441 U.S. at 696; *see also* United States v. Alabama, 828 F.2d 1532, 1548 n.63 (11th Cir. 1987) (per curiam); Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 ENVTL. L. 285, 318, 329 (1995); Mank, *supra* note 195, at 28.

215. *Cannon*, 441 U.S. at 703; *see also* Mank, *supra* note 195, at 28.

216. 393 U.S. 544 (1969).

217. *Id.* at 554–57. In *Cannon*, the Supreme Court noted that, "in *Allen v. State Board of Elections*, 393 U.S. 544, [the] Court had interpreted the comparable language in § 5 of the Voting Rights Act as sufficient to authorize a private remedy." *Cannon*, 441 U.S. at 698; Stabile, *supra* note 149, at 891 n.164. Furthermore, the *Cannon* Court stated:

> In fact, Congress enacted Title IX against a backdrop of three recently issued implied-cause-of-action decisions of this Court involving civil rights statutes with language similar to that in Title IX. In all three, a cause of action was found.

Cannon, 441 U.S. at 698 n.22 (citing Sullivan v. Little Hunting Park, 396 U.S. 229; Allen v. State Board of Elections, 393 U.S. 544; Jones v. Alfred H. Mayer Co., 392 U.S. 409).

218. *See infra* notes 273–287 and accompanying text.

> It is always appropriate to assume that our elected representatives, like other citizens, know the law; in this case, because of their repeated references to Title VI and its modes of enforcement, we are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI and that that interpretation reflects their intent with respect to Title IX.[219]

Of course, Congress is more likely to know important judicial precedents than more obscure ones. The *Cannon* Court concluded that it was likely that the Congress that enacted Title IX in 1972 knew about cases that had construed similar language in Title VI and the Voting Rights Act to establish a private right of action.[220] "[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them."[221]

In *Cannon*, even Justice Rehnquist, who has usually disfavored judicial implication of private rights of action,[222] acknowledged in his concurring opinion that during the period when Congress had enacted the major provisions of several titles of the Civil Rights Act, which occurred from 1964 until 1972, the legislature had generally assumed that courts would decide whether a civil rights statute contained an implied private right of

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219. *Cannon*, 441 U.S. at 696–98.

220. *Id.* at 696–709.

221. *Id.* at 699; *see also* Stepanischen v. Merchs. Despatch Transp. Corp., 722 F.2d 922, 924–27 (1st Cir. 1983) (stating that the fact Congress amended § 2 of the Railway Labor Act without removing private cause of action implied by the courts strongly supports the interpretation that Congress did not intend the Act's criminal sanctions to be exclusive); Stabile, *supra* note 149, at 891 n.166. *But see* Health Care Plan, Inc. v. Aetna Life Ins., 966 F.2d 738, 741–42 (2d Cir. 1992) (suggesting that *Curran* and *Cannon* do not support a broad application of the context canon). Occasionally, the Supreme Court has used a statute's context to refuse to imply a private right of action. *See* T.I.M.E. Inc. v. United States, 359 U.S. 464, 474 (1959) (rejecting the implication of a private right of action under the Motor Carrier Act of 1935 because it did "not think that Congress, which we cannot assume was unaware of the holding of the *Abilene* case that a common-law right of action to recover unreasonable common carrier charges is incompatible with a statutory scheme in which the courts have no authority to adjudicate the primary question in issue, intended by the savings clause of § 216(j) to sanction a procedure such as that here proposed"); Stabile, *supra* note 149, at 891 n.166.

222. *See Cannon*, 441 U.S. at 718 (Rehnquist, J., concurring) (arguing courts should encourage Congress to specify whether it intends to authorize private right of action and against liberal judicial implication of such rights); Stabile, *supra* note 149, at 884–85 n.131 (discussing Justice Rehnquist's opposition to judicial implication of private rights of action in his *Cannon* concurrence).

action.[223] Because several Supreme Court and lower court decisions had found implied rights of action in statutes with similar language, it was reasonable for courts to infer that Congress intended to delegate the question to the courts.[224] Justice Rehnquist stated:

> We do not write on an entirely clean slate, however, and the Court's opinion demonstrates that Congress, at least during the period of the enactment of the several Titles of the Civil Rights Act, tended to rely to a large extent on the courts to *decide* whether there should be a private right of action, rather than determining this question for itself. Cases such as *J. I. Case Co. v. Borak,* and numerous cases from other federal courts, gave Congress good reason to think that the federal judiciary would undertake this task.[225]

2. Curran

In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*,[226] the Court similarly observed that for statutes enacted after *Cort* it would require evidence of congressional intent to create an implied right of action, but that it would examine the "contemporary legal context" for statutes enacted prior to *Cort*.[227] In *Curran*, the Supreme Court addressed whether the 1974 amendments to the Commodities Exchange Act (CEA) established an implied private cause of action. Before the enactment of the 1974 amendments to the CEA, lower courts had "routinely and consistently" implied private rights of action under comparable provisions of the CEA.[228] When it reenacted the CEA in 1974, Congress had not questioned these implication decisions.[229] Because prior decisions had already established an implied private right of action under the CEA, the Court determined that it was appropriate to assume that Congress intended to retain private rights of action when it did not disturb them in the 1974 Amendments.[230] To infer

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223. *Cannon*, 441 U.S. at 718 (Rehnquist, J., concurring); Stabile, *supra* note 149, at 891 n.165.

224. *Cannon*, 441 U.S. at 718 (Rehnquist, J., concurring); Stabile, *supra* note 149, at 891 n.165.

225. *Cannon*, 441 U.S. at 718 (Rehnquist, J., concurring) (citations omitted).

226. 456 U.S. 353 (1982).

227. *Id.* at 377–82; *see also* Sagers, *supra* note 4, at 1388–90.

228. *Curran*, 456 U.S. at 379.

229. *See Curran*, 456 U.S. at 378–82; Peter J. Skalaban, Borak *Breathes: Implying a Private Right of Action to Enforce SEC Rule 14A-8*, 61 GEO. WASH. L. REV. 1514, 1527–28 (1993).

