1994

Chief Justice Rehnquist, Pluralist Theory, and the Interpretation of Statutes

Thomas W. Merrill
Columbia Law School, tmerri@law.columbia.edu

CHIEF JUSTICE REHNQUIST, PLURALIST THEORY, AND THE INTERPRETATION OF STATUTES

Thomas W. Merrill*

I. INTRODUCTION

Chief Justice William H. Rehnquist is often viewed as the ultimate "political" judge. According to Mark Tushnet, for example, "[o]ne could account for perhaps ninety percent of Chief Justice Rehnquist's bottom-line results by looking, not at anything in the *United States Reports*, but rather at the platforms of the Republican Party."[1] Nowhere is this attitude more prevalent than with respect to issues of statutory interpretation. When I informed colleagues I was working on an article about Chief Justice Rehnquist's theory of statutory interpretation, the almost universal response was: "What theory?"

Contrary to the common view that Chief Justice Rehnquist is simply a "Republican Chief Justice,"[2] especially in statutory construction cases, I will argue here that his judicial performance largely conforms to a coherent theory of law and politics. There is not a perfect fit between theory and practice: it would be more than a little astonishing if there were, given the practical constraints under which Justices labor, including the need to respect (most) prior majority opinions and to compromise (often) with colleagues in forging new majorities. Still, it is my sense that Chief Justice Rehnquist is far more internally consistent than most Supreme Court Justices, and that the best predictor of his behavior is not the platforms of the Republican Party but an implicit theory of the political system and of the proper role of the judiciary within it.

The underlying theory animating Chief Justice Rehnquist may be described as a species of pluralism. In common with other pluralists, the Chief Justice perceives the political system as one in which

* John Paul Stevens Professor of Law, Northwestern University. The comments of Dean Robert Bennett and the research assistance of Robert Moye are greatly appreciated. Financial support was provided by the Class of 1940 Research Professorship.

1. Mark V. Tushnet, *A Republican Chief Justice*, 88 MICH. L. REV. 1326, 1328 (1990).

2. *Id.* at 1334.

competing groups seek to advance private interests through bargaining and compromise.[3] Within the universe of pluralism, however, there are a number of divergent perspectives, and it is important to specify exactly what kind of pluralist the Chief Justice is. Three factors in particular differentiate his implicit pluralism from other varieties, such as the pluralism embraced by modern public choice scholarship,[4] or the pluralist analysis of contemporary politics employed by republican revival scholars.[5] First, in contrast to most public choice scholars, Chief Justice Rehnquist is generally optimistic rather than pessimistic about the capacity of democratic institutions accurately to aggregate or sum private interests to reach conclusions about proper policy. Second, unlike republican revival theorists, Chief Justice Rehnquist tends to view courts as an extension of the pluralist process, rather than as institutions that function in a qualitatively different fashion than legislatures or agencies. And third, unlike both public choice scholars and the republican revivalists, Chief Justice Rehnquist is skeptical about any claim to objective knowledge of the common good separate and distinct from the outcomes reached through pluralist politics.

Once one understands the particular strain of pluralism that animates Chief Justice Rehnquist, a number of prominent features of his judicial record make more sense. Several commentators have observed that the Chief Justice's opinions and voting record reflect a remarkably consistent hierarchy of values. The earliest analysis along this line was offered by David Shapiro in 1976. He argued that then-Justice

---

3. Succinct discussions of the tenets of pluralism may be found in Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1468-73 (1989); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 32-34 (1985). For a sophisticated exposition by a proponent, see ROBERT A. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT (1968); ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); ROBERT A. DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY (1961).

4. A number of excellent surveys of the implications of public choice theory for legal issues have been done, especially concerning the role of the courts. *See* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE (1991); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991); Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123 (1989).

5. I have in mind here scholars such as Cass Sunstein, who are influenced by pluralism as a descriptive account of modern political reality, but who reject pluralism as a normative model. *See* Sunstein, *supra* note 3. On the republican revival, see generally Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988).

Rehnquist tended to favor claims of order over liberty, claims of states over the federal government, and claims of restriction over expansion of the jurisdiction of federal courts.[6] Seven years later, Robert Riggs and Thomas Proffitt published a study that confirmed a similar pattern using a more statistical approach.[7] Most recently, Sue Davis concluded that Chief Justice Rehnquist ranks "federalism in the highest position in his hierarchy of values, with property rights in second place and individual rights in the lowest position."[8] Although there are differences in emphasis in these accounts, what is striking is the degree of consensus: each of these observers agrees that the Chief Justice, relative to other Justices, tends to place the rights of majorities ahead of the rights of individuals; the rights of states ahead of those of the federal government; and favors a restrictive view of the powers of federal courts.

What is generally lacking from the hierarchy-of-values accounts is any sense that Chief Justice Rehnquist's commitments can be traced back to a coherent theory of politics. By and large, he is presented as someone who just happens to have a particularly strong commitment to federalism, a particularly weak commitment to individual rights, and a particularly jaundiced view of federal courts.[9] In contrast, I will argue

---

6. David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 294 (1976) [hereinafter Shapiro, *Mr. Justice Rehnquist*]; *see also* David L. Shapiro, *William Hubbs Rehnquist*, *in* 5 THE JUSTICES OF THE SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 109-45 (Leon Friedman ed., 1978) (summarizing and updating the conclusions to 1978).

7. Robert E. Riggs & Thomas D. Proffitt, *The Judicial Philosophy of Justice Rehnquist*, 16 AKRON L. REV. 555 (1983).

8. SUE DAVIS, JUSTICE REHNQUIST AND THE CONSTITUTION 32 (1989); *see also* Sue Davis, *Justice William H. Rehnquist*, *in* THE BURGER COURT: POLITICAL & JUDICIAL PROFILES 315, 334 (Charles M. Lamb & Stephen C. Halpern eds., 1991).

9. Sue Davis's monograph is a partial exception to this statement. She argues that Chief Justice Rehnquist's hierarchy of values stems from a philosophy of legal positivism. DAVIS, *supra* note 8, at 21-24. She identifies this philosophy as having three components: a democratic model of American government, *id.* at 24-26; moral relativism, *id.* at 26-28; and a static approach to constitutional interpretation based on the text and intentions of the framers, *id.* at 29-30. The combination of these three tenets leads logically to a "minimal role for the judiciary." *Id.* at 30. I agree that there is a strong strand of legal positivism in Chief Justice Rehnquist's jurisprudence. But I am not persuaded that this is the ultimate source of his hierarchy of values. Legal positivism and a minimal judicial role can explain Justice Rehnquist's tendency to put majoritarian values ahead of individual liberties. But such a commitment to positivism does a poor job of explaining Justice Rehnquist's attachment to States' rights relative to federal rights, and

that once one understands Chief Justice Rehnquist's peculiar brand of pluralism, each of his central value commitments falls into place.

In addition to explaining his enduring value commitments, Chief Justice Rehnquist's pluralism also has important implications for his approach to statutory interpretation. Specifically, one would predict that a pluralist of his stripe would adhere to four general interpretational precepts. First, he would conceptualize the Court's task as being that of the faithful agent of the enacting legislature, asking what a majority of the legislature would have agreed upon if it had confronted the question explicitly. Thus, he would adopt an originalist rather than a dynamic or evolutionary model of interpretation; he would be an intentionalist rather than a textualist; and he would freely refer to legislative history materials insofar as they bear on reconstructing what the majority would have wanted. Second, insofar as interpretational questions present choices between conflicting social policies, he would tend to defer to decisions made by electorally accountable interpreters such as executive branch agencies. Third, in cases that implicate federalism values, he would favor the use of canons of construction that would tilt interpretation toward more localized decisionmaking. And fourth, he would give little weight to claims of stare decisis in matters of statutory construction, at least when such claims conflict with the result obtained using pluralist interpretative techniques.

I will argue that Chief Justice Rehnquist's performance in statutory construction cases generally conforms to the foregoing expectations about the interpretative stance an optimistic pluralist of the type I have described would adopt. Thus, the picture that emerges from the statutory interpretation decisions reinforces the inferences to be drawn from the hierarchy-of-values commentary: Chief Justice Rehnquist is a highly principled jurist animated by a unique form of pluralist political theory.

---

his tendency to cabin the jurisdiction of federal courts. With respect to both of these commitments, commentators have observed that Chief Justice Rehnquist often distorts legal positivist sources (statutes and precedents) in order to reach preferred outcomes. *See* Jeff Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317 (1982); Shapiro, *Mr. Justice Rehnquist*, *supra* note 6. Moreover, even if all three of his central commitments could be derived from legal positivism, this would only pose a further question: what accounts for his commitment to legal positivism? I would submit that the Chief Justice's attachment to positivism, like his other major value commitments, can best be explained by his commitment to a particular form of pluralism.

I will conclude my remarks by contrasting Chief Justice Rehnquist's pluralist approach to questions of legal interpretation with that of Justice Scalia. As is well known, Justice Scalia has emerged in recent years as the energetic champion of a textualist method of statutory interpretation that looks to the language of the statute, related statutes, and dictionary definitions, while vigorously rejecting the use of legislative history. This method is very different from the faithful agent style of interpretation favored by Chief Justice Rehnquist.

What is especially intriguing about the contrast between the interpretative styles of Chief Justice Rehnquist and Justice Scalia is that although Justice Scalia is much more explicit and insistent about his commitments to a particular method of interpretation, it is more difficult to discern a coherent theory of politics underlying Justice Scalia's writings than is the case with respect to the Chief Justice. The variable that appears to be particularly uncertain or unresolved for Justice Scalia is whether he thinks democratic institutions work well or poorly as instruments of government. At one level, his textualism seems to presuppose that legislative acts reflect a kind of imminent rationality. If this is the motivating impulse behind his work, then Justice Scalia would have to be seen as rejecting pluralist theory altogether. In other respects, however, his textualism appears to reflect hostility to legislative processes, and thus could be understood as a response consistent with what a pessimistic pluralist of the public choice variety might espouse. In any event, it is not clear whether Justice Scalia has explicitly derived his legal method from an underlying theory of government, or whether he and his supporters appreciate the deep tensions between his approach and the theory of government that animates the Chief Justice.

II. THE TAXONOMY OF PLURALISM

What does it mean to say that a person is a "pluralist"? A wide variety of thinkers have been given this label, and the term is not used with much precision.[10] Perhaps the key difficulty is the failure to distinguish consistently between positive and normative deployment of pluralist ideas. Quite a few theorists embrace pluralism as a model for describing or understanding contemporary democratic institutions; a

10. *See* Henry S. Kariel, *Pluralism*, *in* 12 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 164 (David L. Sills ed., 1968).

considerably smaller number endorse it as a basis for defining the judicial role within the political system.

I will define pluralism inclusively to refer to any theory that accepts as a descriptive matter that modern democratic politics is characterized by the following features. First, that individuals and groups have divergent interests and values that are largely exogenously determined, in the sense that they are not much influenced by participation in the political process. Second, that the central features of modern democratic institutions, including periodic elections and majority voting, are designed to aggregate or sum these private interests and values. And third, that the aggregating or summing process will tend to produce a public policy based on compromise that does not necessarily reflect a coherent conception of the common good.

Within the universe of pluralist thought that accepts these descriptive propositions, however, several important variations exist. These variations, in turn, will have important implications for the normative posture that any particular pluralist thinker will adopt. Of particular relevance for present purposes are the implications for one's normative conception of the role of the judiciary, both in constitutional cases and in cases that involve questions of statutory interpretation.

One important variable concerns the degree to which a pluralist believes that existing democratic institutions work well or poorly in aggregating private interests. Some pluralists believe that the competition for votes and the compromises needed to produce legislation under a system of majority voting tends to produce a reasonably accurate summation of private preferences—or at least will do a better job of summing than any other governmental arrangement known to exist.[11] I will call these *optimistic* pluralists.

Other pluralists, however, have strong reservations about the capacity of democratic institutions to produce an accurate summing of preferences. These *pessimistic* pluralists, including most modern public choice theorists,[12] emphasize that different groups have different

---

11. The early group theorists in the immediate postwar period fall into this category. *See* WILFRED E. BINKLEY & MALCOLM C. MOOS, A GRAMMAR OF AMERICAN POLITICS (1949); EARL LATHAM, THE GROUP BASIS OF POLITICS (1952); DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION (1951). The early works of Robert Dahl, listed *supra* note 3, also generally fit here. For a recent defense of the optimistic assumption from an economic perspective, see Donald Wittman, *Why Democracies Produce Efficient Results*, 97 J. POL. ECON. 1395 (1989).

