

NOTE

THE NEWER TEXTUALISM: JUSTICE ALITO'S STATUTORY INTERPRETATION

I. INTRODUCTION

Despite his fifteen-year tenure as a judge on the U.S. Court of Appeals for the Third Circuit, Justice Samuel Alito remained something of a mystery when he was nominated to the Supreme Court in 2005. His lower court opinions were described as “reserved,” much unlike the sometimes polemical screeds penned by other members of the bench.¹ Justice Alito’s seemingly conservative views as an appellate judge prompted some commentators to compare him to Justice Antonin Scalia,² but these analysts made little headway in defining Justice Alito’s legal methodology with any measure of precision. More than a year after his confirmation, legal scholars, the media, and the American public still have many questions about Justice Alito. This Note attempts to answer one of those questions: What is Justice Alito’s method of statutory interpretation?

In 1990, Professor William Eskridge documented the rise of the “new textualism” that Justice Scalia brought to the Supreme Court upon his elevation in 1986.³ The new textualism, Professor Eskridge explained, “posits that once the Court has ascertained a statute’s plain meaning, consideration of legislative history becomes irrelevant.”⁴ This Note contends that, notwithstanding the frequent comparisons to Justice Scalia, Justice

1. *E.g.*, Stephen Henderson, *Alito Backed Strip-search of 10-year-old in Drug Case*, ST. LOUIS POST-DISPATCH, Nov. 6, 2005, at A2.

2. *See, e.g.*, Peter Baker, *Alito Nomination Sets Stage for Ideological Battle*, WASH. POST, Nov. 1, 2005, at A1 (“Alito has drawn comparisons to Scalia, to the point that some have dubbed him ‘Scalito’—as if he were the next generation of the Supreme Court’s most powerful conservative intellect.”). *But see* JAN CRAWFORD GREENBURG, SUPREME CONFLICT 293–94 (2007) (reporting that Justice Alito has found the nickname ‘Scalito’ to be inappropriate and “based mostly on ethnicity”).

3. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (coining the phrase “new textualism”).

4. *Id.* at 623.

Alito brings a markedly different flavor of textualism to the Court. For him the text of the statute still reigns supreme, but legislative history can be used to establish the context in which the statute should be read. Just as Justice Scalia's new textualism has influenced the Court since the 1980s,⁵ Justice Alito's "newer textualism" might very well make a similar impact on the Roberts Court.

One of Justice Alito's first opinions as a member of the Court serves as the catalyst for this theory. In *Zedner v. United States*,⁶ Justice Alito used a federal statute's legislative history to confirm his interpretation of the unambiguous statutory text.⁷ This move—unorthodox for many textualists—prompted a concurring opinion by Justice Scalia vigorously protesting the use of legislative history.⁸ Part II of this Note analyzes *Zedner*, using the dueling opinions of Justices Scalia and Alito to showcase three frameworks through which one can view legislative history and to set the stage for this Note's thesis. Because textualism in practice often demands more than what textualism allows in theory, Part III.A surveys the core tenets of textualism, while Part III.B reviews one of Justice Alito's typical statutory cases from the Third Circuit and concludes that, at least in simple cases, Justice Alito exhibits textualist behavior.

Part IV explains and defends Justice Alito's newer textualism. Part IV.A describes Justice Alito's use of legislative history by comparing two of his Third Circuit cases; Part IV.B reconciles his use of legislative history in the chronologically-later case with the core tenets of textualist theory. That case serves as an example of the newer textualism. Part IV.C defends the newer textualism against Justice Scalia's critique of legislative history. Finally, Part IV.D then argues that Justice Alito's newer textualism is normatively superior to Justice Scalia's practice.

As a disclaimer, this Note does not attempt to demonstrate that textualism is superior to other methods of statutory interpretation. Nor is its analysis meant to serve as a comprehensive review of all of Justice Alito's opinions interpreting statutes.