230. *Curran*, 456 U.S. at 381–82, 387.

congressional intent, the *Curran* Court emphasized the importance of the legal context in which the 1974 Amendments were enacted:

> In determining whether a private cause of action is implicit in a federal statutory scheme when the statute by its terms is silent on that issue, the initial focus must be on the state of the law at the time the legislation was enacted. More precisely, we must examine Congress'[s] perception of the law that it was shaping or reshaping. When Congress enacts new legislation, the question is whether Congress intended to create a private remedy as a supplement to the express enforcement provisions of the statute. When Congress acts in a statutory context in which an implied private remedy has already been recognized by the courts, however, the inquiry logically is different. Congress need not have intended to create a new remedy, since one already existed; the question is whether Congress intended to preserve the pre-existing remedy.[231]

The Court concluded that Congress intended to preserve prior implication decisions by not rejecting them in the 1974 Amendments: "[T]he fact that a comprehensive reexamination and significant amendment of the CEA left intact the statutory provisions under which the federal courts had implied a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy."[232]

In his dissenting opinion, Justice Powell strongly disagreed with the majority's view that Congress failure to exclude private rights of action was an implicit ratification of lower court decisions finding such remedies.[233] In Powell's view, it was inappropriate for federal courts, which under the Constitution have limited jurisdiction and do not possess general common law authority, to imply a private right of action.[234] Accordingly, under his reasoning, the lower court decisions that had construed the CEA to create an implied private remedy were wrongly decided and the failure of Congress to take affirmative steps to reject such erroneous decisions should not be construed to bind Congress.[235] Most importantly, Justice Powell argued that there was no actual evidence that Congress in its 1974 Amendments intended to approve judicial decisions that had recognized an implied right of action.[236]

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231. *Id.* at 378–79 (footnotes omitted).

232. *Id.* at 381–82; *see also* Skalaban, *supra* note 229, at 1527–28.

233. *Curran*, 456 U.S. at 395–409 (Powell, J., dissenting); Skalaban, *supra* note 229, at 1528 n.98.

234. *Curran*, 456 U.S. at 399 (Powell, J., dissenting).

235. *Id.* at 399–402.

236. *Id.* at 402–09.

As in *Cannon*, an important question is whether *Curran* adopted a narrow or broad approach to the use of contextual evidence. The Court stated that the "initial focus" must be on the state of the law at the time the legislation was enacted."[237] This portion of the opinion suggests that courts should generally consider contemporary context evidence. However, the *Curran* Court also considered more particular evidence concerning Congress's "perception of the law" and whether Congress intended to establish a private right of action.[238] Analyzing Congress's perception of the law or intent in drafting evidence requires more specific evidence of legislative knowledge and intent than simply what the law was on the day the legislature enacted a statute. Accordingly, *Curran* suggests that legal context is simply one piece of evidence that a court considers in gaining a fuller understanding of congressional intent in enacting a statute.[239]

More narrowly, *Curran* emphasized that courts had already recognized a private right of action for comparable portions of the CEA before the 1974 Amendments.[240] As a result, the court stated that the issue was whether Congress intended to preserve an existing remedy rather than create a new one.[241] Accordingly, it is possible to read *Curran* narrowly and limit its scope to situations in which legislative amendments do not reject prior judicial precedent recognizing an implied right of action under the same statute.

C. *Justice Scalia's Rejection of Contemporary Context*

In addressing whether to imply a private right of action, Justice Scalia has argued that the legal context in which a statute was enacted alone is not sufficient to justify implication unless there is further support in the statute's text.[242] Justice Scalia contends that the *Cannon* and *Curran* decisions do not stand for the general proposition that a statute's context is decisive in implying private rights of action.[243] Instead, Justice Scalia maintains that these cases properly implied a private cause of action because courts had construed similar language to create a private right of action and then Congress had enacted the same language in "related

237. *Id.* at 378 (Stevens, J.).
238. *Id.* at 378–79.
239. *See id.*
240. *Id.*
241. *Id.*
242. Thompson v. Thompson, 484 U.S. 174, 189–90 (1988) (Scalia, J., concurring in the judgment).
243. *Id.*

legislation prior to the subject's enactment" or "the same legislation prior to its reenactment."[244]

1. Thompson

In *Thompson v. Thompson*,[245] the Court considered the context in which Congress had enacted the Parental Kidnapping Prevention Act of 1980 (PKPA), although it did not rely solely on contextual evidence in reaching its decision.[246] Citing *Curran*, the Court stated: "We examine initially the context of the PKPA with an eye toward determining Congress's perception of the law that it was shaping or reshaping."[247] Justice Marshall's majority opinion considered the state of the law at the time the statute was enacted regarding whether courts applied the Full Faith and Credit Clause to child custody orders.[248] His opinion used the legal context of the PKPA to conclude "that the principal problem Congress was seeking to remedy was the inapplicability of full faith and credit requirements to custody determinations."[249] The Court also reviewed the PKPA's legislative history and language to confirm that Congress enacted the statute to address the reluctance of courts to be bound by the custody decisions of another state, but did not seek to establish an implied cause of action in federal court to determine which of two conflicting state custody decrees is valid.[250] The Court concluded, "In sum, the context, language, and history of the PKPA together make out a conclusive case against inferring a cause of action in federal court to determine which of two conflicting state custody decrees is valid."[251] While it did not rely solely on contextual evidence, the *Thompson* Court clearly considered legal context in reaching its decision.

In his concurring opinion, Justice Scalia agreed with the majority that the PKPA did not create an implied private right of action, but disagreed with the majority's opinion's on the use of legal context.[252]

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244. *Id.* (citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982); Cannon v. Univ. of Chi., 441 U.S. 677 (1979)); *accord* Health Care Plan, Inc. v. Aetna Life Ins. Co., 966 F.2d 738, 741–42 (2d Cir. 1992) (suggesting that *Curran* and *Cannon* support context analysis only in limited cases).

245. 484 U.S. 174 (1988).

246. *Id.* at 187.

247. *Id.* at 180.

248. *Id.* at 180–81.

249. *Id.* at 181.

250. *Id.* at 181–87.

251. *Id.* at 187.

252. *Id.* at 188–92.

> Finally, the Court's opinion conveys a misleading impression of current law when it proceeds to examine the "context" of the legislation for indication of intent to create a private right of action, after having found no such indication in either text or legislative history. In my view that examination is entirely superfluous, since context alone cannot suffice. We have held context to be relevant to our determination in only two cases—both of which involved statutory language that, in the judicial interpretation of related legislation prior to the subject statute's enactment, or of the same legislation prior to its reenactment, had been held to create private rights of action. Since this is not a case where such textual support exists, or even where there is any support in legislative history, the "context" of the enactment is immaterial.[253]

While Justice Scalia did not write the majority opinion in *Thompson*, his rejection of implication by context has been influential in subsequent cases.