12. Elhauge, *supra* note 4, at 35-44. Pessimism is especially pronounced among thinkers associated with the Chicago school of economics. *See, e.g.*, Fred S. McChesney,

abilities to organize for political action, with the result that cohesive minorities may exert more influence than diffuse majorities.[13] In addition, unless most legislators rank preferences in the same order, whatever legislation gets enacted may be determined more by the ability of key players to influence the sequence in which issues are considered, or the committees to which they are assigned, rather than any conclusive manifestation of majority will.[14] For these pessimists, therefore, democratic institutions are not perceived as doing a particularly effective job of summing private interests.

Although it exists at the level of positive analysis, the dichotomy between optimistic and pessimistic pluralism has important normative implications, especially for the judicial role. All other things being equal, an optimistic pluralist is likely to endorse judicial restraint. If one believes the political system consists of compromises between competing private interests, and that modern democratic institutions do a fairly good job of summing these interests, then one is likely to believe that courts should defer to the outcomes reached by these institutions rather than impose their own views.

Pessimistic pluralists, on the other hand, are more likely to entertain the possibility that judicial ordering will improve upon legislative ordering. For example, scholars influenced by public choice theory are likely to advocate greater use of market mechanisms rather than public regulation as a method for summing individual or group interests.[15] Not surprisingly, therefore, some public choice-influenced scholars urge an activist form of judicial review to minimize the scope of government regulation.[16] Other pessimistic pluralists influenced by republican

---

Rent Extraction and Rent Creation in the Economic Theory of Regulation, 16 J. LEGAL STUD. 101 (1987); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J. LAW & ECON. 211 (1976); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. 3 (1971).

13. The literature on interest group influence on legislation is summarized in FARBER & FRICKEY, *supra* note 4, at 12-37. Perhaps the most influential work in this genre is MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

14. *See* FARBER & FRICKEY, *supra* note 4, at 38-62. The key work here is KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951). For a recent work stressing this difficulty, see Kenneth A. Shepsle, *Congress is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

15. *See, e.g.*, Richard A. Epstein, *Modern Republicanism—Or the Flight from Substance*, 97 YALE L.J. 1633, 1640 (1988).

16. *See generally* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY & THE POWER OF EMINENT DOMAIN (1985); STEPHEN MACEDO, THE NEW RIGHT V. THE CONSTITUTION (1986); BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980).

revival theory advocate a more participatory and deliberative form of democracy as an antidote to the perceived failings of pluralist democracy.[17] In either event, the pessimistic pluralist is more apt to call upon courts to take an active role in overturning or modifying the output of democratic institutions.

A second important variable concerns whether the pluralist views courts as being part of the process of pluralist politics or as somehow separate and distinct from that process.[18] Those whom I will call *judicial pluralists* see the courts as simply another pluralist institution in which judges act on exogenously-determined values and reach outcomes based on bargaining and compromise.[19] Others, whom I will call *judicial deliberationists*, see courts as being different from pluralist institutions, and conceive of litigation as a process in which contested policy issues are resolved in a nonpluralist fashion (such as collectively deliberating about the common good).[20]

---

17. *See, e.g.*, Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

18. *Cf.* Elhauge, *supra* note 4, at 67 (arguing that it is critical for public choice theorists to develop a theory of comparative advantage that would explain why courts are less susceptible to rent seeking and cycling than legislatures).

19. Two distinct groups appear to fall in this category. On the one hand, there are the traditional political scientists who believe that the behavior of courts can best be explained as a response to dominant public opinion, especially as reflected in overtly majoritarian institutions such as the legislature. *See, e.g.*, Robert A. Dahl, *Decision-Making in a Democracy: The Role of the Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); Thomas W. Merrill, *A Modest Proposal for a Political Court*, 17 HARV. J.L. & PUB. POL'Y 137 (1994) (citing additional authorities). On the other hand, there are public choice scholars who have applied the insights of the Arrow Theorem, *see supra* note 14, to decisionmaking by multi-member appellate courts. *See, e.g.*, Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982); Matthew L. Spitzer, *Multicriteria Choice Processes: an Application of Public Choice Theory to Bakke, the FCC, and the Courts*, 88 YALE L.J. 717 (1979). Starting from different premises, both groups depict courts as "political" institutions reaching decisions in ways that do not differ qualitatively from the way decisions are reached by legislatures or administrative agencies.

20. Interestingly, law-and-economics literature (the first cousin of public choice theory) contains a version of what I have called judicial deliberationism. This is the theory of the efficiency of the common law, which at least in its Posnerian incarnation posits that common law courts produce efficient decisions because judges consciously or unconsciously seek to reach utilitarian results. *See* RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 50-51 (2d ed. 1983). The most common form of the deliberationist view is found in writing in the republican revival vein. *See, e.g.*, Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145 (1977-78); Frank I. Michelman, *Politics and Values, or What's Really Wrong with Rationality Review?*, 13 CREIGHTON L. REV. 487 (1979); Owen Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073 (1984).

Again, it is not difficult to see how one's position on judicial pluralism versus judicial deliberationism would translate into different attitudes about the judicial role. For the judicial pluralist, having an activist judiciary simply entails substituting one pluralist process for another pluralist process. Instead of having private groups compete for advantage through elections and legislative lobbying, now they compete by funding litigation and seeking to influence the judicial selection and confirmation processes.[21] Since the judicial pluralist sees little reason why the collective action problems in litigation are less significant than those in the legislative process,[22] and little reason to believe that multi-member appellate courts are less susceptible to cycling and agenda manipulation than legislatures,[23] such a pluralist is unlikely to prefer judicial policymaking to legislative and executive policymaking. In contrast, the judicial deliberationist is more apt to endorse judicial activism, since for such a theorist transferring the focus of decisional authority from democratic institutions to courts promises an escape from the collective action and incoherence problems associated with ordinary pluralist politics.

A third important distinction among pluralists (existing directly at the normative level) is whether there is a meaningful concept of the common good separate and distinct from the sum of individual preferences generated by the pluralist political process. Some pluralists, whom I will call *moral skeptics*, think that it is not meaningful to speak of such a common good. For these theorists, any statement about the common good reduces to a statement about the speaker's personal tastes and preferences.[24] Other pluralists, who I will call *moral realists*, believe there is an independent and discernible common good.[25] Such a pluralist is quite willing to criticize the outcomes reached by the political process insofar as they deviate from the outcomes that would be

---

21. *See, e.g.*, Panel Discussion, *The Role of Interest Groups in the Appointment Process*, 84 NW. U. L. REV. 933-82 (1990).

22. *See* Elhauge, *supra* note 4, at 66-87.

23. *Id.* at 101-09; Easterbrook, *supra* note 19.

24. Justice Holmes is a well-known legal figure who often seemed to embrace this kind of skepticism. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). Judge Learned Hand is another. *See infra* note 68.

25. I use "realism" here in the philosophical sense (as in "metaphysical realism"), not the legal realist sense. *See* Michael S. Moore, *The Interpretative Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871 (1989).

generated by a consistent application of the theorist's concept of the common good.[26]

Once again, where one falls on the moral skepticism versus moral realism spectrum will have important implications for one's concept of the proper judicial role. As Einer Elhauge has persuasively argued, one "cannot apply interest group theory to condemn the political process without some independent normative baseline."[27] Thus, skeptical pluralists—those who deny the reality of any such independent normative baseline—will be more inclined to advocate judicial restraint. If there is no meaningful concept of the common good separate and distinct from pluralist bargaining, then there is little basis for believing that society will be better off if it is governed by courts rather than legislatures. On the other hand, moral realists—those convinced of the reality of some normative baseline such as efficiency or equality[28]—are more apt to view the courts as positive instruments of reform. All the moral realist has to do is convince the courts to accept his vision of the common good, and convince them that they have the power to act to implement that vision, and society will be better off than if governed by pluralist compromises.

Obviously, there is considerable interdependence among the foregoing three variables. For example, a moral realist who holds to an objective theory of the common good will more likely be pessimistic about the outcomes of existing democratic institutions than a moral skeptic. The moral realist will have a clear benchmark against which to measure the performance of democratic institutions, and for that reason alone will be more likely to find that performance wanting.

Nevertheless, I do not believe that any of these factors logically entails any other. For example, a moral realist who is a majoritarian—that is, one who believes that the wishes of the majority defines the common good—could be either an optimist or a pessimist about the

---

26. Richard Epstein provides an example of this position from the political right, urging judicial intervention to promote a norm of wealth maximization. *See* Epstein, *supra* note 15. Cass Sunstein provides an example from the political left, urging the use of canons of constructions designed to promote redistributive ends. *See* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION (1990).

27. Elhauge, *supra* note 4, at 58.

28. Elhauge mentions four "normative baselines" that have been adopted by pluralist thinkers: majoritarianism (measuring outcomes by the number of persons who approve); wealth maximization (measuring outcomes by total dollars of societal wealth); utility maximization (measuring outcomes by total utility); and distributive justice (measuring outcomes by whether they bring us closer to an equitable distribution). *Id.* at 58-59.

capacity of existing institutions to realize the will of a majority, and could conceive of the courts as being either pluralist or deliberative institutions.[29]

The different strands of pluralist thought also suggest that there is an ideal typical pluralist who would be maximally inclined toward a modest federal judicial role. This pluralist would be optimistic about the interest-summing powers of the electoral branches, pessimistic about the ability of courts to transcend pluralist politics, and skeptical about the possibility of an objective understanding of the common good. Such a thinker could be called an *ultrapluralist*. On the other hand, one can also imagine an ideal typical pluralist who would be maximally inclined toward an expansive federal judicial role. This pluralist would be pessimistic about the functioning of democratic institutions, would believe that courts are nonpluralist, and would embrace an objective theory of the common good.[30] Virtually all judges and legal theorists probably fall somewhere between these two extremes, or adopt one set of assumptions for one type of issue and other assumptions for other issues. Occasionally, however, one encounters the pure type.

III. CHIEF JUSTICE REHNQUIST AS AN ULTRAPLURALIST

Chief Justice Rehnquist is a pluralist, as I have defined the term.[31] Indeed, he appears to conform very closely to what I have described as the ideal typical pluralist most likely to endorse a modest federal judicial role: an ultrapluralist. That is to say, Chief Justice Rehnquist is optimistic about the interest-summing capacities of legislatures, tends to

---

29. James Madison provides a further illustration of the ways in which these variables can be mixed and matched in different combinations. Madison worried that democratic legislatures would be dominated by factions, and criticized this prospect based on his own ideas of the common good. *See, e.g.*, THE FEDERALIST Nos. 10, 44 (James Madison). But he also opposed judicial review as a solution, preferring instead to try to devise a structure of government that would minimize the dangers of factions. *See* Thomas W. Merrill, *Zero-Sum Madison*, 90 MICH. L. REV. 1392 (1992). Thus, Madison might be described as a pessimistic pluralist who was a moral realist but a judicial pluralist rather than a judicial deliberationist.

30. Since this ideal type does not play a major role in the ensuing analysis, I do not need a name for it. If one were needed, perhaps it could be called Lochnerian pluralism, since the substantive due process jurisprudence of the *Lochner* Court appears to presuppose these features.

31. I am not the first to have made the connection between Rehnquist and pluralist theory, *see* Stephen A. Gardbaum, *Why the Liberal State Can Promote Moral Ideals After All*, 104 HARV. L. REV. 1350, 1359 n.42 (1991), but I am not aware of the point being developed in the literature.

view the judiciary as just another pluralist institution, and is a moral skeptic.

The evidence supporting these assertions includes Chief Justice Rehnquist's extrajudicial writings and inferences that can be drawn from specific positions he has taken while a sitting Supreme Court Justice.[32] Perhaps the best evidence of Chief Justice Rehnquist's ultrapluralism, however, consists of the hierarchy of values reflected in his overall voting record—the preference for order over liberty, for local authority over federal authority, and for a constrained rather than an expansive view of federal court jurisdiction. I shall argue that these basic commitments are all consistent with ultrapluralism. Of course, the fact that an ultrapluralist could embrace these value commitments does not necessarily mean that Chief Justice Rehnquist is motivated by such a philosophy. But taken together with the evidence from his extrajudicial writings and his positions on discrete issues, a fairly convincing case can be made that his performance is grounded in an implicit pluralist political theory of the type I have described.