5. *See id.* at 656–66 (documenting the rise of the new textualism on the Supreme Court); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 355–58 (1994) (discussing how Justice Scalia's textualism "has achieved a substantial measure of success" on the Supreme Court).

6. 126 S. Ct. 1976 (2006).

7. *Id.* at 1985–86.

8. *See id.* at 1990–91 (Scalia, J., concurring).

Additionally, this Note does not attempt to rationalize all of his opinions, nor does it contend that his opinions are invariably correct. Instead, this Note focuses on several opinions in which Justice Alito explicitly sets forth his interpretive method, and uses these opinions to help answer a question that many have posed since his nomination and confirmation: Who are you, Justice Alito?

II. LEGISLATIVE HISTORY SERVED THREE WAYS:
ZEDNER AND THE TEXTUALIST FUTURE OF THE COURT

The dueling opinions of Justices Scalia and Alito in *Zedner* set the stage for a comparative examination of their methods of statutory interpretation. Justice Scalia's concurrence, which attacks Justice Alito's use of legislative history, describes only two possible approaches to legislative history.⁹ In Justice Scalia's disfavored approach, a judge considers legislative history an authoritative source of congressional intent that can, at least on occasion, override seemingly unambiguous statutory text.¹⁰ In Justice Scalia's favored approach, a judge views legislative history as entirely "illegitimate" and irrelevant for the purposes of statutory interpretation.¹¹ Although Justice Alito did not defend his use of legislative history against Justice Scalia's critique, his opinion in *Zedner* hints at a third approach that Justice Scalia did not address. Justice Alito's third approach, where legislative history is used in a narrow fashion to shed contextual light on statutory text, is the key to his method of statutory interpretation—the "newer textualism." This newer textualism not only respects the core tenets of textualism, but is also normatively superior to Justice Scalia's approach, in which legislative history is uniformly rejected.

In *Zedner*, the Court considered, among other issues, whether a defendant can prospectively waive his rights under the Speedy Trial Act of 1974.¹² Although the Act typically requires a federal criminal trial to commence within 70 days after a defendant is charged or makes an initial appearance,¹³ the defendant in this case signed a blanket waiver of his Speedy Trial

9. *See id.*

10. *See id.*

11. *Id.*

12. *Zedner*, 126 S. Ct. at 1980–81 (majority opinion).

13. *See id.* at 1980.

Act rights at the suggestion of the trial judge.¹⁴ Thus, the Court needed to decide whether such a waiver was permitted under the statute.

Writing for the Court, Justice Alito noted that the Act contained no provision contemplating waiver and that the structure of the Act indicated “that this omission was a considered one.”¹⁵ He contended that allowing prospective waivers would undermine the interest of the public in a speedy trial, which he identified as one of the purposes of the Act. Justice Alito cited the language of the Act to support his assertion that it “was designed with the public interest firmly in mind.”¹⁶ Instead of ending his statutory analysis there, however, he proceeded to quote from the Senate and House reports to confirm that the Act was, indeed, written with the public interest in mind.¹⁷

This arguably unnecessary paragraph drew a scathing rebuke from Justice Scalia, who concurred in everything except the Court’s use of legislative history.¹⁸ “[I]f legislative history is relevant when it confirms the plain meaning of the statutory text,” Justice Scalia protested, “it should also be relevant when it contradicts the plain meaning, thus rendering what is plain ambiguous.”¹⁹

Justice Alito could easily have removed the offending section from his opinion without altering the outcome of the case, thereby bringing the Court together in unanimity. His decision to include this section in the face of Justice Scalia’s fiery reprimand suggests that the importance of *Zedner* reaches beyond the relatively narrow substantive issue presented by the case.²⁰

14. *See id.* at 1980–81.

15. *Id.* at 1985.

16. *Id.*

17. *Zedner*, 126 S. Ct. at 1985–86.

18. *Id.* at 1990–91 (Scalia, J., concurring).

19. *Id.* at 1991.