2. Health Care Plan, Inc.

In *Health Care Plan, Inc. v. Aetna Life Insurance Co.*,[254] the Second Circuit agreed with Justice Scalia's view that *Curran* and *Cannon* support only a limited use of the context canon where Congress has amended a statute subsequent to judicial decisions implying a private right of action and there is evidence in the amendments that Congress intends to accept such judicially established remedies.[255]

> In these limited circumstances, the Court will presume congressional intent to preserve a private cause of action without engaging in a *Cort*-type analysis. But in all other situations, we are told to determine whether a private cause of action is implied by applying the law in effect at the time of decision—in this case, a structured inquiry into Congress'[s] intent—rather than the method of analysis that courts applied at the time of a statute's enactment.[256]

In a footnote, the Second Circuit did observe that context can matter if "the contemporary legal context in which Congress legislated has bearing on Congress's intent—rather than on the method of analysis we employ to

253. *Id.* at 189–90 (Scalia, J., concurring) (citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982); Cannon v. Univ. of Chi., 441 U.S. 677 (1979)).

254. 966 F.2d 738 (2d Cir. 1992).

255. *Id.* at 741–42.

256. *Id.* (citing *Curran*, 456 U.S. 353; Herman & Maclean v. Huddleston, 459 U.S. 375 (1983)).

determine that intent . . . ."[257] In other words, the Second Circuit would have considered evidence that Congress was aware of judicial decisions implying a private remedy in similar cases and intended to imply such an action when it enacted a statute; however, the *Health Care Plan* court was unwilling to automatically presume that Congress intended to do so based solely on the time when a statute was enacted.[258]

3. Central Bank

In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*,[259] the Supreme Court may have partially adopted Justice Scalia's textualist approach to contextual evidence by observing that context was an important factor in assessing statutory meaning, but only where the text does not resolve an issue.[260] Yet the *Central Bank* Court also suggested that contextual evidence about the state of the law at the time a statute was enacted is relevant to its interpretation if a statute's intent is not clear from its text.[261] In *Central Bank*, Justice Kennedy's majority opinion held that there was no implied right of action to sue those who allegedly aid or abet securities fraud because the text of section 10(b) of the Securities Act of 1934 clearly prohibits only manipulative or deceitful acts such as making a material misstatement or omission, and does not reach those who aid or abet such violations.[262] Despite its textualist approach to interpretation, the Court observed that in some circumstances it might have been appropriate "to infer how the 1934 Congress would have addressed the issue[s] had the [implied] action been included as an express provision in the 1934 Act."[263] Accordingly, *Central Bank* did not preclude consideration of the "contemporary legal context" in which the statute was enacted, but found context to be less persuasive than text.[264] In *Central Bank*, the Court stated:

> [D]etermining the elements of the 10b-5 private liability scheme, has posed difficulty because Congress did not create a private §

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257. *Id.* at 742 n.5.

258. *Id.*

259. 511 U. S. 164 (1994).

260. *Id.* at 173–80.

261. *See id.* at 173–77.

262. *Id.*

263. *Id.* at 173 (quoting Musick, Peeler & Garrett v. Employers Ins. Of Wausau, 508 U.S. 286, 294 (1993)); Sagers, *supra* note 4, at 1389.

264. *Central Bank*, 511 at 173. Even for statutes enacted before the 1975 *Cort* decision, the Supreme Court has sometimes refused to infer a private right of action. *See, e.g.* Touche Ross & Co. v. Redington, 442 U.S. 560, 575–79 (1979) (pre-1975 statute); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 24 (1979) (same); Sagers, *supra* note 4, at 1389 n.49.

> 10(b) cause of action and had no occasion to provide guidance about the elements of a private liability scheme. We thus have had "to infer how the 1934 Congress would have addressed the issue[s] had the 10b-5 action been included as an express provision in the 1934 Act."[265]

Ultimately, the Court concluded that the statute's text resolved the issue in question, but stated it would have looked at statutory context if the text had not done so.

> Because this case concerns the conduct prohibited by § 10(b), the statute itself resolves the case, but even if it did not, we would reach the same result. When the text of § 10(b) does not resolve a particular issue, we attempt to infer "how the 1934 Congress would have addressed the issue had the 10b-5 action been included as an express provision in the 1934 Act." For that inquiry, we use the express causes of action in the securities Acts as the primary model for the § 10(b) action. The reason is evident: Had the 73d Congress enacted a private § 10(b) right of action, it likely would have designed it in a manner similar to the other private rights of action in the securities Acts.[266]

While *Central Bank* appropriately gave the greatest weight to textual evidence, the decision also suggested that contemporary legal context evidence has independent value, at least where it does not contradict the meaning of the text. Thus, if a statute's text is unclear, *Central Bank* suggests that contemporary legal context evidence could be determinative. Accordingly, the decision supports Justice Scalia's textualist methodology to some extent, but also allows for the consideration of non-textual contextual evidence where the text is not clear. For Justice Scalia, the likely lesson of *Central Bank* is that the Court will avoid considering contemporary legal context evidence if he can convince a majority that the text of the statute at issue has a clear meaning that precludes the possibility of an implied private right of action.

D. Sandoval

In 1964, Congress enacted Title VI of the Civil Rights Act to prohibit federal agencies from providing funding to grant applicants or recipients that discriminate on the basis of race.[267] Under § 602 of the statute, every

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265. 511 U.S. at 173 (citing *Musick, Peeler & Garrett*, 580 U.S. at 294).

266. *Id.* at 178 (citing *Musick, Peeler & Garrett*, 508 U.S. at 294).

267. Section 601 of the statute states that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the

federal agency must issue regulations that define which types of activities result in discrimination, and establish policies for "investigation and assessment of complaints filed with the agency alleging racial discrimination."[268] Since 1964, every federal agency has consistently interpreted § 602 to prohibit funding to applicants or recipients that either commit intentional discrimination or take actions having discriminatory impacts.[269] Relying on statements in *Cannon* that there is an implied right of action under both Title VI and Title IX, during 1983, in *Guardians Ass'n v. Civil Service Commission*,[270] a divided Supreme Court issued a complex opinion that recognized an implied right of action for claims of intentional discrimination under § 601 of Title VI.[271] Additionally, in *Guardians*, a majority of five justices approved the prevailing practice of federal agencies issuing implementing regulations under § 602 that prohibit recipients from actions causing disparate impact discrimination.[272] However, the

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benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 601–605, 78 Stat. 241, 252, 42 U.S.C. § 2000d (2000); Mank, *supra* note 195, at 12 & n.52.