A. Evidence from Extrajudicial Writings and Judicial Positions

In considering the evidence from Chief Justice Rehnquist's extrajudicial writings and positions on specific issues, I will begin with his moral skepticism, where the evidence is especially strong. Chief Justice Rehnquist's extrajudicial writings contain some very explicit statements of skepticism about the possibility of an objective theory of the common good. Perhaps the best known is a passage from an article entitled *The Notion of a Living Constitution*,[33] where he states explicitly that moral judgments are statements of subjective preference that cannot be proven or disproven through any logical demonstration:

---

32. Although Chief Justice Rehnquist received two masters degrees in political science in the late 1940s (one from Stanford and one from Harvard), I was unable to discover any evidence that might suggest he was influenced directly by early optimistic group theorists who were beginning to be active at that time. *See supra* note 11. The masters thesis he wrote at Stanford is available at that school's library. William H. Rehnquist, Contemporary Theories of Rights (1948) (unpublished M. Pol. Sci. thesis, Stanford University) (copy on file with author). Although this thesis deals with political philosophy and theories of rights, it does not cite any of the group theorists. It is unclear whether Chief Justice Rehnquist wrote a thesis while at Harvard; if he did, it is no longer available at the school's library.

33. William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 704 (1976). *But see* William W. Justice, *A Relativistic Constitution*, 52 COLO. L. REV. 19 (1980) (criticizing the moral relativism of the Texas article).

> Beyond the Constitution and the laws in our society, there simply is no basis other than the individual conscience of the citizen that may serve as a platform for the launching of moral judgments. There is no conceivable way in which I can logically demonstrate to you that the judgments of my conscience are superior to the judgments of your conscience, and vice versa. Many of us necessarily feel strongly and deeply about our own moral judgments, but they remain only personal moral judgments until in some way given the sanction of law.[34]

Chief Justice Rehnquist went on to clarify that he did not mean to say "that individual moral judgments ought not to afford a springboard for action in society, for indeed they are without doubt the most common and most powerful wellsprings for action when one believes that questions of right and wrong are involved."[35] Rather, his point was that the only way to choose between moral judgments in a democratic society is to take a vote, and adhere to the judgment endorsed by a majority.[36]

Chief Justice Rehnquist has drawn a similar conclusion in writing about the Bill of Rights. The only reason the Bill of Rights trumps ordinary legislation, he believes, is because it reflects the will of a supermajority rather than an ordinary majority.[37] Accordingly, there would be nothing illegal, immoral, or improper about a decision by a future supermajority to repeal the entire Bill of Rights.[38]

Further evidence that Chief Justice Rehnquist is a skeptic about theories of the common good is provided by his positions on specific

---

34. Rehnquist, *supra* note 33, at 704.

35. *Id.* at 705.

36. *Id.*

37. William H. Rehnquist, *Government by Cliché*, 45 MO. L. REV. 379, 390-92 (1980).

38. *Id.* This skepticism about the possibility of an objective concept of the common good is not a recently acquired element of Chief Justice Rehnquist's thinking. His masters thesis, written nearly 30 years earlier at Stanford, *see supra* note 32, also contains strong statements of value skepticism. For example, he relies upon the subjectivity of values in support of the proposition that the state should remain neutral as between competing conceptions of the good:

> The fact that the ultimate, and only reliable, source of value judgments is in individuals themselves indicates that the highest moral purpose the state can fulfill is not to adopt or impose any arbitrary theory of morality, but to be itself amoral. To put this another way, the highest end which the state can serve is to serve no end at all, but merely exist as a means for the individuals within it to realize their own ends.

Rehnquist, *supra* note 32, at 73.

issues that have come before the Court.[39] In equal protection cases, for example, he has demonstrated considerable impatience with the requirement that a classification must be shown to have a "legitimate" purpose. He has come close to suggesting that the very fact that a majority of the legislature voted to adopt a classification is sufficient to establish that it has a legitimate end.[40] This of course is exactly the position one would expect a moral skeptic to take. If the only arbiter of the public good is the vote of a majority, then a majority vote should be both necessary and sufficient to establish that an action is "good."

The second element in Chief Justice Rehnquist's pluralist philosophy—his belief that courts are just another form of pluralist institution—is visible in his stewardship of the Supreme Court as its Chief Justice. For example, as Chief Justice he has significantly cut down on the amount of time the Court spends in collective deliberation in conference.[41] His book on the Supreme Court supplies the reason: "I do not think that conference discussion changes many votes."[42] The book's reflections on the role of the conference is most revealing in this light:

> Probably every new justice, and very likely some justices who have been there for a while, wish that on occasion the floor could be opened up to a free-swinging exchange of views with much give-and-take rather than a structured statement of nine positions . . . . [But e]ach of us soon comes to know the general outlook of his eight colleagues, and on occasion I am sure that each of us feels, listening to the eight others, that he has "heard it all before." If there were a real prospect that extended discussion would bring about crucial changes in position on the part of one or more members of the Court, there would be a strong argument for

39. Sue Davis has reviewed Chief Justice Rehnquist's opinions in individual rights cases and concluded he is a moral relativist. *See* DAVIS, *supra* note 8, at 26-28.

40. In the most notorious of these opinions, the Chief Justice said: "[W]here . . . there are plausible reasons for Congress' action our inquiry is at an end . . . . [T]his Court has never insisted that a legislative body articulate its reasons for enacting a statute." United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980); *see also* United States Dep't of Agric. v. Moreno, 413 U.S. 528, 546 (1973) (Rehnquist, J., dissenting); United States Dep't of Agric. v. Murray, 413 U.S. 508, 523 (1973) (Rehnquist, J., dissenting); Jefferson v. Hackney, 406 U.S. 535, 549 (1972).

41. The most dramatic change here is in what used to be called the "long conference," held in the final week of September to dispose of certiorari petitions that have accumulated over the summer recess before the start of a new Term. Under Chief Justice Burger, the September conference lasted five days. Chief Justice Rehnquist cut it down to two days. *See* DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT 53 (1992).

> having that sort of discussion even with its attendant consumption of time. But my sixteen years on the Court have convinced me that the true purpose of the conference discussion of argued cases is not to persuade one's colleagues through impassioned advocacy to alter their views, but instead by hearing each justice express his own views to determine therefrom the view of the majority of the Court.[43]

This sort of attitude, of course, carries with it a kind of self-fulfilling prophecy. Chief Justice Rehnquist is convinced that most minds are made up before conference and hence there is little point in an exchange of views. But truncating the discussion only increases the odds that no one will change their mind. In any event, it is significant that the Chief Justice views the process of collective decisionmaking by the conference in the same pluralist terms commonly used to describe voting in the legislature.

There are other, more subtle ways in which judicial pluralism is revealed by Chief Justice Rehnquist's attitude as a judicial administrator. For example, he defends the practice of sending "join" memoranda to the author of a proposed majority opinion before waiting to read the dissent.[44] In a pluralist world where individuals make up their minds based on exogenous preferences this makes perfect sense; in a world where individuals engage in collective deliberation and have their beliefs and values shaped by dialogue it does not. Justice Rehnquist also confirms that he imposes very short deadlines—"ten days or two weeks"—on his clerks in preparing draft opinions.[45] Clearly, he regards the thoroughness and persuasiveness of an opinion as less important than making sure the trains run on time. Again, the implicit judgment is that other Justices are not likely to be influenced by the legal arguments set forth in a draft opinion, since their minds are already made up.

Chief Justice Rehnquist's judicial pluralism is also evident in his published statements about the sources of influence on Supreme Court decisions. One gets very little sense in these writings that the Chief Justice sees the law as a significant force in shaping the views of the Justices. Instead, he has frankly acknowledged that the Court is influenced by public opinion. Public opinion, he has indicated, shapes the views of the Justices directly, through their contacts with the wider

---

42. WILLIAM H. REHNQUIST, THE SUPREME COURT, HOW IT WAS, HOW IT IS 292 (1987).

43. *Id.* at 294-95.

44. *Id.* at 303.

45. *Id.* at 298.

society.[46] He has suggested that this is desirable, because if a Justice attempted to isolate himself from public opinion, the consequence would be that he would only be "influenced by the state of public opinion at the time he came to the bench."[47]

Public opinion also influences the Court through Presidential appointments. Chief Justice Rehnquist has written approvingly of Presidential efforts to "pack" the Court with individuals "who are sympathetic to his political or philosophical principles."[48] As he explained:

> [T]he manifold provisions of the Constitution with which judges must deal are by no means crystal clear in their import, and reasonable minds may differ as to which interpretation is proper. When a vacancy occurs on the Court, it is entirely appropriate that that vacancy be filled by the President, responsible to a national constituency, as advised by the Senate, whose members are responsible to regional constituencies. Thus, public opinion has some say in who shall become Justices of the Supreme Court.[49]

Chief Justice Rehnquist evidently believes both that Supreme Court decisions are the product of the personal values and attitudes of the Justices, and that public policy should be fixed on the basis of the values of attitudes of the majority. Consistent with these views, he regards it as a good thing that some mechanism exists, however imperfect, for keeping the values and attitudes of the Justices in line with dominant public opinion.

The third element in Chief Justice Rehnquist's pluralism—his optimistic assessment of the capacity of democratic institutions to engage in interest-summing—finds less direct support in his extrajudicial writings. However, the very absence of any discussion of the possible failings of democratic processes is itself significant. Although Chief Justice Rehnquist has acknowledged that majorities can and do oppress minorities,[50] the possibility that minorities might be able to exploit democratic institutions to oppress majorities seems not to have occurred to him. In other words, Chief Justice Rehnquist is largely

---

46. William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751 (1986).

47. *Id.* at 768-69.

48. William H. Rehnquist, *Presidential Appointments to the Supreme Court*, 2 CONST. COMMENTARY 319 (1985).

49. *Id.* at 320.

50. Rehnquist, *supra* note 32, at 55-56.

oblivious of the insights of modern public choice theory. He consistently equates "majority rule" with "the will of the people,"[51] and does not stop to consider the possibility that the relationship between the two may be problematic.

Chief Justice Rehnquist's position on issues that have come before the Court also provides inferential support for the proposition that he is an optimistic pluralist. He consistently urges judges to defer to legislatures where the legislature has resolved a contested policy question. As Sue Davis notes, "His persistent advocacy of a deferential standard of review for classifications based on gender, illegitimacy, and alienage presents a very clear example of his commitment to the democratic model."[52] But this position is not simply a reflection of a Thayerian belief that courts should defer to legislatures on all issues of "reasonable doubt."[53] In circumstances where Chief Justice Rehnquist perceives that Congress has failed to resolve a contested policy question, he has argued that legislation should be declared unconstitutional under the nondelegation doctrine.[54] Such a result would in effect "remand" the issue to Congress to make an explicit choice. The idea that nondelegation doctrine prohibits Congress from ducking controversial policy questions has no clear foundation in the text of the Constitution.[55] Thus, under Thayer's conception of the judicial role, there would be no more basis for enforcing the nondelegation doctrine than for invalidating classifications based on gender or illegitimacy.

Once Chief Justice Rehnquist is seen to be an ultrapluralist, however, there is no inconsistency between his deference to legislative judgments where it *has* resolved contested policy questions and his

---

51. *See, e.g.*, Rehnquist, *supra* note 37, at 392.

52. *See* DAVIS, *supra* note 8, at 63.

53. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). *See generally* Symposium, *One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 NW. U. L. REV. 1 (1993) (discussing different dimensions and implications of Thayer's theory of judicial review).

54. *See* American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 543 (1981) (Rehnquist, J., dissenting); Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring).

55. It is true that the Constitution creates three branches of government, and vests "all Legislative Powers herein granted" to the Congress. U.S. CONST. art. I, § 1. But the Constitution does not prohibit Congress from enacting statutes that duck serious policy questions by granting enforcement authority to executive agencies (or courts) in broadly-worded or ambiguous terms. The nondelegation doctrine posits that a line can be drawn between permissibly and impermissibly vague grants of enforcement authority, a line the Court has never succeeded in defining. *See* Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 246-47.

refusal to defer in cases where the legislature has *failed* to resolve such questions. Both positions are consistent with a belief that the best institutions to resolve conflicting policy questions are democratic legislatures. It is precisely because of his faith in the efficacy of pluralist summing by legislatures that Chief Justice Rehnquist would force legislatures to make controversial decisions rather than allow them to be determined by agencies or courts.

B. The Hierarchy of Values

Perhaps even more telling evidence of Chief Justice Rehnquist's ultrapluralist philosophy is provided by the hierarchy of values other commentators have perceived in his judicial record. I will take the following propositions about Chief Justice Rehnquist's value commitments to be established:[56] (1) he prefers claims of order over claims of liberty or individual right; (2) he prefers claims of state and local governments over claims of federal authority; and (3) he prefers to restrict the jurisdiction and powers of the federal courts. Each of these value commitments is consistent with the ultrapluralist philosophy I have described.