20. This point was not lost on legal commentators. *See, e.g.*, Editorial, *Maybe Not Scalito*, WASH. POST, June 6, 2006, at A14 (“Justice Alito committed one of the cardinal sins of Scaliaesque judging: He cited the act’s legislative history.”); Tony Mauro, *Alito the Latest to Feel Scalia’s Sting*, LEGAL TIMES, June 12, 2006, at 8, available at <http://www.law.com/jsp/article.jsp?id=1149510922951> (“Alito’s use of legislative history places him closer to the camp of moderate-liberal Justice Stephen Breyer, who last year warned in his book *Active Liberty* of ‘the danger that lurks where judges rely too heavily on text.’”); Orin Kerr, *Alito Opinion Rules for Criminal Defendant, Draws Scalia Concurrence* (June 5, 2006), <http://www.orinkerr.com/2006/06/05/alito-opinion-rules-for-criminal-defendant-draws-scalia-concurrence/> (“[T]he opinion is interesting because Alito wanted to

Although Justice Scalia is the most vocal textualist on the Supreme Court and, perhaps, in the country, one must not forget that his approach does not represent the only possible understanding of textualism, even if one starts with the same assumptions that he does. Because other understandings of textualism are possible, a brief review of textualism is necessary before any conclusions can be drawn about Justice Alito's method of statutory interpretation.

III. STATUTORY SUPREMACY AND THE JUNIOR JUSTICE

This Note evaluates Justice Alito's method of statutory interpretation in a two-step process. This Part addresses the threshold question of whether Justice Alito considers unambiguous statutory text to be superior to conflicting legislative history. Part III.A offers an overview of the origins and the core tenets of textualist theory. Part III.B introduces a typical case in which Justice Alito had the option of rejecting unambiguous statutory text in favor of statements found in the legislative history. By holding the unambiguous statutory text superior to the legislative history, Justice Alito exhibits threshold textualist behavior.

A. Textualism's Tenets

For most of its history, the Supreme Court attempted to interpret statutes in light of "the original intent or purpose of the enacting Congress."²¹ That is, where a statute's clear text did not comport with what was said to be the statute's purpose, the Court would hold the purpose superior to the text under the theory that judges should properly act to implement Congress's true intentions.²² Only in the 1980s, through the efforts of Justice Antonin Scalia and Chief Judge Frank Easterbrook of the Seventh Circuit, did modern textualism emerge as a serious alternative to the traditional purposive method.²³

keep the discussion of legislative history in his opinion, and declined to accommodate [sic] Justice Scalia's request to take it out.").

21. Eskridge, *supra* note 3, at 626 (describing this approach as the "traditional approach"). For the prototypical example of the traditional approach, see *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892). For a brief description and analysis of this case, see Antonin Scalia, *Common-Law Courts in a Civil-Law System*, in *A MATTER OF INTERPRETATION* 3, 18–23 (Amy Gutmann ed., 1997).

22. See John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 72 (2006).

23. See *id.* at 73.

The basic premise of textualism is that judges “must seek and abide by the public meaning of the enacted text, [as] understood in context” and should “choose the letter of the statutory text over its spirit.”²⁴ Textualists argue that only the statutory text has passed the constitutional requirements of bicameralism and presentment, and that judicial reliance on unenacted intentions or purposes “disrespects the legislative process.”²⁵ Since the constitutional requirements for enacting a statute promote the balancing of interests and thoughtful deliberation, textualists claim that reliance on unenacted intent or purpose skirts the constitutional protections designed to safeguard liberty by diffusing legislative power.²⁶

Additionally, textualists reject the traditional approach’s search for a statute’s “spirit” as an exercise in futility.²⁷ Textualists generally contend that a collective body of hundreds of individuals cannot possess a singular cognizable “intent.”²⁸ They further note that legislators are often themselves unaware of the legislative history that some claim is indicative of their intent.²⁹ Moreover, textualists claim that legislation is often the product of political compromise rather than affirmation of any specific intent.³⁰ Finally, they argue that relying on legislative history encourages individual members of Congress and their staffs to prospectively manipulate a statute’s interpretation by inserting statements into the legislative history that do not reflect any collective intent.³¹

24. John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005).

25. Manning, *supra* note 22, at 73; see also Scalia, *supra* note 21, at 22 (“[T]he decision [in *Church of the Holy Trinity*] was wrong because it failed to follow the text. The text is the law, and it is the text that must be observed.”).