268. 42 U.S.C. § 2000d-1 (2000). *See* Mank, *supra* note 195, at 12.

269. *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 592 n.13 (1983) (White, J.) (observing "every Cabinet department and about 40 federal agencies adopted Title VI regulations prohibiting disparate-impact discrimination"); Sidney D. Watson, *Reinvigorating Title VI: Defending Health Care Discrimination—It Shouldn't Be So Easy*, 58 FORDHAM L. REV. 939, 947–48 (1990) (observing presidential task force in 1964 drafted disparate impact regulations under Title VI that all federal agencies have adopted); Mank, *Private Cause*, *supra* note 195, at 12–13 (same).

270. 463 U.S. 582 (1983).

271. Seven Justices in Guardians agreed that § 601 requires proof of discriminatory intent. *Id.* at 610–11 (Powell, J., concurring, joined by Burger, C.J. & Rehnquist, J.); *id.* at 612–15 (O'Connor, J. concurring); *id.* at 642–45 (Stevens, J. dissenting, joined by Brennan & Blackmun, JJ.); Mank, *supra* note 195, at 14–15; Bradford Mank, *Using Section 1983 To Enforce Title VI's § 602 Regulations*, 49 U. KAN. L. REV. 321, 361–63 (2001) [hereinafter Mank, *Using Section 1983*]. "Justices White and Marshall each argued in dissent that showing disparate impacts was sufficient to prove a violation under Section 601." Mank, *supra* note 195, at 14. *See Guardians*, 463 U.S. at 584 & n.2, 589–93 (White, J.); *id.* at 615, 623 (Marshall, J., dissenting); Mank, *Using Section 1983*, *supra* note 271, at 361–63. *Guardians* clearly established that Section 601 of Title VI creates a private right of action. 463 U.S. at 594–95 (stating that at least eight members of the *Cannon* Court agreed that implied right of action existed under Title VI). *See* Mank, *supra* note 195, at 33–36; Mank, *Using Section 1983*, *supra* note 277, at 363 n.307.

272. *Guardians*, 463 U.S. at 584 (White, J.) (stating that "[t]he threshold issue before the Court is whether the private plaintiffs in this case need to prove discriminatory intent to establish a violation of Title VI . . . and administrative implementing regulations promulgated thereunder. I conclude, as do four other Justices, in separate opinions, the Court of Appeals erred in requiring proof of discriminatory intent"); *id.* at 635–39, 642–45 (Stevens, J., joined by Brennan & Blackmun, JJ., dissenting); *id* at 584 & n.2, 591–95; *id.* at 623, 625–26, 634 (Marshall, J., dissenting); Mank, *supra* note 195, at 14–15, 33–34; Michael Mello, *Defunding Death*, 32 AM. CRIM. L. REV. 933, 965–68 (1995).

Guardians Court never clearly addressed whether there is a private right of action to enforce such regulations.[273]

1. Justice Scalia's Majority Opinion

In *Sandoval*, the crucial issue was whether the Court would imply a private right of action as it had in *Cannon* based on the liberal pre-*Cort* standard or the more stringent recent standard.[274] Prior to the Supreme Court's *Sandoval* decision, every court of appeals to address the issue, including the Eleventh Circuit in the case below, had recognized that citizens have a private right of action under § 602 of Title VI to enforce agency regulations prohibiting disparate impact discrimination against recipients of federal aid.[275] However, in a five-to-four decision, the

273. While five justices in dicta suggested that a private cause of action existed for disparate impact discrimination, they never did so explicitly. *Guardians*, 463 U.S. at 584 n.2, 589–95; *id.* at 635–39 (Stevens, J., joined by Brennan & Blackmun, JJ.); *id.* at 625–26, 634 (Marshall, J.); Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 930 (3d Cir. 1997), *vacated as moot*, 524 U.S. 974 (1998); Mank, *supra* note 195, at 33–36 (discussing whether *Guardians* recognized a private right of action for disparate impact discrimination); Mank, *Using Section 1983*, *supra* note 271, at 363. In *Sandoval*, Justice Scalia's majority opinion concluded that only two justices in *Guardians* had supported a private right of action for disparate impact discrimination, but Justice Stevens' dissenting opinion in *Sandoval* contended that Stevens' dissenting opinion in *Guardians*, which was joined by two other justices, had in fact supported such a right of action and that five justices in *Guardians* had effectively supported a private right of action for § 602 disparate impact claims. *Compare* Alexander v. Sandoval, 532 U.S. 275, 283 n.3 (2001) (Scalia, J., delivering the opinion of the Court) *with id.* at 300 n.6 (Stevens, J., dissenting).

274. Alexander v. Sandoval, 522 U.S. 275, 287–93 (2001).

275. *See, e.g., id.* at 295 n.1 (Stevens, J., dissenting) (citing cases); Sandoval v. Hagan, 197 F.3d 484, 502–07 (11th Cir. 1999), *rev'd*, 532 U.S. 275 (2001); Powell v. Ridge, 189 F.3d 387, 399–400 (3rd Cir. 1999) (holding there is private right of action under § 602 of Title VI to enforce disparate impact regulations), *cert. denied*, 528 U.S. 1046 (1999); Villanueva v. Carere, 85 F.3d 481, 486 (10th Cir. 1996) (citing *Guardians*, court stated that, "[a]lthough Title VI itself proscribes only intentional discrimination, certain regulations promulgated pursuant to Title VI prohibit actions that have a disparate impact on groups protected by the act, even in the absence of discriminatory intent."); New York Urban League Inc., v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995) (citing *Guardians* and *Alexander v. Choate*, 469 U.S. 287, 293 & nn.8–9 and allowing plaintiffs to file a disparate impact claim under Title VI's regulations); City of Chicago v. Lindley, 66 F.3d 819, 827–28 (7th Cir. 1995) (citing *Guardians* and *Alexander*, court recognized private cause of action for disparate impact discrimination under Title VI's regulations); Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1406–07 (11th Cir. 1993) (citing *Guardians* and *Alexander*, the court upheld district court's disparate impacts interpretation of Department of Education's Title VI regulations); United States v. Lulac, 793 F.2d 636, 648–49 & n.34 (5th Cir. 1986) (citing *Guardians* and allowing plaintiffs to seek equitable relief for disparate impact claim under both Title VI and its regulations); Larry P. v. Riles, 793 F.2d 969, 981–82 (9th Cir. 1984) (citing *Guardians*, holding "proof of discriminatory effect suffices to establish liability when the suit is brought to enforce regulations issued