Consider first his preference for order over liberty. This is exactly what one would expect from pluralist who is optimistic about the capacities of democratic institutions to aggregate disparate private interests, who regards the judiciary as just another pluralist institution, and who is skeptical about theories of an objective common good. Claims for order tend to be majoritarian. They are typically embodied in legislation or in administrative action taken by actors accountable to an elected executive. Claims for liberty, in contrast, tend to be advanced by dissenting minorities seeking judicial protection. Given that Chief Justice Rehnquist believes that democratic institutions accurately sum individual preferences, it makes sense that he should prefer majoritarian outcomes: they are more likely to reflect an accurate weighing of majority and minority interests than any other outcome. This impulse is reinforced by the proclivity of partisans of liberty to frame arguments in terms of theories of natural right that Chief Justice Rehnquist finds lacking in any objective foundation. Finally, since he views the judicial process as an extension of pluralist politics, judicial endorsement of

56. This consensus view of Chief Justice Rehnquist's hierarchy of values is distilled from Shapiro, Riggs and Proffitt, and Davis. *See supra* notes 6-8 and accompanying text.

claims of liberty simply involves replacing one pluralist outcome with another, less reliable, pluralist outcome.

Chief Justice Rehnquist's consistent preference for claims of state and local governments over claims of federal authority[57] also can be derived from ultrapluralism. Although an optimistic pluralist believes that democratic institutions generally reach results that reflect the greatest good of the greatest number, such a process always generates pools of winners and losers. One of the strengths of federalism (or of decentralized decisionmaking in any form) is that in a world governed by majoritarian decisionmaking, the greater the number of jurisdictions into which pools of competing groups are divided, the larger the net sum of winners over losers will be.[58]

The point can be demonstrated by illustration. Suppose there is a single political jurisdiction, and within that jurisdiction one group of individuals wants to permit smoking in public places, and another group wants to prohibit it. If there are 110 smokers and ninety nonsmokers, then the smokers will prevail and there will be a rule permitting smoking. The net sum of winners over losers is twenty. Now suppose that the same two hundred citizens are divided into two jurisdictions, each containing one hundred citizens. It is possible that each jurisdiction will contain fifty-five smokers and forty-five nonsmokers, and the same net sum of winners over losers will result. But if the distribution of preferences is skewed in any way between the two jurisdictions, the net sum of winners over losers will increase. For example, if Jurisdiction *A* has sixty-five smokers and thirty-five nonsmokers, and Jurisdiction *B* has forty-five smokers and fifty-five nonsmokers, then *A* will permit smoking and *B* will prohibit smoking. The total number of winners will now be sixty-five plus fifty-five, or 120, and the total number of losers thirty-five plus forty-five, or eighty. The net sum of winners over losers is now forty.

---

57. As Sue Davis has written: "Rehnquist seems to assume that small units of government, those closest to the people, will most likely reflect the will of the majority. Thus, state laws, which most closely resemble the ideal of the democratic model, are to be highly valued." DAVIS, *supra* note 8, at 34. For further documentation of Chief Justice Rehnquist's strong preference for state and local solutions, see Powell, *supra* note 9.

58. *See* ALBERT BRETON, THE ECONOMIC THEORY OF REPRESENTATIVE GOVERNMENT 114 (1974); Bhajan S. Grewal, *Economic Criteria for the Assignment of Functions in a Federal System, in* ADVISORY COUNCIL FOR INTER-GOVERNMENTAL RELATIONS, TOWARDS ADAPTIVE FEDERALISM 1, 8 (1981). The illustration that follows in the text is adapted from Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1494 (1987).

Generalizing from this point, in a pluralist world where we assume that outcomes accurately reflect majority will, the larger the number of jurisdictional units, the larger the surplus of winners over losers. On this basis alone, an ultrapluralist would logically prefer that governmental decisions be made at the most decentralized level possible. When one adds to this insight the prospect that decentralization will induce migrations of voters to jurisdictions that more closely reflect their individual tastes and preferences,[59] the pluralist case for federalism is even more compelling.

This account overlooks many complexities, such as interjurisdictional spillovers and the possibility that decentralized decisionmaking will lead to a regulatory race to the bottom.[60] But for an optimistic pluralist like Chief Justice Rehnquist, who is largely innocent of the insights of public choice theory, these difficulties may not loom large. In any event, even if such a pluralist recognized that exceptions exist, this would not detract from the force of the general point, which should be sufficient to establish at least a presumptive rule in favor of localized, rather than centralized, decisionmaking.

Finally, Chief Justice Rehnquist's consistent preference for restrictions on federal court jurisdiction and powers can also be derived from his specific brand of ultrapluralism.[61] For such a pluralist, the proper function of federal courts is to enforce federal law as agreed upon by legislative majorities (in the case of statutes) or supermajorities (in the case of constitutional provisions).[62] To the extent that federal courts go beyond these functions, as they will constantly be asked to

---

59. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

60. *See* Richard Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race to the Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).

61. For an elaboration on the theme that Chief Justice Rehnquist has consistently sought to restrict federal judicial power, see William V. Luneburg, *Justice Rehnquist, Statutory Interpretation, the Policies of Clear Statement, and Federal Jurisdiction*, 58 IND. L.J. 211 (1982).

62. Note that the proper performance of these functions requires a degree of judicial independence from the political branches. Chief Justice Rehnquist thus recognizes the need for an independent judiciary. For example, he has expressed relief over the failure of the 1804 impeachment of Justice Samuel Chase, because this episode established that federal judges could be not be impeached because of congressional disagreement with their decisions. WILLIAM H. REHNQUIST, GRAND INQUESTS 10, 118-119, 275-78 (1992). As he notes, the absence of any tradition supporting impeachment for ideological reasons "surely contributed as much to the maintenance of our tripartite federal system of government as any case decided by any court." *Id.* at 278.

do,[63] they will perform as just another pluralist institution. In the absence of a majority vote on the issue, however, there is no objective basis for approving or disapproving the courts' decisions or ascertaining whether they advance the common good. It follows that allowing more decisions to be made by federal courts simply substitutes decisionmaking by a defective pluralist institution—one which is imposing its own parochial and subjective idea of the good—for decisionmaking by better pluralist institutions. To minimize this danger, the ultrapluralist follows a presumptive rule of always construing the jurisdiction and powers of the federal courts narrowly.

It is important not to overstate the extent to which Chief Justice Rehnquist's hierarchy of values conforms to what one would predict from an ultrapluralist. Certain anomalies remain. For example, Chief Justice Rehnquist appears to be somewhat sympathetic to claims that state and local governments have engaged in an uncompensated taking of property.[64] Presumably, a thoroughgoing ultrapluralist would have little sympathy for takings claims—which, after all, are claims of individual rights grounded in federal law that frustrate outcomes adopted by local legislative majorities. To be sympathetic to takings claims, a judge must harbor some suspicion of local democratic institutions,[65] and have some degree of faith in the capacity of courts to define property rights independently of the definition implicitly adopted by local authorities. To be sure, Chief Justice Rehnquist is at best only a sometime enthusiast for the Takings Clause, and has written opinions rejecting takings claims that conflict with state and local policies.[66] Still, the fact that he is at least a mild takings enthusiast (relative to some other Justices) is some evidence that his faith in the interest-summing capacities of state and local legislatures has its limits.

---

63. *See* Rehnquist, *supra* note 33.

64. For example, Chief Justice Rehnquist joined the majority opinions in Lucas v. South Carolina Coastal Comm'n, 505 U.S. __, 112 S. Ct. 2886 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran v. County of L.A., 482 U.S. 304 (1987). He authored dissents in two other prominent takings cases. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 506 (1987) (Rehnquist, C.J., dissenting); Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 138 (1978) (Rehnquist, J., dissenting).

65. I discuss the relationship between optimism and pessimism about politics and one's attitude toward the Takings Clause in Thomas W. Merrill, *Rent Seeking and the Compensation Principle*, 80 NW. U. L. REV. 1561, 1584-85 (1986).

66. *See* Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989); Pruneyard Shopping Ctr. v. Robins, 447 U.S. 79 (1980).

IV. IMPLICATIONS FOR STATUTORY INTERPRETATION

One shortcoming of the hierarchy-of-values accounts of Chief Justice Rehnquist's judicial record is their focus on constitutional decisions, where issues of individual rights, federalism, and the scope of federal court jurisdiction loom largest. The negative implication may be that there is nothing remarkable about Chief Justice Rehnquist's statutory interpretation decisions—that he adopts a conventional pragmatic or ad hoc "political" approach to such issues. Once we see that Chief Justice Rehnquist's value commitments can all be derived from a particular version of pluralism, however, it is also possible to see that this ultrapluralism should generate presumptive guidelines for statutory interpretation. Specifically, I will argue that four general guidelines follow from the tenets of the ultrapluralist theory I have ascribed to Chief Justice Rehnquist.

First and most fundamentally, one would expect the general question in every case of statutory interpretation to be: what was the "deal" struck by Congress when it adopted this particular piece of legislation? This follows from the general pluralist premise that legislation reflects compromise between competing private interests, coupled with the ultrapluralist understanding that this process generally produces an accurate summing of those interests. On these assumptions, legislation should be viewed as a negotiated bargain—and most likely a good one at that. The proper role of the court is to try to figure out what exactly was agreed upon, and to enforce that understanding.

This, of course, is the conception of statutory interpretation advanced in early law and economics literature, where the proper posture of the court was depicted as being that of the faithful agent carrying out the "deal" that was agreed upon by the contesting factions in the legislature.[67] As developed most fully by Judge Posner, the

---

67. *See* William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J.L. & ECON. 875 (1975); Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983). More recently, as law-and-economics scholars have become increasingly influenced by public choice theory, the normative appeal of the faithful agent model has been called into question. *See, e.g.*, Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983) [hereinafter Easterbrook, *Statutes' Domains*]; Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: an Interest Group Model*, 86 COLUM. L. REV. 223 (1986). For example,

proper inquiry for such a faithful agent is to ask the counterfactual question: what would a majority of the legislature have decided upon if it had expressly attended to the issue of statutory interpretation? Thus, the bargain-enforcing faithful agent tries to put himself into the shoes of the enacting legislators, and to predict how *they* would have decided the question if they had focused on it directly.[68]

What implications does such a faithful agent conception have for the major issues of controversy in the world of statutory interpretation: originalism versus presentism, intentionalism versus textualism, and the role of legislative history? Because the process of interpretation is seen as carrying out the wishes of the enacting legislature, the faithful agent would clearly be an originalist. Statutes must be given the meaning they had when the legislative command was issued. Any notion of presentism, dynamic, or evolving interpretation[69] would be anathema.

Similarly, the orientation of the faithful agent is intentionalist rather than textualist. The role of the interpreter under the faithful agent model is to ascertain, as best possible, how the enacting legislature would have decided the issue if it had been addressed directly. This is another way of saying that the interpreter is trying to discover "legislative intent."[70]

Judge Posner has apparently abandoned the agency model in favor of what he calls "pragmatism." *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 270 (1990). Judge Easterbrook has also endorsed textualism. *See* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 62 (1988). Since the Chief Justice does not share public choice theory's pessimism about democratic institutions, for him the proper posture of the court in cases of statutory interpretation should be that of the faithful agent.

68. The foremost judicial proponent of this "counterfactual" approach to statutory interpretation is probably Judge Learned Hand. *See* Fishgold v. Sullivan Drydock & Repair Corp., 154 F.2d 785 (2d Cir.), *aff'd*, 328 U.S. 275 (1946); Lehigh Valley Coal Co. v. Yensavage, 218 F. 547, 552-53 (2d Cir. 1914); LEARNED HAND, *How Far is a Judge Free in Rendering a Decision?*, *in* THE SPIRIT OF LIBERTY 105-10 (Irving Dilliard ed., 3d ed. 1960). Not coincidentally, Hand too shared many of the tenets of what I have called ultrapluralism, including a strong belief in democratic institutions and moral skepticism, as captured in his famous line that he would find it "most irksome to be ruled by a bevy of Platonic guardians." LEARNED HAND, THE BILL OF RIGHTS 73 (1958); *see also* LEARNED HAND, *Democracy: Its Presumptions and Realities*, *in* THE SPIRIT OF LIBERTY, *supra*, at 90-102; Learned Hand, *Is There a Common Will?*, 28 MICH. L. REV. 46, 50-51 (1929) (acknowledging the pluralist character of legislatures, but recognizing majoritarian "nose-counting" as the best available approach to government).

69. The dynamic or evolutionary perspective is defended in T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1989); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987). For criticism, see Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 20 (1987).