26. See John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 707–10 (1997).

27. See generally *id.* at 684–89.

28. See, e.g., Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 68 (1994) (“Intent is elusive for a natural person, fictive for a collective body.”); Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992).

29. See, e.g., Scalia, *supra* note 21, at 32–34 (positing that members of congressional committees are sometimes unaware of what is expressed in their own committee reports).

30. For an excellent discussion of this phenomenon, see *Edwards v. Aguillard*, 482 U.S. 578, 636–37 (1987) (Scalia, J., dissenting).

31. See, e.g., Scalia, *supra* note 21, at 34 (“It is less that the courts refer to legislative history because it exists than that legislative history exists because the courts refer to it. One of the routine tasks of the Washington lawyer-lobbyist is to draft

Textualists, however, do not completely deny the legitimacy of searching for legislative intent. But they do argue that, because of the nature of the legislative process, the search for intent should be restricted to what can be discerned from the statutory text. As Professor John Manning explains:

Textualists . . . deny that Congress has a collective will apart from the outcomes of the complex legislative process that conditions its ability to translate raw policy impulses or intentions into finished legislation Accordingly, whereas intentionalists believe that legislatures have coherent and identifiable but *unexpressed* policy intentions, textualists believe that the only meaningful collective legislative intentions are those reflected in the *public meaning* of the final statutory text.³²

Modern textualists, however, do not argue that this public meaning must be wholly defined within the four corners of the statutory text.³³ Words and phrases may have multiple potential meanings, where the correct interpretation can only be determined by considering context. Justice Scalia once famously determined that the word “take” means something other than its common use in the context of the Endangered Species Act of 1973, consulting several extra-statutory sources to shed light on what the term means when used in the context of “taking” wild animals.³⁴

Though legislative history could, in many places, provide context for what is meant by statutory texts, textualists tend to reject references to legislative history entirely.³⁵ As this Note

language that sympathetic legislators can recite in a prewritten ‘floor debate’—or, even better, insert into a committee report.”).

32. See Manning, *supra* note 24, at 424; *cf.* *Zedner v. United States*, 126 S. Ct. 1976, 1990 (2006) (Scalia, J., concurring) (“I believe that the only language that constitutes ‘a Law’ within the meaning of the Bicameralism and Presentment Clause of Article I, § 7, and hence the only language adopted in a fashion that entitles it to our attention, is the text of the enacted statute.”).

33. See Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 348 (2005) (“[N]o ‘textualist’ favors isolating statutory language from its surrounding context”); *id.* at 355 (“Textualists acknowledge that the same statutory language might be understood differently if adopted in a context that suggests one purpose than if adopted in a context that suggests another.”).

34. See *infra* note 91 and accompanying text.

35. See Manning, *supra* note 22, at 84 (“[T]extualists generally forgo reliance on legislative history as an authoritative source of [a statute’s] purpose, but that reaction goes to the reliability and legitimacy of a certain type of evidence of purpose rather than to the use of purpose as such.”); *cf.* *Zedner*, 126 S. Ct. at 1991 (Scalia, J.,

argues in Part IV, however, this total rejection is based on the practical limitations of using legislative history, as described above, and on the questionable legitimacy of using legislative history as a source of authoritative law. The narrow use of legislative history to provide context, however, can be compatible with the core tenets of textualism.

In sum, textualists derive legislative intent from the text of a statute. Though the meaning of statutory texts can be informed by considering context, textualism rejects legislative history where it conflicts with unambiguous statutory text. As detailed in the following section, Justice Alito passes this threshold test.