Sandoval Court refused to imply a private right of action to enforce disparate impact regulations promulgated under § 602 of Title VI because it could find no explicit textual or other evidence demonstrating congressional intent to establish a private right of action to enforce disparate impact regulations.[276] Furthermore, Justice Scalia, writing for the majority, interpreted *Cannon* and *Guardians* as establishing a private right of action for claims alleging intentional discrimination only.[277]

Justice Scalia applied the post-*Cort* standard for private rights of action; there must be evidence that Congress intended to create such a right.[278] "Respondents would have us revert in this case to the understanding of private causes of action that held sway 40 years ago when Title VI was enacted."[279] In *Sandoval*, the Court refused to apply *Borak's* purposive approach that asked whether an implied private right of action would advance the statute's purposes without interfering with its public enforcement mechanisms.[280] "Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink."[281]

Because Title VI's text was silent about the issue of private rights of action, Justice Scalia rejected using contemporary legal context to determine whether it was appropriate to imply such a remedy.[282] In response to the United States assertion in its brief that the Court should follow the contemporary context rule and find that courts in 1964 would have implied a private right of action to file disparate impact claims based

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pursuant to the statute rather than the statute itself"); Mank, *supra* note 195, at 35–36 n.209 (citing additional cases); Mank, *Using Section 1983*, *supra* note 271, at 322 n.8 (same). Before the Supreme Court decided *Sandoval*, no Court of Appeals had ever reached a contrary conclusion. *Sandoval*, 532 U.S. at 295 n.1 (Stevens, J., dissenting). *But cf.* New York City Envtl. Justice Alliance v. Giuliani, 214 F.3d 65, 73 (2d Cir. 2000) (implying that the question may not be fully resolved).

276. In *Sandoval*, the Supreme Court did recognize that Title VI and its regulations clearly prohibit intentional discrimination by a recipient against groups protected by the statute and authorize a plaintiff to file a private right of action in federal court to stop such discrimination. *Sandoval*, 532 U.S. at 280–84 ("We do not doubt that regulations applying § 601's ban on intentional discrimination are covered by the cause of action to enforce that section.").

277. *Id.* at 282–84. Justice Stevens disagreed and argued that *Cannon* was not limited to intentional discrimination, but included disparate discrimination. *Id.* at 298 (Stevens, J., dissenting). However, Justice Stevens acknowledged that reasonable jurists could disagree about whether *Cannon* reached disparate impact discrimination. *Id.* at 313 (Stevens, J., dissenting).

278. *Id.* at 286.

279. *Id.* at 287.

280. *Id.*

281. *Id.*

282. *Id.* at 287–88.

on agency regulations under § 602 of Title VI, Justice Scalia stated for the Court:

> Nor do we agree with the Government that our cases interpreting statutes enacted prior to *Cort v. Ash* have given "dispositive weight" to the "expectations" that the enacting Congress had formed "in light of the 'contemporary legal context.'" Only three of our legion implied-right-of-action cases have found this sort of "contemporary legal context" relevant, and two of those involved Congress's enactment (or reenactment) of the verbatim statutory text that courts had previously interpreted to create a private right of action. In the third case, this sort of "contemporary legal context" simply buttressed a conclusion independently supported by the text of the statute. We have never accorded dispositive weight to context shorn of text. In determining whether statutes create private rights of action, as in interpreting statutes generally, legal context matters only to the extent it clarifies text.[283]

The Court applied a textualist approach to inferring congressional intent to establish a private right of action: "We therefore begin (and find that we can end) our search for Congress's intent with the text and structure of Title VI."[284] The Court easily concluded that there was no textual evidence of congressional intent to establish a private right of action for disparate impact claims because Title VI is silent about the issue.[285] Furthermore, the Court rejected the respondents' argument that agency regulations could independently establish an implied right of action.[286] "Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not."[287]

Additionally, the Court determined that subsequent amendments to Title VI did not demonstrate that Congress intended to establish a private cause of action to enforce § 602 even though the legislative histories of those amendments suggest that many members of Congress were aware that lower courts had often implied such remedies.[288] The respondents argued that Congress implicitly ratified lower court decisions recognizing an implied private right of action by not rejecting those decisions when it

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283. *Id.* at 287–88 (citations omitted).

284. *Id.* at 288.

285. *Id.* at 289–91.

286. *Id.* at 291.

287. *Id.*

288. *Id.* at 291–92; Mank, *supra* note 195, at 41–45 (arguing that 1987 Amendments to Title VI did not provide sufficient support for inferring private right of action under § 602 regulations).

amended the statute in 1986 and 1987.[289] The amendments did not directly address private rights of action, and, therefore, the only issue was whether they demonstrated that Congress had acquiesced in judicial implication of such rights.[290] However, the Court rejected the argument that congressional inaction was enough to infer acceptance of such private remedies.[291] Furthermore, Justice Scalia rejected the respondents' assertion that *Curran* had established a clear principle in favor of judicial implication or ratification when Congress amends a statute without rejecting judicial decisions establishing an implied right of action.[292] Even if *Curran* had suggested the Court would infer congressional ratification by silence in some circumstances, Justice Scalia concluded that *Central Bank* had rejected inference by silence.[293]

> Respondents point to [*Curran*], which inferred congressional intent to ratify lower court decisions regarding a particular statutory provision when Congress comprehensively revised the statutory scheme but did not amend that provision. But we recently criticized *Curran*'s reliance on congressional inaction, saying that "[a]s a general matter . . . [the] argumen[t] deserve[s] little weight in the interpretive process."[294]

Accordingly, the Court held that "[n]either as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602. We therefore hold that no such right of action exists."[295]

2. Justice Stevens' Dissenting Opinion

In his dissenting opinion in *Sandoval*, Justice Stevens argued that the Court should apply the liberal standard for inferring private rights of action that existed in 1964 when Congress enacted Title VI.[296] He contended:

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289. *See Sandoval*, 532 U.S. at 291–93 (discussing Rehabilitation Act Amendments of 1986, § 1003, 42 U.S.C. § 2000d-7; Civil Rights Restoration Act of 1987, § 6, 102 Stat. 31, 42 U.S.C. § 2000d-4a).

290. *Id.* at 291–92; Mank, *supra* note 195, at 41–45 (arguing that 1987 Amendments to Title VI did not provide sufficient support for inferring private right of action under § 602 regulations).