70. In this sense, the faithful agent model is simply a version of what has been called the "traditional model" of statutory interpretation. *See* Earl M. Maltz, *Rhetoric and*

Under this orientation, the text of the statute is in effect regarded as evidence of the law, rather than the law itself. Although the text of the statute will invariably be regarded as the *best* evidence of what the enacting legislature would have decided, it is quite possible that the plain meaning of the text may be overcome by other evidence. If the court concludes that the plain meaning is contrary to what a majority of the legislature would have wanted, then the intention rather than the meaning controls.

Finally, because the process of interpretation entails a prediction about what a group of historical actors would have decided about an issue left unresolved, the faithful agent interpreter will be most interested in the legislative history of an enactment. This does not mean that the faithful agent will be incautious in using such evidence. A contrived colloquy between two interested legislators might not accurately reflect the understanding of a majority of the legislators who voted for the measure. But caution surely would not rise to the level of a prophylactic rule of exclusion as urged by Justice Scalia. Legislative history can disclose important insights about shared assumptions that can be critical in interpreting ambiguities or gaps in statutes. Thus, the faithful agent will want to rely on both official and unofficial historical materials, taking appropriate care to remember that the ultimate inquiry is to predict how the majority would have wanted the issue to be decided, not to enforce the private expectations of a small group of manipulators.

Beyond the basic commitment to the faithful agent model of interpretation, Chief Justice Rehnquist's ultrapluralism has other implications for statutory interpretation. First, one would expect a pluralist of his stripe to be sympathetic to calls for deference to interpretations of statutes adopted by executive branch agencies. The faithful agent's inquiry into what the majority of the enacting legislature would want will often yield highly uncertain results. In such cases, the faithful agent, left to his own devices, can only make an educated guess based on the available evidence. In effect, however, such guesses will entail a choice between conflicting social policies— the type of decision that ideally should be resolved in a pluralist world by a more democratic body.

Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy, 71 B.U. L. REV. 767, 769-70 (1991).

In these circumstances, if another branch of government more accountable to the public than the courts has rendered an interpretation of the statute, pluralist theory would suggest that the court should defer to the views of the accountable interpreter.[71] Such an accountable institution will presumably do a better job of summing the competing private interests involved than will an unelected court. This is very similar to the thesis of the Supreme Court's *Chevron* decision.[72] *Chevron* reasoned that administrative decisionmakers are more electorally accountable than courts, because they are appointed by and must generally answer to the President, who is elected.[73] Gaps and ambiguities in statutes should therefore be filled in by agency officials rather than having courts impose their own views of correct policy. Thus, one would predict that a pluralist like Chief Justice Rehnquist would be a strong supporter of *Chevron* deference.[74]

Second, given Chief Justice Rehnquist's strong commitment to federalism—which as we have seen can also be derived from his pluralist premises—one would expect that he would strongly endorse the use of canons of construction grounded in precepts of federalism.[75] Included here would be various clear statement rules, such as the presumption against federal conditions on state administration of federal spending programs,[76] the presumption against congressional waiver of states' Eleventh Amendment immunity,[77] the presumption against congressional regulation of core state functions,[78] and the presumption against abrogation of concurrent state court jurisdiction to enforce federal statutes.[79] And of course, one would expect such a pluralist to

---

71. *See* Thomas W. Merrill, *Pluralism, the Prisoner's Dilemma, and the Behavior of the Independent Judiciary*, 88 NW. U. L. REV. 396, 399 (1993).

72. Chevron U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984).

73. *Id.* at 865-66.

74. The pluralist argument for deference to agency interpretations is similar to the argument Chief Justice Rehnquist has advanced in support of a revived nondelegation doctrine. *See supra* notes 54-55 and accompanying text. The ideal ultrapluralist solution in cases of doubt would be a "remand" to the legislature, as per the nondelegation doctrine. Given the Court's unwillingness to endorse that solution, the next best course would be to accept the interpretative views of the executive branch.

75. *See generally* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 619-29 (1992) (detailing the rise of federalism-based clear statement rules in the Rehnquist Court).

76. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981).

77. Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985).

78. Gregory v. Ashcroft, 501 U.S. 452 (1991).

79. Tafflin v. Levitt, 493 U.S. 455 (1990).

take seriously the venerable canon that clear evidence is required before determining that Congress has intended to preempt state and local regulation in any given area.[80]

Finally, one would expect a jurist driven by a philosophy of ultrapluralism to be relatively indifferent to considerations of stare decisis.[81] Stare decisis is a policy supported by values that inhere in the idea of the rule of law, such as predictability, equal treatment, and the protection of reliance interests.[82] But the policy is a judicial creation; it has not been mandated or endorsed by any legislative majority. Thus, for an optimistic pluralist who views courts as another pluralist institution and who is skeptical about the objectivity of concepts of the public good, any clash between claims of stare decisis and legislative intent should be resolved in favor of legislative intent.

V. CHIEF JUSTICE REHNQUIST'S APPROACH TO STATUTORY INTERPRETATION

A review of Justice Rehnquist's many statutory interpretation opinions since he joined the Court in 1972 suggests that he has largely conformed to the pattern that one would expect from an ultrapluralist. To be sure, the evidence of congruence between theory and practice is not quite as strong as it is with respect to the basic commitments identified by the hierarchy-of-values analysts. This may perhaps be explained by the fact that the stakes are lower in the statutory interpretation cases, and so strategic behavior by the Chief Justice, e.g., joining opinions he might prefer were written differently, is likely to be more pronounced. All in all, however, we find more confirmation of a basic pluralist orientation of the type I have described.

A. Faithful-Agent Interpretation

Perhaps the best way to determine Chief Justice Rehnquist's basic orientation to questions of statutory interpretation—whether he accepts

80. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

81. The key may be philosophy, not pluralism. As Anthony Kronman has observed: "The law accords the past an authority that philosophy does not—an authority which indeed is incompatible with the independent spirit of all philosophical reflection." Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1034 (1990). Anyone who tries to reduce law to legal philosophy will almost inevitably disparage the role of precedent in law.

82. *See, e.g.*, Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

the faithful agent model, textualism, dynamic interpretation, or some combination of these approaches that might be called "pragmatism"[83]—is to examine statutory interpretation opinions he has written, especially those where there is reason to believe he is operating with a relatively unforced hand. I would include in this category both majority opinions where the issue is relatively obscure (and thus unlikely to engender much interest or suggestion for revision from concurring Justices), and concurring and dissenting opinions.

A review of these opinions discloses no occasion on which the Chief Justice has expressly cast the task of statutory interpretation in terms of a faithful agent enforcing the bargain reached in Congress. Nevertheless, it is reasonably clear that he generally views the task of the Court to be one of reconstructing the values and attitudes that the members of the enacting Congress brought to bear on the problem. Implicit in this approach is the understanding that the relevant inquiry is how the enacting legislature would have resolved the issue if it had expressly confronted it. As we have seen, this is precisely the approach that the faithful agent model of ultrapluralism seems to require.

I have selected two of Chief Justice Rehnquist's majority opinions to illustrate his basic approach to statutory construction. The first, *Ruckelshaus v. Sierra Club*,[84] presented the question whether a district court could award attorney's fees to a nonprevailing party under a provision of the Clean Air Act authorizing courts to award fees "whenever it determines that such an award is appropriate."[85] The expansive language of the statute might have been construed as a delegation of authority to courts to construct a "common law" of fee shifting,[86] in which case, of course, the Court would have been free to decide that an award of fees to nonprevailing parties was either "appropriate" or "inappropriate." Significantly, however, Justice Rehnquist eschewed any such analysis. Instead, he framed the inquiry in terms of the general understanding associated with the "American rule" prohibiting any fee shifting absent special legislative

---

83. For an overview of different modes of statutory interpretation, see Maltz, *supra* note 70; Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1076-1087 (1992).

84. 463 U.S. 680 (1983).

85. 42 U.S.C. § 7607(f) (1982).

86. *See* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985) (discussing statutory delegations of common lawmaking authority to federal courts); Easterbrook, *Statutes Domains*, *supra* note 67.

authorization.[87] He then canvassed other fee-shifting statutes in order to show that ordinarily Congress permits fee awards only to prevailing parties.[88] The conclusion was that although Congress did not explicitly limit fees to prevailing parties in the Clean Air Act, it was probable that Congress would have agreed on such a limitation if it had attended to the issue specifically.

Justice Rehnquist's opinion in *Ruckelshaus v. Sierra Club* also undertook a careful analysis of the legislative history. Interestingly, the history contained what could be regarded as a "smoking gun"—a passage in a House Report stating explicitly that the Committee did not intend to impose a "prevailing party" requirement.[89] Notwithstanding this statement, Justice Rehnquist concluded that the totality of the history revealed at most a consensus in favor of rejecting a requirement that a party prevail on *all issues* in order to receive a fee. It was not clear that the cited report was saying anything more than that a party that prevailed in part would be eligible for a fee.[90] Absent more definitive evidence of an intention to depart from the general practice revealed in other statutes, Justice Rehnquist concluded that Congress intended to require that a party prevail at least in part in order to be eligible for a fee.

Several aspects of the *Ruckelshaus v. Sierra Club* decision are characteristic of the approach to statutory interpretation one would expect from an ultrapluralist. First, and not surprisingly, the opinion rejects any suggestion that the statute embodies a delegation of discretionary lawmaking power to courts. Given the preferred status of legislatures relative to courts as interest-summing institutions, one would expect an ultrapluralist to be reluctant to endorse a statutorily-mandated federal common law.[91] Second, consistent with the faithful agent approach to interpretation, it is not surprising that the opinion implicitly frames the issue in terms of what a majority of the Congress would have decided had it addressed the issue explicitly. Finally, although the opinion makes free use of legislative history, it does not fall prey to the error of simply looking for the legislative history most

87. 463 U.S. at 683-84.
88. *Id.* at 683-86.
89. *Id.* at 686-87.
90. *Id.* at 689-90.
91. Chief Justice Rehnquist has in fact sought to limit the scope of federal common law. *See* City of Milwaukee v. Illinois, 451 U.S. 304 (1981).

directly on point and enforcing as "the law."[92] Instead—as one would expect of an approach that tries to ascertain the shared understanding of all actors in the legislative process—it looks to general background understandings and the pattern of results reached under similar statutes in order to predict what a majority would have decided if it had addressed the issue.

The second decision, *Leo Sheep Co. v. United States*,[93] concerned a much older statute—the Union Pacific Act of 1862. That Act established a "checkerboard square" pattern of land grants, with the railroad being given alternative sections along a broad right-of-way and the government retaining the remainder.[94] The question was whether the government retained an implied easement of way over the sections granted to the railroad, in order to assure access to otherwise landlocked sections it had retained.

Neither the language of the statute nor the legislative history adverted to the easement issue, and Chief Justice Rehnquist set about with considerable gusto to try to infer what Congress would have wanted given the shared assumptions and expectations of the time. Drawing freely from secondary sources and painting on a broad canvas, the Chief Justice surveyed the history of the development of the transcontinental railroads, and the reasons for the development of the checkerboard land grant scheme.[95] He even digressed to describe the Battle of Glorieta Pass in New Mexico in 1862, apparently to illustrate the urgency Congress perceived in constructing supply lines to support Union troops in the West.[96] Implicit in this approach, again, is the assumption that the proper resolution of the interpretative question is to determine what the enacting legislature would have decided if it had considered the issue explicitly.

Chief Justice Rehnquist's attempt in *Leo Sheep* to answer that question based on his historical researches was not wholly successful. The best he could come up with was the inference that Congress would have concluded that the problem would take care of itself.[97] This may not be enough to overcome the canon (relied upon by the government)

---

92. Well before Justice Scalia's arrival on the Court, then-Justice Rehnquist recognized the potential for manipulation inherent in "potted" legislative history. *See* Simpson v. United States, 435 U.S. 6, 17-18 (1978) (Rehnquist, J., dissenting).

93. 440 U.S. 668 (1979).

94. *See* GEORGE C. COGGINS, PUBLIC NATURAL RESOURCES LAW ch. 10 (1990).

95. *Leo Sheep*, 440 U.S. at 670-77.

96. *Id.* at 674-75.

97. *Id.* at 686.

that any doubts regarding federal land grants "are resolved for the government, not against it."[98] Still, *Leo Sheep* reveals the lengths to which Chief Justice Rehnquist is prepared to go in order to recreate the mindset of the enacting Congress. Even when the language of the statute and the legislative history are silent, he is prepared to turn to extralegislative historical sources in order to try to predict how the enacting legislature would have resolved the issue, and prefers this to relying on canons.