B. Justice Alito as a Threshold Textualist

On several occasions during his tenure on the Third Circuit, Justice Alito was presented with the option of accepting legislative intent as derived from legislative history rather than the text of a statute. Justice Alito has generally rejected these opportunities.³⁶ In *Pennsylvania Protection & Advocacy, Inc. v. Houstoun*,³⁷ for example, an advocacy organization for the mentally ill sought peer review reports relating to the death of a mental patient at a Pennsylvania hospital pursuant to the Protection and Advocacy for Mentally Ill Individuals Act.³⁸ The Act stated that certain ad-

concurring) (“[T]he use of legislative history is illegitimate and ill advised in the interpretation of any statute . . .”).

36. As stated in the Introduction, this Note does not purport to reconcile every opinion Justice Alito has penned with textualism. Indeed, in several cases, Justice Alito has seemingly rejected the plain text of the statute for an alternative interpretation. See, e.g., *RNS Servs., Inc. v. Sec’y of Labor*, 115 F.3d 182, 190 (1997) (Alito, J., dissenting); *In re Channel Home Ctrs., Inc.*, 989 F.2d 682, 686–88 (1993) (Alito, J.) (conceding that a “strictly literal parsing of the words of the statute” led to a different result than that found by the court); *Pennsylvania v. Dep’t of Health and Human Servs.*, 996 F.2d 1505, 1511 (1993) (Alito, J.). Though it is beyond the immediate scope of this Note to demonstrate, each of these cases is at least arguably compatible with modern textualism. Perhaps no modern textualist holds that the statutory text should be supreme against all else *all* of the time. See, e.g., John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2407 (2003) (“Thus, despite being reserved only for exceptional cases, the absurdity doctrine serves an important legitimating function, making textualism more palatable by offering reassurance that the problem of statutory generality will not compel the acceptance of deeply troubling outcomes.”); Scalia, *supra* note 21, at 20–21 (discussing “scrivener’s error”); cf. Antonin Scalia, *Response, in A MATTER OF INTERPRETATION*, *supra* note 21, at 129, 139–40 (discussing stare decisis as occasionally warranting departures from original understanding, at least in the context of constitutional interpretation).

37. 228 F.3d 423 (3d Cir. 2000) (Alito, J.).

38. *Id.* at 425–26.

vocacy organizations shall “have access to all records of . . . any individual who is a client of” those organizations.³⁹

Writing for an undivided panel, Justice Alito found that the peer review reports clearly fell within the statutory term “records,” and thus needed to be disclosed.⁴⁰ Arguing that state law precluded disclosure, Pennsylvania pointed to a House report that accompanied the Act’s 1991 reauthorization that stated: “[i]t is the Committee’s intent that the . . . Act does not preempt State law regarding disclosure of peer review/medical review records relating to the proceedings of such committees.”⁴¹ Rejecting this argument, Justice Alito concluded:

As noted, [the Act] requires that [certain] groups . . . be given access to a defined category of records. Peer review reports either fall within that definition or they do not. The statutory language cannot reasonably be construed to encompass identical peer review reports in some states but not others. If Congress wished to achieve that result, it needed to enact different statutory language. It could not achieve that result, in the face of the statutory language it enacted, simply by inserting a passage in a committee report.⁴²

In this case, Justice Alito resisted implementing the purported intent of Congress rather than the duly enacted statutory text. His reasoning in this case and others demonstrates that, at least in cases with unambiguous statutory language, he acts like a textualist.⁴³ This Note now turns to the more difficult

39. *See id.* at 426 (quoting 42 U.S.C. § 10805(a)(4)(A)) (internal quotation marks omitted).

40. *Id.*

41. *Id.* at 427 (quoting H.R. REP. NO. 102-319, reprinted in 1991 U.S.C.C.A.N. 777, 782) (alteration omitted).

42. *Pennsylvania Prot. & Advocacy, Inc. v. Houstoun*, 228 F.3d 423, 427–28 (3d Cir. 2000) (Alito, J.).