291. *Sandoval*, 532 U.S. at 292.

292. *Id.*

293. *Id.*

294. *Id.* (citing Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 165, 187 (1994) (first alteration added)).

295. *Id.* at 293 (footnote omitted).

296. *Id.* at 294 (Stevens, J., dissenting).

> At the time of the promulgation of these regulations, prevailing principles of statutory construction assumed that Congress intended a private right of action whenever such a cause of action was necessary to protect individual rights granted by valid federal law. Relying both on this presumption and on independent analysis of Title VI, this Court has repeatedly and consistently affirmed the right of private individuals to bring civil suits to enforce rights guaranteed by Title VI. A fair reading of those cases, and coherent implementation of the statutory scheme, requires the same result under Title VI's implementing regulations.[297]

Justice Stevens' dissenting opinion argued that the Court's precedent supported an implied right of action under § 602 regulations.[298] He rejected the majority's conclusion that the private right of action established in *Cannon* for both Titles VI and IX was limited to intentional discrimination claims.[299] While *Cannon* did not directly address the issue of whether private rights of action could be based on disparate effects, the underlying claim by the plaintiff in *Cannon* was in fact one of disparate impact despite Justice Scalia's claim to the contrary.[300] His dissent maintained that the holding in *Cannon* applied to *all* discrimination under both Title IX and Title VI.[301] Furthermore, he argued that the *Guardians* decision had at least implicitly recognized a private right of action to enforce § 602 disparate impact regulations.[302] He contended "a clear majority of the [*Guardians*] Court expressly stated that private parties may seek injunctive relief against governmental practices that have the effect of discriminating against racial and ethnic minorities."[303]

Additionally, Justice Stevens' dissent argued that the legislative histories of the two major amendments to Title VI—(1) the Civil Rights Restoration Act of 1987,[304] which expanded the definition of "program" under the statute; and (2) the Rehabilitation Act Amendments of 1986,[305] which

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297. *Id.* at 294 (Stevens, J., dissenting).

298. *Id.* at 293–317.

299. *Id.* at 297–98.

300. *Id.* at 298.

301. *Id.*

302. *Id.* at 298–99.

303. *Id.* at 299 (citing *Guardians*, 463 U.S. at 594–95, 607 (White, J.); *id.* at 634 (Marshall, J., dissenting); *id.*, at 638 (Stevens, J., joined by Brennan and Blackmun, JJ., dissenting). However, Justice Scalia concluded that Justice Stevens' *Guardians* dissent had not explicitly stated that there is a private right of action to enforce disparate impact regulations under § 602 of Title VI. *See supra* note 273 and accompanying text.

304. § 6, 102 Stat. 31 (codified at 42 U.S.C. § 2000d-4a) (2000).

305. § 1003, 100 Stat. 1845 (codified at 42 U.S.C. § 2000d-7) (2000).

explicitly abrogated states' Eleventh Amendment immunity in suits under Title VI—both demonstrated that Congress was aware that courts had implied private rights of action under Title VI and did not seek to change those rights.[306] According to Justice Stevens, Congress's acquiescence in these judicially created rights of action should have been enough to leave these settled rights and expectations in place. "Here, there is no need to rest on presumptions of knowledge and ratification, because the direct evidence of Congress's understanding is plentiful."[307]

Returning to the question of what should be the standard for implying a private right of action, Justice Stevens first contended that *Cannon* had already resolved the issue by concluding that there is a private right under both Title's VI and IX, and that the case offered no distinction between intentional and disparate impact discrimination.[308] While conceding that the majority might legitimately disagree about whether *Cannon*'s holding directly addressed disparate impact claims, Justice Stevens maintained that it was improper for the majority to ignore the *Cannon* Court's reasoning, which emphasized the importance of contemporary legal context as a guide to congressional intent.[309] If it was necessary to decide whether there was a private right of action under § 602 disparate impact regulations, Justice Stevens' dissent argued that context was highly relevant in discerning Congress's statutory intent:

> Similarly, if the majority is genuinely committed to deciphering congressional intent, its unwillingness to even consider evidence as to the context in which Congress legislated is perplexing. Congress does not legislate in a vacuum. As the respondent and the Government suggest, and as we have held several times, the objective manifestations of congressional intent to create a private right of action must be measured in light of the enacting Congress'[s] expectations as to how the judiciary might evaluate the question.[310]

Justice Stevens acknowledged that context was not always determinative: "Like any other type of evidence, contextual evidence may

306. *See Sandoval*, 532 U.S. at 302 n.9 (Stevens, J., dissenting) (discussing legislative history of 1986 and 1987 amendments to Title VI, which show many members of Congress were aware that courts had implied private rights of action under Section 602 disparate impact regulations); *see supra* notes 288–291 and accompanying text.

307. *Sandoval*, 532 U.S. at 303 n.9 (Stevens, J., dissenting).

308. *Id.* at 312–13.

309. *Id.* at 313.

310. *Id.* at 313–14 (citing Thompson v. Thompson, 484 U.S. 174 (1988); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 378–79 (1982); Cannon v. Univ. of Chi., 441 U.S. 677, 698–99 (1979)).

be trumped by other more persuasive evidence. Thus, the fact that, when evaluating older statutes, we have at times reached the conclusion that Congress did not imply a private right of action does not have the significance the majority suggests."[311] Justice Stevens argued there was good reason to infer that the Congress in 1964 assumed that Title VI included a private right of action. When Congress enacted Title VI, courts usually presumed that Congress intended to establish a private right of action "whenever it passed a statute designed to protect a particular class that did not contain enforcement mechanisms which would be thwarted by a private remedy."[312]

Furthermore, Justice Stevens argued that the context rule should also be applied to judicial implication of private rights of action to enforce agency regulations promulgated pursuant to statutory authority:

> Ultimately, respect for Congress'[s] prerogatives is measured in deeds, not words. Today, the Court coins a new rule, holding that a private cause of action to enforce a statute does not encompass a substantive regulation issued to effectuate that statute unless the regulation does nothing more than "authoritatively construe the statute itself." *Ante,* at 284. This rule might be proper if we were the kind of "common-law court" the majority decries, *ante,* at 287, inventing private rights of action never intended by Congress. For if we are not construing a statute, we certainly may refuse to create a remedy for violations of federal regulations. But if we are faithful to the commitment to discerning congressional intent that all Members of this Court profess, the distinction is untenable. There is simply no reason to assume that Congress contemplated, desired, or adopted a distinction between regulations that merely parrot statutory text and broader regulations that are authorized by statutory text.[313]

Justice Stevens criticized the majority's use of *Central Bank* as precedent for its conclusion that a private right of action must be based on the statute itself and not a duly promulgated regulation.[314]

> Only one of this Court's myriad private right of action cases even hints at such a rule. Even that decision, however, does not fully support the majority's position for two important reasons. First, it is not at all clear that the majority opinion in that case simply held that the regulation in question could not be enforced by private

311. *Id.* at 314 n.23 (citation omitted).
312. *Id.* (citation omitted).
313. *Id.* at 314–15 (citations & footnote omitted).
314. *Id.* at 314–15 n.24.