The approach to statutory interpretation in *Ruckelshaus v. Sierra Club* and *Leo Sheep* is by no means unique. Quite a number of Chief Justice Rehnquist's statutory interpretation opinions reveal the similar features.[99] These opinions make it abundantly clear that Chief Justice Rehnquist rejects any type of presentist or dynamic approach to statutory interpretation. For example, in *Smith v. Wade*[100] the issue was what degree of culpability is required to award punitive damages in actions brought pursuant to 42 U.S.C. § 1983 (enacted as part of the Civil Rights Act of 1871). Justice Brennan's majority opinion rejected a malicious intent requirement, relying on "the common law of torts (both modern and as of 1871), with such modification or adaptation as might be necessary to carry out the purpose and policy of the statute."[101] Thus, the majority adopted an approach that contained strong elements of a dynamic or evolutionary approach to statutory interpretation.[102]

In his dissenting opinion, Justice Rehnquist strenuously rejected any reliance on modern tort doctrine in construing § 1983:

> The reason our earlier decisions interpreting § 1983 have relied upon common law decisions is simple: members of the 42d Congress were lawyers, familiar with the law of their time. In resolving ambiguities in the enactments of that Congress, as with other Congresses, it is useful to

98. *Id.* at 682 (quoting Andrus v. Charlestone Stone Prods. Co., 436 U.S. 604, 617 (1978)).

99. *See, e.g.*, Hendrik Hudson Cent. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176 (1982); County of Wash. v. Gunther, 452 U.S. 161, 181 (1981) (Rehnquist, J., dissenting); Pennhurst State Sch. v. Halderman, 451 U.S. 1 (1981); United Steelworkers of Am. v. Weber, 443 U.S. 193, 219 (1979) (Rehnquist, J., dissenting); California v. United States, 438 U.S. 645 (1978); Philbrook v. Glodgett, 421 U.S. 707 (1975); City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 640 (1973) (Rehnquist, J., dissenting); Laird v. Nelms, 406 U.S. 797 (1972).

100. 461 U.S. 30 (1983).

101. *Id.* at 34 (citing Carey v. Piphus, 435 U.S. 247, 253-64 (1978)).

> consider the legal principles and rules that shaped the thinking of its members. The decisions of state courts decided well after 1871, while of some academic interest, are largely irrelevant to what members of the 42d Congress intended by way of a standard for punitive damages.[103]

Thus, although Justice Rehnquist again made free use of historical background materials, his *Smith v. Wade* dissent makes clear that the relevance of these materials is in reconstructing the shared understandings of the members of the enacting Congress, not in establishing an implicit delegation allowing courts to inject a dynamic element into statutory interpretation.[104]

It is slightly more difficult to show that Chief Justice Rehnquist rejects textualism, although here too I think the ultimate judgment is clear. Chief Justice Rehnquist clearly regards the language of the statute as the most important datum in ascertaining legislative intent.[105] And he will enforce the literal meaning of the statute, if he is convinced that it fairly reflects congressional intent.[106] But he has expressly declined to enforce the "plain meaning" of a statute when it is contradicted by the general background and legislative history of the provision in question. For example, in *Rosebud Sioux Tribe v. Kneip*,[107] the issue was whether Congress had unilaterally modified a tribe's reservation boundaries when it adopted legislation in 1904 providing for a "cession" of certain lands. The tribe argued that a "cession" requires bilateral consent, and because the tribe had not consented, the land was still within the reservation. Writing for the Court, Justice Rehnquist agreed that "[a]s a matter of strict English usage," the tribe was correct about the meaning of the word "cession."[108] In context, however, he found that the objectives of Congress were clear: the land had been

---

102. *See* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 278-92 (1988).

103. Smith v. Wade, 461 U.S. at 66 (Rehnquist, J., dissenting).

104. The *Smith v. Wade* dissent also clarifies the role of policy arguments in faithful agent statutory interpretation. Such arguments are relevant, but only insofar as the policies can be shown to be ones that the enacting legislature would have found persuasive. *See* 461 U.S. at 86 (Rehnquist, J., dissenting).

105. *See, e.g.*, NOW, Inc. v. Scheidler, __ U.S. __, 114 S. Ct. 798 (1994); Negonsott v. Samuels, 507 U.S. __, 113 S. Ct. 1119 (1993); Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 526 (1990) (Rehnquist, C.J., dissenting).

106. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982); *see also infra* notes 110-12 and accompanying text.

107. 430 U.S. 584 (1977).

108. *Id.* at 597.

withdrawn without regard to whether the tribe gave its consent. Quoting from Holmes, Justice Rehnquist observed: "[W]e are not free to say to Congress: 'We see what you are driving at, but you have not said it, and therefore we shall go on as before.'"[109]

It is true that on at least one occasion Justice Rehnquist has enforced the "literal" meaning of the statute in circumstances where the result would very likely have been rejected by the enacting Congress if it had been presented with the facts of the specific case at hand.[110] But he did so only after establishing that the general rule reflected in the literal language of the statute is one that the enacting Congress very likely *would* have agreed with.[111] Thus, this particular example of "literalism" means (at most) that he sees the need to undertake the inquiry at a level of generality commensurate with the language of the statute.[112] The question is: What rule would Congress have agreed to had it expressly considered the issue? The question is not: How would Congress want this particular case to come out? Given the understanding that Congress legislates for the generality of cases, not for individual applications, it is not inconsistent with a pluralist perspective to try to identify the shared understanding at the level of a general rule.

It is also true that in recent years Chief Justice Rehnquist, like other members of the Court, has authored opinions that avoid any discussion of legislative history.[113] But I do not believe these opinions necessarily signal a change of heart on the part of the Chief Justice about the correct general approach to issues of statutory interpretation. A simpler explanation is that they are majority opinions joined by Justice Scalia, who has often refused to join majority opinions that contain a

---

109. *Id.* at 597 (quoting Johnson v. United States, 163 F. 30, 32 (1st Cir. 1908)).

110. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982) (upholding "literal" interpretation of penalty for withholding seaman's wages that resulted in award of over $300,000).

111. *Id.* at 571.

112. As my colleague Michael Perry has recently written: "According to originalism, . . . a judge should not try to articulate the directive represented by a constitutional provision (as originally understood) at a level of generality any broader—or any narrower—than the relevant materials ('words, structure, and history') warrant." MICHAEL PERRY, THE CONSTITUTION IN THE COURTS: THE JUDICIAL PROTECTION OF CONSTITUTIONAL RIGHTS 23 (1994).

113. *See, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991); Demarest v. Manspeaker, 498 U.S. 184 (1991).

discussion of legislative history.[114] Chief Justice Rehnquist is surely aware of this, and consequently to avoid fragmenting the Court has apparently agreed to drop the erstwhile obligatory discussion of legislative history.[115] On the other hand, there is little evidence that Chief Justice Rehnquist shares or is even sympathetic to Justice Scalia's strong allergy to legislative history. He has generally declined to join in Justice Scalia's diatribes against legislative history, and has frequently associated himself with opinions that Justice Scalia finds objectionable.[116] Thus, the most that can be inferred from the recent decisions is that Chief Justice Rehnquist cares less about the controversy over the use of legislative history than Justice Scalia does.

B. Deference to Agency Interpretations

There is also evidence to suggest that Chief Justice Rehnquist is somewhat more than ordinarily willing to defer to interpretations adopted by politically accountable institutions. Here it is possible to proceed on a more quantitative basis. In a previously-published study, I collected all Supreme Court decisions from the 1981 Term through the 1990 Term that involved a question whether to defer to an administrative construction of a federal statute.[117] For the ten Terms in question, the Court considered a total of 135 deference cases, and accepted the executive view in ninety-eight (seventy-three percent overall). During this same period, Chief Justice Rehnquist agreed with the agency interpretation eighty-six times (sixty-four percent overall). Thus, considering only this data, it would appear that Chief Justice Rehnquist is somewhat *less* deferential to executive interpretations than

---

114. *See* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 365 (1994).

115. *See* County of Wash. v. Gunther, 452 U.S. 161, 182 (1981) (Rehnquist, J., dissenting) (noting that reference to legislative history is conventional and criticizing majority for deciding case on policy grounds rather than legislative history). For data on the precipitous decline in legislative in the Supreme Court in recent years, see Merrill, *supra* note 114.

116. *See, e.g.*, United States v. Thompson/Center Arms Co., __ U.S. __, 112 S. Ct. 2102 (1992) (plurality opinion); Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597 (1991); Moskal v. United States, 498 U.S. 103 (1990); Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989).

117. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992).

is the Court on the whole, contrary to what the ultrapluralist model would predict.

When we break the data down into time periods, however, a slightly different picture emerges. Prior to the Court's 1984 decision in *Chevron*, the practice of deferring to agency interpretations was justified largely in terms of agency expertise or the protection of reliance interests associated with longstanding agency interpretations.[118] There is no reason to believe that an ultrapluralist of the type I have described would be particularly inclined to defer to agency views for these reasons. After *Chevron*, and especially after Justice Scalia's arrival on the Court, the practice of deference came to be associated with democratic theory, and in particular with the idea that administrative agencies are more politically accountable than courts.[119] Once this understanding gained currency, one would assume that an ultrapluralist would demonstrate a greater willingness (relatively speaking) to defer to agency views.

And indeed, if we look only at the four Terms after Justice Scalia's arrival (1987-1990), we see a different pattern. During this period, the Court's deference to agency interpretations dropped to sixty percent (thirty-four out of fifty-seven cases). Chief Justice Rehnquist, however, continued to defer at his old rate of sixty-four percent (thirty-five of fifty-five). Thus, whereas the Chief Justice deferred somewhat less than the Court as a whole prior to Justice Scalia's arrival, afterwards he became slightly more deferential than the Court as a whole. By contrast, it is interesting to note that Justice Scalia—the supposed champion of *Chevron* deference—deferred at the rate of only forty-nine percent (twenty-seven of fifty-five). At least one thing seem clear: Chief Justice Rehnquist is more deferential to executive views than is Justice Scalia.

Moreover, there is some reason to believe that in cases that involve particularly sensitive issues of public policy, Chief Justice Rehnquist is especially willing to defer to administrative interpretations. In the controversial *Rust v. Sullivan*[120] decision, for example, the Court considered a regulation of the Department of Health and Human Services which prohibited recipients of federal family planning funds from engaging in abortion counseling, referral, or encouraging abortion

---

118. *Id.* at 972-75.

119. Justice Scalia has been an especially vigorous proponent and exponent of *Chevron*. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511.

120. 500 U.S. 173 (1991).

as a family planning technique.[121] Chief Justice Rehnquist's opinion for the Court found that the statutory language on the question was ambiguous,[122] and held that under the *Chevron* framework deference to the Secretary's interpretation was required. He did so even though a plausible argument could be made that the gag rule was unconstitutional under the First Amendment, thus giving rise to the canon that interpretations raising difficult constitutional questions are disfavored.[123] For an ultrapluralist, however, it would be logical for a court to give greater weight to the views of an accountable interpreter than to decide on the basis of the outer reaches of judge-made First Amendment law. The Chief Justice's willingness to rest on *Chevron* deference in this context thus should not be surprising.[124]

C. Federalism Canons

Given Chief Justice Rehnquist's unusually strong commitment to federalism, as documented by the hierarchy-of-values analysts, it should come as no surprise that he uniformly supports the use of federalism canons in cases of statutory interpretation. Consider for example the *Atascadero* canon[125] that federal statutes will not be construed as permitting suit against states absent a clear and unequivocal statement

---

121. *Id.* at 177-81.

122. *Id.* at 184.

123. *See* Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); NLRB v. Catholic Bishop, 440 U.S. 490, 500 (1979).

124. Another type of accountable interpreter that an ultrapluralist might heed in cases of doubt is subsequent Congresses. Reliance on post-enactment legislative history is especially controversial, given the increased dangers of manipulation. But where this danger is minimized, one might expect an ultrapluralist to rely on subsequent congressional action in determining the correct meaning of a statute, for example, where Congress as a whole has reenacted legislation after a particular interpretation by lower courts. *See generally* William K. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988). There is some evidence that Chief Justice Rehnquist is willing to rely on subsequent legislative action in this context. *See* Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 n.13 (1980) ("Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction."); Laird v. Nelms, 406 U.S. 797, 802 (1972) (Congress's failure to amend the Federal Tort Claims Act, and passage of a separate bill granting relief to specific individuals injured as a result of low flying jets, shows that Congress intended to import the doctrine of absolute liability into the Act).

125. Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985).

from Congress. The canon builds upon an earlier opinion by Justice Rehnquist,[126] and has been applied by Chief Justice Rehnquist in subsequent decisions.[127] Where disputes arise over the application of the canon, Chief Justice Rehnquist consistently sides with the faction that does not find the requisite clear statement has been made.[128] A similar story could be told about the *Pennhurst* canon[129] and the *Gregory* canon.[130]

Preemption cases, which ultimately turn on the interpretation of federal statutes, merit a separate word. It is an established canon in preemption cases that the historic police powers of the States are not to be superseded by federal statute "unless that was the clear and manifest purpose of Congress."[131] Unlike other Justices, who either quote the canon or disregard it as suits the needs of the day, Chief Justice Rehnquist appears to take it quite seriously.[132] Overall, he has complied a very consistent record of opposition to preemption claims (again, relative to other Justices).[133] Of particular interest here is a growing divergence with Justice Scalia. Applying his textualist method of

---

126. *See* Edelman v. Jordan, 415 U.S. 668, 674 (1974).

127. *See* Green v. Mansour, 474 U.S. 64, 68 (1985).

128. *See, e.g.*, Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96 (1989) (plurality opinion) (interpreting § 106(c) of the Bankruptcy Code); Welch v. Texas Dep't of Highways, 483 U.S. 468 (1987) (interpreting the Jones Act); Papasan v. Allain, 478 U.S. 265 (1986) (petitioner's trust claims were barred by the Eleventh Amendment).

129. This canon originated in an opinion by Justice Rehnquist, Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981), and has been invoked by Justice Rehnquist in a subsequent decision to deny relief. *See* Suter v. Artist M., 503 U.S. __, 112 S. Ct. 1360 (1992); *see also* Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 524 (1990) (Rehnquist, C.J., dissenting); School Bd. v. Arline, 480 U.S. 273, 298 (1987) (Rehnquist, C.J., dissenting).

130. *Gregory* relied in part on Sugarman v. Dougall, 413 U.S. 634, 649 (1973) (Rehnquist, J., dissenting). The Chief Justice has indicated a willingness to apply that canon in later cases. *See* Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting, joined by Rehnquist, C.J.). *But see* Hilton v. South Carolina Pub. Rys. Comm'n, 502 U.S. 197, 112 S. Ct. 560, 565-66 (1991) (majority opinion, Rehnquist, C.J., joining).

131. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

132. *See, e.g.*, Golden State Transit Corp. v. Los Angeles, 475 U.S. 608, 620 (1986) (Rehnquist, J., dissenting); Jones v. Rath Packing Co., 430 U.S. 519, 543 (1977) (Rehnquist, J., concurring and dissenting); City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 643 (1973) (Rehnquist, J., dissenting).

133. In addition to the decisions cited *supra* note 132, *see* Toll v. Moreno, 458 U.S. 1, 25 (1982) (Rehnquist, J., dissenting); Fidelity Fed. Sav. & Loan v. de la Cuesta, 458 U.S. 141, 172 (1982) (Rehnquist, J., dissenting).

interpretation, Justice Scalia has on several occasions found state laws preempted in situations where Chief Justice Rehnquist, following the clear intent canon, has voted to uphold the challenged state regulation.[134]

D. Statutory Stare Decisis

It is well known that Chief Justice Rehnquist is not a strong adherent of stare decisis in constitutional matters.[135] He has written opinions in many cases either overruling[136] or urging the overruling of constitutional decisions.[137] Although the rule of stare decisis is generally regarded as being stronger in statutory cases,[138] there is also evidence that Chief Justice Rehnquist is not a particularly strong proponent of precedent in the statutory context either. For example, after Congress failed to follow his recommendation to modify the law of federal habeas corpus in certain respects,[139] he nevertheless authored or joined a series of decisions that accomplished similar ends by cutting back on or directly overruling Warren Court precedents.[140] He also

---

134. *See, e.g.*, Cipollone v. Liggett Group, Inc., 505 U.S. __, 112 S. Ct. 2608 (1992) (Rehnquist, C.J., joining majority); *cf. id.* at 2632 (Scalia, J., concurring in part and dissenting in part); Morales v. TWA, Inc., 504 U.S. __, 112 S. Ct. 2031, 2054 (1992) (Stevens, J., dissenting, joined by Rehnquist, C.J.).

135. Earl M. Maltz, *No Rules in a Knife Fight: Chief Justice Rehnquist and the Doctrine of Stare Decisis*, 25 RUTGERS L.J. 669 (1994).

136. Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597, 2609-11 (1991); Solorio v. United States, 483 U.S. 435 (1987); National League of Cities v. Usery, 426 U.S. 833 (1976).

137. *See* Planned Parenthood v. Casey, 505 U.S. __, 112 S. Ct. 2791, 2855-67 (1992) (Rehnquist, C.J., concurring in part and dissenting in part) (urging overruling of Roe v. Wade, 410 U.S. 113 (1973)); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1985) (Rehnquist, J., dissenting) (urging future overruling of the case at hand).

138. *See, e.g.*, Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177 (1989).

139. For details, see Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2357-73 (1993).

140. *See* Brecht v. Abrahamson, 507 U.S. __, 113 S. Ct. 1710 (1993) (majority opinion authored by Rehnquist, C.J.) (adopting stricter harmless error standard for purposes of habeas corpus review); McCleskey v. Zant, 499 U.S. 467 (1991) (majority opinion authored by Kennedy, J., joined by Rehnquist, C.J.) (rejecting deliberate abandonment standard and adopting strict cause-and-prejudice standard for determining abuse of the writ); Teague v. Lane, 489 U.S. 288 (1989) (majority opinion authored by O'Connor, J., joined by Rehnquist, C.J.) (adopting position that new constitutional rulings will not be applied retroactively on habeas corpus review). Chief Justice Rehnquist

joined the order in *Patterson v. McLean*[141] which directed the parties to address the question whether an earlier interpretation of the statute there in question should be overruled.

To be sure, Chief Justice Rehnquist will occasionally bow to considerations of stare decisis in statutory cases. Consider in this regard the decision in *California v. Federal Employees Retirement Commission*.[142] Simplifying somewhat, the issue was whether the Court would follow an old Supreme Court precedent closely on point interpreting a section of the Federal Power Act,[143] or a more recent case (authored by Chief Justice Rehnquist) that provided a more comprehensive analysis of the legislative history of the relevant provision.[144] In effect, for the Chief Justice the case presented a direct clash between a precedent and his understanding of the legislative intent. Interestingly, he chose to join Justice O'Connor's unanimous opinion for the Court following the older precedent rather than his own prior analysis of legislative intent.[145] Thus, the claim that Chief Justice Rehnquist is a weak adherent of stare decisis in statutory cases must be understood in context. Like all members of the Court, he bows to stare decisis when a powerful claim can be made that prior Supreme Court precedent is directly controlling.

All in all, it is fair to say that Chief Justice Rehnquist's performance in statutory interpretation cases confirms the hypothesis that he is driven by an ultrapluralist theory of politics. The evidence is somewhat weaker than it is with respect the hierarchy of values identified by previous commentators, focusing primarily on constitutional cases. Perhaps not surprisingly, the strongest support consists of his consistent invocation of federalism canons. It is also possible to discern the faithful agent model of interpretation at work in Chief Justice Rehnquist's unconstrained statutory interpretation opinions. There is modest

---

has of course long been associated with revisionism in interpretation of the federal habeas corpus statutes. *See* Wainwright v. Sykes, 433 U.S. 72 (1977) (majority opinion authored by Rehnquist, J.) (adopting cause-and-prejudice standard for assessing failures to follow state procedural rules, and confining *Fay v. Noia* to its facts).

141. 485 U.S. 617 (1988).

142. 495 U.S. 490 (1990).

143. First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n, 328 U.S. 152 (1946).

144. California v. United States, 438 U.S. 645, 653-63 (1978).

145. This could have been an exercise in damage control. By voting with the majority, Chief Justice Rehnquist retained control over assignment of the opinion, and by assigning it to Justice O'Connor, who is highly sympathetic to States' rights, he assured that the opinion was narrowly written.

evidence that he is more deferential to executive agencies than other Justices. Finally, although his ultrapluralism is qualified by a stronger allegiance to stare decisis in statutory cases, he is more willing to disregard precedent in this context than other Justices.

VI. THE TEXTUALIST ALTERNATIVE

The importance of Justice Rehnquist's pluralism to his statutory interpretation opinions is highlighted further when we contrast the Chief Justice's performance in this area with that of Justice Scalia. Since arriving on the Court, Justice Scalia has staked out a very clear conception of proper judicial method in statutory interpretation cases—perhaps clearer than that of any other Justice in history.[146] What is unclear is whether, or how, this conception of judicial method relates to an underlying theory of the political order analogous to Chief Justice Rehnquist's ultrapluralism.

Justice Scalia's method of statutory interpretation has been aptly described as a form of "textualism."[147] Like the faithful agent conception I have described, Justice Scalia's textualism is originalist rather than presentist in orientation. That is, it seeks the meaning of the statute in terms of understandings current at the time of enactment, not at some subsequent point in time, e.g., the present. In contrast to the faithful agent view, however, textualism adopts an "objective" rather than a "subjective" theory of meaning. That is, it does not try to determine what a majority of the enacting legislature would have decided had it attended specifically to the question at issue; instead, it asks what the ordinary reader of the statute would have understood the words to mean at the time of the enactment.[148]

Because Justice Scalia's textualism makes the objective meaning to the ordinary historical reader key, different types of legal authority are

146. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990); William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133 (1992).

147. *See* Eskridge, *supra* note 146; 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 (1990); Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597, 1597-98 (1991).

148. *See* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, USING AND MISUSING LEGISLATIVE HISTORY: A REEVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION 20-26 (1989); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994).

deemed to be relevant than those consulted by the faithful agent. Most importantly, all forms of legislative history are out of bounds, in part because of the danger of manipulation (also acknowledged by faithful agent interpreters),[149] but more fundamentally because these materials are relevant to determining the subjective intentions of the enacting legislators, rather than the objective meaning of the statute.[150] In contrast, other interpretative aids, such as contemporary dictionaries and usage reflected in other contemporary statutes, may be freely consulted. In addition, Justice Scalia makes frequent use of Whole Act rule—examining the structure of the statute and the language of other provisions—in order to glean clues to the meaning of the challenged provision.[151] Finally, when confronted with a question that cannot be answered by dictionary definitions or an examination of other statutory provisions, he will generally turn to canons of construction in order to supply an answer to a disputed issue of statutory interpretation.[152]

My point in raising Justice Scalia's textualism is not to debate the relative merits of the faithful agent approach and the textualist method.[153] Instead, the question I would like to ask is this: if faithful

149. *See, e.g.*, Begier v. IRS, 496 U.S. 53, 67 (1990) (Scalia, J., concurring in judgment); Blanchard v. Bergeron, 489 U.S. 87, 97 (1989) (Scalia, J., concurring in part and concurring in judgment); Hirschey v. Federal Employees Retirement Comm'n, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring).

150. *See, e.g.*, Pennsylvania v. Union Gas Co., 491 U.S. 1, 29 (1989) (Scalia, J., concurring in part and dissenting in part). Justice Scalia has recognized a narrow exception to his proscription against use of legislative history. In cases where it is alleged that the plain meaning of the statute generates an absurd result, legislative history may be consulted in order to confirm that the absurd meaning was *not* intended. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring). Justice Scalia has also freely consulted extra-textual historical materials in constitutional cases, an anomaly noted by several commentators. *See, e.g.*, Note, *Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses*, 1990 DUKE L.J. 160.

151. *See, e.g.*, Chan v. Korean Air Lines, 490 U.S. 122 (1989).

152. *See, e.g.*, Smith v. United States, 508 U.S. __, 113 S. Ct. 2050, 2060 (1993) (Scalia, J., dissenting); Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting).

153. I agree with much of Justice Stephen Breyer's recent critical analysis of textualism as a method for resolving questions involving ambiguities or gaps in statutes. *See* Stephen Breyer, *On The Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992). A more serious question is whether these advantages are worth the additional administrative costs entailed by requiring parties and courts to consult legislative history, given that in a high percentage of cases the legislative history is uninformative or misleading.

agent interpretation can be seen as a byproduct of an ultrapluralist theory of government, then what theory of government supports textualism?