43. *See, e.g., Khodara Env'tl., Inc. v. Blakey*, 376 F.3d 187, 201–02 (3d Cir. 2004) (Alito, J.) (rejecting purposive interpretation for deference to agency interpretation); *Zubi v. AT&T Corp.*, 219 F.3d 220, 231 (3d Cir. 2000) (Alito, J., dissenting) (“In light of the clarity of the language of § 1658, when interpreted in accordance with standard canons of construction, it is not apparent that resort to the legislative history is appropriate.”); *United States v. Hecht*, 212 F.3d 847 (3d Cir. 2000) (Alito, J.) (“The reference to ‘notice’ in the Commentary cannot be read to overrule the unambiguous text of the statute and the Guideline, or to modify their mandatory nature.”); *Hotel Employees & Restaurant Employees Int’l Union Local 54 v. Elsinore Shore Assocs.*, 173 F.3d 175, 188 (3d Cir. 1999) (Alito, J., concurring) (“[E]ven if I were convinced that Congress harbored some general purpose that was inconsistent with those specific provisions, I would follow the specific language that Congress duly enacted.”); *cf. United States v. Fisher*, 10 F.3d 115, 120

cases in which Justice Alito considers legislative history in evaluating ambiguous statutes.

IV. JUSTICE ALITO'S NEWER TEXTUALISM

Although Justice Alito's method of statutory interpretation in simple cases like the one above has a distinctly textualist tone, his unorthodox use of legislative history in more ambiguous cases requires explanation. At his Supreme Court confirmation hearings, Justice Alito acknowledged the difficulties inherent in using legislative history.⁴⁴ He suggested that he relies on legislative history only when the statutory text is not dispositive. In response to a question by Senator Charles Grassley, Justice Alito stated:

I have often looked to legislative history in the cases that I have written concerning statutory interpretation. And I think if anybody looks at those opinions they will see that.

When I interpret a statute, I do begin with the text of the statute. I think that certainly is the clearest indication of what Congress as a whole had in mind in passing the statute. And sometimes the language of the statute is dispositive and is really—the decision can be made based on the language of the statute itself.

But when there is an ambiguity in the statute, I think it is entirely legitimate to look to legislative history, and as I said, I have often done that.⁴⁵

Even though Justice Alito recognized only a limited role for legislative history, a review of his Third Circuit opinions reveals an occasional willingness to look at legislative history

(3d Cir. 1993) (Alito, J.) (“Needless to say, however, this passage [of legislative history] does not itself have the force of law; nor does it purport to illuminate any ambiguous statutory language.”).

44. See *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 504 (2006) (statement of then-Judge Samuel Alito) (“I think [reference to legislative history] needs to be done with caution. Just because one member of Congress said something on the floor, obviously that doesn't necessarily reflect the view of the majority who voted for the legislation.”).

45. *Id.* at 503–04; see also *id.* at 350 (“When I interpret statutes . . . where I start and often where I end is with the text of the statute. And if you do that, I think you eliminate a lot of problems involving legislative history . . .”).

even where the statutory language is unambiguous.⁴⁶ This Part attempts to reconcile Justice Alito's approach to legislative history with the tenets of textualism.

Although one of Justice Alito's early Third Circuit opinions used legislative history in an anti-textualist manner, he changed his methodology in later cases, using legislative history as a source of context illuminating the meaning of the statutory text. The following Section documents this evolution. Justice Alito's use of legislative history as a source of context is then reconciled with the core tenets of textualism. This practice, unusual for a textualist, is what makes the newer textualism newer. Following this explanation, the next Section presents Justice Scalia's critique of legislative history and makes an argument that Justice Alito's newer textualism avoids the pitfalls of Justice Scalia's approach. Finally, a normative defense of the newer textualism is presented.