> action; the opinion also permits the reading, assumed by the dissent, that the majority was in effect invalidating the regulation in question. Second, that case involved a right of action that the Court has forthrightly acknowledged was judicially created in exactly the way the majority now condemns. As the action in question was in effect a common-law right, the Court was more within its rights to limit that remedy than it would be in a case, such as this one, where we have held that Congress clearly intended such a right.[315]

By contrast, Justice Stevens contended that there is no reason to believe that the Congress in 1964 sought to limit the rights of those suing under § 602 regulations rather than § 601's text.[316] Quoting his dissenting opinion in *Guardians*, he argued:

> It is one thing to conclude, as the Court did in *Cannon*, that the 1964 Congress, legislating when implied causes of action were the rule rather than the exception, reasonably assumed that the intended beneficiaries of Title VI would be able to vindicate their rights in court. It is quite another thing to believe that the 1964 Congress substantially qualified that assumption but thought it unnecessary to tell the Judiciary about the qualification.[317]

Justice Stevens concluded by criticizing the majority for failing to consider contemporary context evidence that was the most reliable means of ascertaining the probable intent of the Congress that enacted Title VI in 1964 and maintained that the Court's opinion was instead based on a profound distaste for implied private rights of action.[318]

> Like much else in its opinion, the present majority's unwillingness to explain its refusal to find the reasoning in *Cannon* persuasive suggests that today's decision is the unconscious product of the majority's profound distaste for implied causes of action rather than an attempt to discern the intent of the Congress that enacted Title VI of the Civil Rights Act of 1964. Its colorful disclaimer of any interest in "venturing beyond Congress's intent," *ante,* at 287, has a hollow ring.[319]

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315. *Id.* (citations omitted).
316. *Id.* at 315.
317. *Id.* at 315 n.25 (quoting *Guardians*, 463 U.S. at 636 (Stevens, J., dissenting)).
318. *Id.* at 316–17.
319. *Id.* at 317 (citation omitted).

3. Who Had the Better Argument in *Sandoval*?

For many statutes enacted between 1964 and 1975, there is no specific evidence of whether Congress intended to imply a private right of action. Accordingly, a crucial issue is whether courts will consider the liberal application of implied rights of action during this time period. Should courts presume that Congress was aware of the liberal implication standard and that Congress generally intended to accept such private remedies? Conversely, even for statutes enacted during this era, should courts look for more specific evidence that Congress was aware of the liberal implication standard and intended to allow courts to apply it to a specific statute?

Before *Sandoval*, the Supreme Court had always at least seriously considered evidence of contemporary legal context in determining statutory meaning. It is true that the Court had failed to articulate a clear standard for whether contemporary legal context evidence alone is enough to infer a private right of action without additional supporting evidence.[320] Both *Cannon* and *Curran* contain some language suggesting that the Supreme Court will presume that Congress intends to follow existing legal doctrine when it enacts a statute.[321] However, in both cases there was specific evidence that Congress was aware of judicial decisions construing related statutes to contain a private remedy and that Congress likely intended to maintain such rights when they amended the statute or enacted related legislation.[322] Thus, *Cannon* and *Curran* emphasized the importance of contemporary legal context at the time a statute is enacted, but did not clarify how much weight that evidence should have in the interpretation process.[323]

In *Sandoval*, the Supreme Court finally took a clear stand on the role of context, but an unnecessarily restrictive one. Justice Scalia appeared to limit context to situations in which it directly affected textual meaning.[324] For example, the Court might consider context where Congress amended a statute and used or retained language that courts had construed to establish a private right of action.[325] However, the *Sandoval* Court appeared to reject the use of context evidence alone to establish statutory meaning.[326]

While *Curran* and *Cannon* arguably involved cases where Congress had amended or enacted a statute with the direct knowledge that courts had

320. *Supra* Part IV.B.
321. *See supra* notes 213–215, 219–221, 229–231 and accompanying text.
322. *See supra* notes 219–221, 229–231 and accompanying text.
323. *See supra* notes 219–221, 231 and accompanying text.
324. *See supra* Part IV.B.
325. *See supra* notes 230–232, 240–241, 255 and accompanying text.
326. *See supra* notes 283–295 and accompanying text.

already implied a private right of action for related statutory language, Justice Scalia's limitation of context to situations in which legal precedent directly addresses the meaning of specific words in a statutory text goes beyond even a narrow reading of those cases. Even narrowly read, *Curran* and *Cannon* support at least a limited consideration of contemporary legal context in ascertaining Congress's intent in enacting a statute.[327] It is true that textual evidence may in some cases be more persuasive than contextual evidence.[328] Yet there is no support in Supreme Court precedent for ignoring contextual evidence even if it does not directly address the meaning of text.[329] The Supreme Court has never relied on contemporary legal context as the sole basis for statutory interpretation, but it has considered it in conjunction with other non-textual evidence such as legislative history.[330]

By contrast, Justice Stevens' dissenting opinion argued that the *Cannon* Court's implication of an implied right of action for Title IX, in light of lower court decisions finding such a remedy under comparable provisions of Title VI, provided direct precedent for implying a private right of action for the related issue of disparate impact regulations.[331] As far as contemporary legal context is concerned, there is no good basis for distinguishing between private rights of action alleging intentional discrimination and those alleging disparate impact discrimination.[332] For statutes enacted between 1964 and 1975, Justice Stevens persuasively contended that courts should presume that Congress expected, in light of the state of the law at the time, that courts would generally imply a private right of action unless there was contrary evidence suggesting that such a right would interfere with the statute's enforcement scheme.[333] In light of *Cannon's* goal of protecting individual rights under both Titles VI and IX, the *Sandoval* Court should have followed the virtually uniform interpretation of the courts of appeals that there is an implied private right of action under § 602 disparate impact regulations because that is what Congress most likely expected when it enacted the statute in 1964.[334]

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327. *See supra* Part IV.B.