One possibility is that textualism corresponds to no particular theory of government. To borrow a distinction made by Dan Farber,[154] some judges may be "foundationalists" who believe that "normative conclusions can be deduced from a single unifying value or principle."[155] Other judges may be "formalists" who adhere to the view that "the proper decision in a case can be deduced from a preexisting set of rules."[156] On my account, Chief Justice Rehnquist would be regarded as a foundationalist: his decisions, both in constitutional and statutory cases, can be explained by a commitment to what I have called an ultrapluralist theory of government. Justice Scalia, in contrast, could simply be a formalist judge. In particular, his textualist theory of statutory interpretation could be grounded in nothing more profound than a belief that one of the rules of judging is to interpret statutes according to the objective meaning for the ordinary reader, rather than the subjective desires of the enacting legislators.[157]

This explanation is not very satisfactory, however. For one thing, textualism is not the conventional "rule" for statutory interpretation, at least in this century.[158] Thus, textualism cannot be justified simply on the ground that "that's the way it is." For another, Justice Scalia himself attributes great normative significance to the battle between textualism and intentionalism, suggesting that the Constitution compels textualism[159] and that the use of legislative history will lead to manipulation of courts by legislative insiders.[160] Finally, Justice Scalia himself uses historical sources on occasion, i.e., in interpreting the

---

154. Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 539 (1992).

155. *Id.*

156. *Id.*

157. Justice Scalia sets forth his case for a jurisprudence of rules in Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

158. *See* Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 610-12 n.4 (1991); Maltz, *supra* note 135; William S. Blatt, *The History of Statutory Interpretation: A Study of Form and Substance*, 6 CARDOZO L. REV. 799 (1985); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

159. *See, e.g.*, Conroy v. Aniskoff, __ U.S. __, 113 S. Ct. 1562, 1567 (1993) (Scalia, J., concurring in judgment); Thompson v. Thompson, 484 U.S. 174, 188 (1988) (Scalia, J., concurring in judgment).

160. Blanchard v. Bergeron, 489 U.S. 87, 97 (1989) (Scalia, J., concurring in part and concurring in judgment).

Constitution,[161] and thus we need some explanation of why textualism is uniquely inappropriate in routine statutory interpretation cases.

When we start to look for a foundationalist theory of the political process that would sustain textualism, two very different possibilities present themselves. One is that Justice Scalia's textualism reflects an implicit political theory that is in many ways the exact opposite of Justice Rehnquist's pluralism: a theory that posits that legislative judgments reflect an inminent rationality—a single coherent truth about the nature of mankind and the proper ordering of human relationships. As Nicholas Zeppos has pointed out, many of the interpretative techniques relied upon most extensively by Justice Scalia presuppose "a rational or omniscient legislature,"[162] rather than a legislature of ad hoc bargains. Included here would be the assumptions that Congress is a perfect grammarian,[163] that different provisions of a statute reflect a single, unified structure,[164] that words are used the same way in different statutes,[165] and that Congress is familiar with all provisions in the United States Code.[166]

Other aspects of Justice Scalia's jurisprudence lend further credence to the hypothesis that he believes in a imminent rational order. In addition to his advocacy of textualism in statutory interpretation, Justice Scalia in recent years has begun to champion the use of tradition as a tool for giving meaning to open-ended clauses of the Constitution, such as the Due Process Clause and the First Amendment.[167] With respect to procedural due process, for example, Justice Scalia has authored opinions upholding transitory personal jurisdiction[168] and standardless

---

161. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

162. Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1320 (1990).

163. Fex v. Michigan, 507 U.S. __, 113 S. Ct. 1085 (1993); Crandon v. United States, 494 U.S. 152, 168 (1990) (Scalia, J., concurring).

164. Dewsnup v. Timm, 502 U.S. __, 112 S. Ct. 773, 779 (1992) (Scalia, J., dissenting); United States v. Fausto, 484 U.S. 439 (1988).

165. Morales v. TWA, Inc., 504 U.S. __, 112 S. Ct. 2031 (1992); Pierce v. Underwood, 487 U.S. 552 (1988).

166. West Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. 83 (1991).

167. *See generally* David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699 (1991).

168. Burnham v. Superior Court, 495 U.S. 604 (1990) (plurality opinion).

jury instructions on punitive damages[169] because both have been sanctioned by longstanding historical practice. With respect to substantive due process, he has argued that fundamental rights should be identified by a narrow inquiry into traditional practice, as reflected for example, in state laws.[170] He recently extended this methodology into the First Amendment area, arguing in *Burson v. Freeman*[171] that the identification of a public forum should be governed by an historical inquiry into tradition.

Taken together, Justice Scalia's textualism and his traditionalism could reflect a more general rationalist theory of politics. Under this theory, the authoritative pronouncements of society—its binding texts and established traditions—would all be seen as reflecting a single, imminent, coherent truth about the proper ordering of human society and human affairs. I am not quite sure what to call this implicit philosophy, perhaps a Burkean or, better yet, Acquinian theory of the political order, on the assumption that such a rationalist theory may be related at some level to Justice Scalia's Roman Catholic upbringing and education.[172] In any event, the idea would be that if we engage in a sustained study of the authoritative texts of the legal order—the laws and traditions of our people—we will discover a single, rational set of rules by which we must be governed.[173]

Although the possibility that Justice Scalia is an Acquinian rationalist is intriguing, there is another very different hypothesis that could also account for his textualism. This is the hypothesis that Justice Scalia is also a pluralist, but unlike Chief Justice Rehnquist, he harbors a pessimistic rather than an optimistic assessment of the capacity of democratic institutions to engage in an accurate summing of private interests. In other words, like the Chief Justice, Justice Scalia is dubious about the possibility of calling upon federal courts to enforce an

---

169. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 24 (1991) (Scalia, J., concurring in judgment).

170. Michael H. v. Gerald D., 491 U.S. 110 (1989) (plurality opinion); Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 292 (1991) (Scalia, J., concurring).

171. 504 U.S. __, 112 S. Ct. 1846, 1859 (1992).

172. *See* George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297 (1990).

173. The posited rationalist theory would also account for Justice Scalia's relative indifference to federalism values (compared to Chief Justice Rehnquist). If one believes in an imminent rational order, then politics reflects a single reality, not diverse conceptions of the good. Hence, there is little point in permitting decentralized decisionmaking.

objective understanding of the common good. But unlike the Chief Justice, he believes that the summing of private interests by democratic institutions is also more than likely defective. A multiply-negative pluralist of this variety could be driven to textualism, the theory would continue, because textualism promises to frustrate rather than advance the defective pluralist outcomes of the legislative branch, and yet it does so in a way that does not require that federal courts understand and implement any comprehensive theory of the common good.

The way in which a multiply-negative pluralist political theory could lead to textualism is illustrated by the jurisprudence of Judge Frank Easterbrook. Judge Easterbrook is an especially significant figure here because, like Justice Scalia, he is a prominent proponent of textualism. Unlike Justice Scalia, however, he has written extensively on public choice theory and its implications for the judicial role. In fact, we know from Judge Easterbrook's pre-judicial writings that (a) he holds a pessimistic view of the capacities of democratic legislatures to engage in accurate interest summing;[174] (b) he believes that courts are subject to the same pluralist forces that affect democratic institutions;[175] and (c) he takes a strongly moral skeptical view of questions of social policy, at least outside the area of economic policy.[176] His first effort to define a judicial role in the face of these commitments was an article called *Statutes' Domains*,[177] where he argued in favor of a kind of universal clear statement rule: if the proponent of a statutory entitlement could not point to language expressly conferring the entitlement, the court would simply declare the statute inapplicable. As Easterbrook made clear, the rule of limited statutes' domains was designed to increase the costs of legislative rent seeking, by requiring interest groups to get the deal in writing before courts would enforce it.

Shortly after assuming the bench, Judge Easterbrook softened his approach to statutory interpretation, and announced his conversion to textualism.[178] The inference that may be drawn from this is that for Easterbrook, textualism serves as a modified version of the rule of

---

174. Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984).

175. Easterbrook, *supra* note 19.

176. Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 110-11.

177. Easterbrook, *Statutes' Domains*, *supra* note 67.

178. *See, e.g.*, *In re* Sinclair, 870 F.2d 1340 (7th Cir. 1989); *In re* Erickson, 815 F.2d 1090 (7th Cir. 1987).

statutes' domains. Like the rule of statutes' domains, it forces interest groups to obtain explicit language codifying any bargains they have secured if they are to be confident of receiving the benefits.[179] Unlike the theory of statutes' domains, the consequences of failing to obtain explicit language under textualism is not that the court will simply declare no law applicable; instead, the consequence is randomness: the court will apply "a relatively unimaginative, mechanical process of interpretation"[180] to reach a result that may or may not coincide with the legislative purpose. Although textualism is weaker medicine for a dysfunctional legislative process than is the rule of statutes' domains, it has the virtue of appearing less activist, and of comporting more closely with established legal traditions.

There is some evidence that would suggest Justice Scalia's commitment to textualism is driven more by Easterbrookian public choice theory than by Acquinian rationalism. His dismissive contempt for legislative history, for example, seems to be motivated in large part by the view that the legislative process is characterized by manipulation and deceit.[181] Additionally, his tenure as an editor of *Regulation* magazine would suggest that he is sympathetic to economic ordering, and familiar with economic and public choice arguments about legislative failure.[182] Finally, his commitment to greater protection of economic rights, especially under the Takings Clause,[183] suggests that

---

179. *See* Easterbrook, *supra* note 148:

> A fourth thing we wish to do is to constrain Congress .... Congress must act bicamerally. It needs presidential approval. The laws must be published. These requirements serve important values—they cut down on the amount of legislation and drive bargains into the open where they may be scrutinized. Enacting a vaporous statute and winking, or putting some stuff in the reports, avoids these constraints—which judges can resist by insisting that words in laws be taken seriously.

Id. at 63-64.

180. *Id.* at 67.

181. *See supra* note 149.

182. Justice Scalia has written, for example, that he believes in the importance of economic rights, and would if a legislator vote for fewer restrictions on economic freedoms. But he has counseled against a revival of strong judicial protection of economic rights under the Due Process Clause because he believes this would encourage judicial activism in other areas, and because courts cannot be trusted to make correct economic judgments. Antonin Scalia, *Economic Affairs as Human Affairs*, 4 CATO J. 703 (1985).

183. *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. __, 112 S. Ct. 2886 (1992); Duquesne Light Co. v. Barasch, 488 U.S. 299, 334 (1989) (Scalia, J.,

he is pessimistic about the capacity of local legislatures to sum competing private interests. To be sure, this evidence is circumstantial. The possibility remains that Justice Scalia is ambivalent about the nature of the political system, or has no fixed views on the subject. But there is some reason to believe that he is not a rationalist but pluralist with an especially dark vision of the relevant options.

VII. CONCLUSION

Chief Justice Rehnquist is an unusual figure in the annals of American law. Commentators from the academy and the media are forever insisting that we need a Chief Justice with a coherent vision. The current Chief Justice has such a vision, but the commentators have trouble seeing it. The problem, of course, is that Chief Justice Rehnquist's theory of politics—ultrapluralism—is not the vision the commentators have in mind. From the perspective of the critics on the left, Chief Justice Rehnquist is a curious mixture of activism and restraint: activist in pursuit of States' rights, restrained in cases of individual rights. His statutory interpretation opinions seem to have no unifying theme at all. However, once we recognize that Chief Justice Rehnquist is an optimist about democratic institutions, pessimistic about courts, and a thoroughgoing skeptic about claims to objective knowledge of the common good, much of his work as a jurist falls into place. It turns out that Chief Justice Rehnquist is every bit as much a visionary as Chief Justice Marshall or Chief Justice Warren.

Although Chief Justice Rehnquist cannot be faulted for lacking a vision, his problems in translating that vision into reality go beyond lack of support outside the Court. If I am correct in my speculations about the wellsprings of Justice Scalia's textualism, it would appear that the majority of conservative Justices now serving on the Court are working at cross purposes with each other. The institutional leader of the conservative group—its Chief Justice—acts on the basis of a pluralist theory that would have courts act as faithful agents to effectuate the decisions made by democratically accountable decisionmakers. The intellectual leader of the group, Justice Scalia, acts on the basis of an approach that works to frustrate the designs of the legislative branch, by interpreting its commands in accordance with a wooden textualism.

---

concurring); Pennell v. City of San Jose, 485 U.S. 1, 15 (1988) (Scalia, J., concurring in part and dissenting in part); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

How this underlying tension will be resolved, or if it will ever be resolved, very much remains to be seen. At least as things presently stand, however, the discordance between Chief Justice Rehnquist's ultrapluralism and Justice Scalia's very different approach to law makes it highly doubtful that the Rehnquist Court will ever establish a legacy to rival that associated with the names Marshall and Warren.