A. Justice Alito's Use of Legislative History

One year after his confirmation to the Third Circuit, Justice Alito dissented in *Cruz v. Chesapeake Shipping, Inc.*,⁴⁷ a case involving a group of Philippine seamen who argued that the temporary reflagging of former Kuwaiti oil tankers under the flag of the United States entitled them to minimum wages and other benefits under the Fair Labor Standards Act.⁴⁸ Dissenting, Justice Alito found two relevant ambiguities in the applicable provisions of the Act.⁴⁹ For each ambiguity he consulted legislative history in a non-textualist manner,⁵⁰ stating at one point that "the legislative history manifests an unambiguous congressional intent to provide minimum wage protection for all seamen on American vessels."⁵¹ Using legislative history as a

46. See, e.g., *DiGiacomo v. Teamsters Pension Trust Fund*, 420 F.3d 220, 230–31 (3d Cir. 2005) (Alito, J., dissenting) (consulting legislative history after finding statutory language unambiguous); *Chen v. Ashcroft*, 381 F.3d 221, 232–233 (3d Cir. 2004) (Alito, J.) (same); *United States v. Rodriguez*, 961 F.2d 1089, 1092–93 (3d Cir. 1992) (Alito, J.) (same); cf. *Zedner v. United States*, 126 S. Ct. 1976, 1985 (2006) (same).

47. 932 F.2d 218, 235 (3d Cir. 1991) (Alito, J., dissenting).

48. *Id.* at 219–20 (majority opinion).

49. *Id.* at 235–36, 237–38 (Alito, J., dissenting).

50. See *id.* at 237–38.

51. *Id.* at 237; see also *id.* at 238 ("The legislative history clearly shows that Congress assumed the 'commerce' requirement would pose no obstacle for seamen on American vessels.").

sign of “congressional intent,”⁵² Justice Alito decided the case at least partly on the authority of the legislative history.

Two years later, however, Justice Alito used legislative history in a considerably different manner. In *Pennsylvania Office of the Budget v. Department of Health and Human Services*,⁵³ the Third Circuit considered a statute providing funding for federal welfare benefit programs administered by states.⁵⁴ The statute required recipient state agencies to “minimize the time elapsing between transfer of the money from the Treasury and the disbursement by a State,” and also noted that “[a] State is not accountable for interest earned on grant money pending its disbursement for program purposes.”⁵⁵ The program at issue was a self-insurance program where Pennsylvania would periodically transfer federal funds into its reserve accounts to cover future obligations.⁵⁶ The question presented was whether Pennsylvania was required to return the interest on those reserve funds, which required in turn an interpretation of the phrase “pending its disbursement for program purposes.”⁵⁷

According to Justice Alito, the district court and Pennsylvania proffered “two entirely different but nevertheless plausible interpretations” of this phrase, each concluding that Pennsylvania was entitled to keep the interest.⁵⁸ After deeming the statute ambiguous, Justice Alito proceeded to consult the legislative history, which he evaluated as follows:

In light of this background, we are convinced that the statutory phrase “pending its disbursement for program purposes” was intended to have a specific and limited meaning. This phrase was intended to refer to the period during which a state temporarily holds federal grant-in-aid money that is destined for prompt transfer to the ultimate recipients of program benefits.⁵⁹

Justice Alito’s use of legislative history here is different than his use in *Cruz*. The difference is subtle, yet telling. In *Cruz*, Jus-

52. *Id.* at 237–38.

53. 996 F.2d 1505 (3d Cir. 1993) (Alito, J.).

54. *Id.* at 1507.

55. *Id.* at 1508 (quoting Intergovernmental Cooperation Act of 1968, 31 U.S.C. § 6503(a) (1988) (amended 1990)).

56. *Id.* at 1507.

57. *Id.* at 1508.

58. *Pennsylvania Office of the Budget*, 996 F.2d at 1509.