328. *See supra* notes 264, 311 and accompanying text.

329. *See supra* notes 270–277 and accompanying text.

330. *See supra* notes 238–251 and accompanying text.

331. *See supra* Part IV.D.2.

332. *Id.*

333. *Id.*

334. *See supra* note 275 (listing court of appeals decisions implying private right of action under § 602 of Title VI).

V. CONCLUSION

In *Cannon, Curran*, and *Thompson*, the Supreme Court properly recognized the importance of legal context. It is appropriate to assume that Congress is aware of significant judicial decisions when it enacts a statute.[335] Because the Supreme Court liberally inferred private rights of action between 1964 and 1975, courts should presume that Congress intended to allow such remedies for all statutes enacted during that time period unless there is evidence to the contrary in the text or legislative history of a particular statute. While contemporary legal context should not always be the most important factor in statutory interpretation, courts should consider the state of the law at the time of a statute's enactment as a relevant factor in interpreting it.[336] Quite simply, legal context is important in understanding the meaning of any statute.

Unfortunately, the *Sandoval* Court adopted an overly restrictive approach to contextual evidence by limiting its consideration to the explication of text and refusing to evaluate its broader relevance to statutory intent or purpose.[337] Even if a statute's text does not explicitly address an issue, Congress may have intended to follow contemporary legal precedent. Furthermore, congressional inaction in the face of prominent judicial decisions may in fact reasonably suggest that Congress has acquiesced in judge-made interpretations.[338] As Justice Stevens recognized, different judges might disagree about the significance of contextual evidence in any particular case, but courts should always at least consider such evidence in evaluating Congress's probable statutory intent.[339]

Justice Scalia's textualist method of interpretation applies a selective and arbitrary approach to considering contextual evidence.[340] Unfortunately, a majority of the Supreme Court in *Sandoval*, including Chief Justice Rehnquist, Justice O'Connor, Justice Kennedy, and Justice Thomas, adopted the anti-contextual approach to interpretation that Justice Scalia advocated in his *Thompson* concurrence.[341] Justice Thomas frequently takes a textualist approach to interpretation[342] and, has voted with Justice

335. *See supra* notes 217, 219–223 and accompanying text.

336. *See supra* notes 297–319 and accompanying text.

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

338. *Id.* at 302 n.9 (Stevens, J., dissenting).

339. *See supra* notes 309–319 and accompanying text.

340. *See supra* note 14 and accompanying text.

341. *See* Thompson v. Thompson, 484 U.S. 174, 192 (1988) (Scalia, J., concurring); *supra* notes 245–253 and accompanying text.

342. *See supra* note 60 and accompanying text.

Scalia more often than any other justice on the Court.[343] Accordingly, it is not surprising that he joined Justice Scalia in rejecting contextual evidence. Justice Kennedy showed some textualist tendencies when he first joined the Court in 1987, but since the early 1990s he has often considered legislative history as evidence.[344] Nevertheless, Justice Kennedy's majority opinion in *Central Bank* partially adopted Justice Scalia's anti-contextual approach by stating that the Court would consider contextual evidence only where such evidence does not contradict a statute's text.[345] In his *Cannon* concurrence, Justice Rehnquist—now Chief Justice—recognized the importance of context.[346] Perhaps Chief Justice Rehnquist's general opposition to implying private rights of action[347] led him to join the majority in *Sandoval* even though he is by no means a strict textualist.[348] Justice O'Connor is not a textualist, but she has been reluctant to allow implied rights of action in the absence of evidence that Congress intended to establish a specific statutory right for the benefit of a class including the plaintiff.[349] Regrettably, the majority's general reluctance to authorize private rights of action in the absence of specific evidence that Congress intended to

343. During each of his first five Terms on the Court, from the 1991 through the 1995 terms, Justice Thomas voted with Justice Scalia in at least 83 percent of the cases and as many as 88 percent. Eric L. Muller, *Where, But for the Grace of God, Goes He? The Search for Empathy in the Criminal Jurisprudence of Clarence Thomas*, 15 CONST. COMMENT. 225, 235 (1998). Some commentators argue that Justice Thomas has become more independent of Justice Scalia. ANDREW PEYTON THOMAS, CLARENCE THOMAS: A BIOGRAPHY 500, 566 (2001).

344. *See* Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 610 n.4 (1991) (Kennedy, J., joining in the opinion) (considering legislative history); Mank, *supra* note 57, at 532 (observing Justice Kennedy has moved from textualism during late 1980s to considering legislative history during 1990s).

345. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 173 (1994) (Kennedy, J.); *supra* notes 261–263 and accompanying text.

346. *See supra* notes 222–225 and accompanying text.

347. Cannon v. Uni. of Chi., 441 U.S. 677, 718 (1979) (Rehnquist, J., concurring) (arguing courts should encourage Congress to specify whether it intends to authorize private right of action and against liberal judicial implication of such rights); Stabile, *supra* note 149, at 884–85 n.131 (discussing Justice Rehnquist's opposition to private rights of action in his *Cannon* concurrence); *supra* note 222 and accompanying text.

348. *See* Zeppos, *supra* note 120, at 693–97 (contrasting Justice Scalia's textualism with Chief Justice Rehnquist's originalist approach to interpretation); *supra* note 225 and accompanying text.

349. *See, e.g.* Thompson v. Thompson, 484 U.S. 174, 188 (1988) (O'Connor, J., concurring in part and concurring in the judgment); *see also* Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 432–41 (1987) (O'Connor, J., dissenting) (arguing that Court should not enforce agency regulations through § 1983 and should apply similar test under both § 1983 and implied rights of action to limit lawsuits to plaintiffs who can demonstrate Congress intended to create a specific statutory right on their behalf); Mank, *Using Section 1983*, *supra* note 271, at 344–45 (discussing Justice O'Connor's dissenting opinion in *Wright*).

establish such a right led them in *Sandoval* to join Justice Scalia's flawed anti-contextual approach to interpretation.

If contextual evidence is useful in interpreting text, such information is also valuable in understanding a statute's intent or purpose. If contemporary understanding of words in a statute matters, so should the state of the law at the time a statute was adopted. It is possible to consider evidence of contemporary legal context and still be a textualist. One may weigh textual evidence more heavily than non-textual contextual evidence. Yet, there is no good reason to selectively consider context only when it directly bears on textual meaning.