59. *Id.* at 1511.

tice Alito resolved statutory ambiguity by using snippets of legislative history as evidence of Congress's intent.⁶⁰ Here, in contrast, Justice Alito did not seek out the overarching intent of Congress, if one actually existed, but rather merely sought to ascertain what Congress meant by using the phrase "pending its disbursement." Whereas Justice Alito in *Cruz* concerned himself with what the *legislators* meant, in *Pennsylvania* he focused on what the *statute* meant, using legislative history modestly as a source of context for interpreting the enacted language.⁶¹

B. *A Textualist Justification of the Newer Textualism*

As noted in Part II, Justice Scalia in his *Zedner* concurrence describes a world in which judges are divided into those who use legislative history and those who do not.⁶² Indeed, he implies that those who use legislative history cannot be true textualists⁶³ and that the use of legislative history has no place in a textualist

60. See *supra* note 52.

61. See *In re Sinclair*, 870 F.2d 1340, 1342 (7th Cir. 1989) (Easterbrook, J.) ("Legislative history may be invaluable in revealing the setting of the enactment and the assumptions its authors entertained about how their words would be understood."); see also *Watson v. Se. Penn. Transp. Auth.*, 207 F.3d 207, 218–220 (3d Cir. 2000) (Alito, J.) ("[T]he legislative history strongly supports an interpretation of the statute that preserves the distinction between 'mixed-motive' and 'pretext' cases."). The reader might question how this case can serve as a model of textualism when Justice Alito required Pennsylvania to refund interest to the federal government, despite statutory text that declared, "A State is not accountable for interest earned on grant money pending its disbursement for program purposes." See *Pennsylvania Office of the Budget*, 996 F.2d at 1508 (quoting Intergovernmental Cooperation Act of 1968, 31 U.S.C. § 6503(a) (1988) (amended 1990)); see also *id.* at 1514 (Becker, J., dissenting) (accusing majority of "supplant[ing] the terms of [the statute] in its entirety, including language that is clear and unambiguous."). But Justice Alito appears to implicitly appeal to the absurdity doctrine in his decision requiring a refund of the interest. See *id.* at 1511 ("[I]t seems clear that the congressional committees and the supporters of Section 203(a) would have been shocked by the thought that a state could keep millions of dollars of interest on federal funds placed in [long-term reserve] accounts."); cf. Manning, *supra* note 36, at 2391 ("[E]ven the staunchest modern textualists still embrace and apply, even if rarely, at least some version of the absurdity doctrine."). Finding that Pennsylvania's actions fell outside the scope of the statute, Justice Alito then applied the traditional remedy of requiring the interest to be returned. See *Pennsylvania Office of the Budget*, 996 F.2d at 1511.

62. *Zedner v. United States*, 126 S. Ct. 1976, 1990–91 (2006) (Scalia, J., concurring).

63. See *id.* at 1991 ("[I]f legislative history is relevant when it confirms the plain meaning of the statutory text, it should also be relevant when it contradicts the plain meaning, thus rendering what is plain ambiguous.").

jurisprudence.⁶⁴ This Note suggests that Justice Scalia ignores a third framework in which legislative history is not viewed as authoritative law, but rather is utilized narrowly to shed light on the context of statutory texts.

All modern textualists recognize that statutory text has meaning only in context.⁶⁵ The relevant question, then, is why certain extra-statutory sources can inform context, yet use of legislative history for the same purpose is forbidden.⁶⁶ Herein lies an interesting split between the two leading practitioners of modern textualism, Justice Scalia and Chief Judge Easterbrook. Though commentators are quick to group the two together when discussing their similar methods of statutory interpretation,⁶⁷ very little has been written comparing their approaches to legislative history.⁶⁸ Chief Judge Easterbrook has been much more receptive than Justice Scalia to using legislative history in a limited manner to “establish[] the domain of the statute.”⁶⁹ In *Zedner*, Justice Scalia bemoaned the ambiguity that legislative history could introduce into a statute, but Chief Judge Easterbrook has praised legislative history for this very reason:

An unadorned “plain meaning” approach to interpretation supposes that words have meanings divorced from their contexts—linguistic, structural, functional, social, historical. Language is a process of communication that works only when authors and readers share a set of rules and mean-

64. See *id.* (“[T]he use of legislative history is illegitimate and ill advised in the interpretation of any statute . . .”).

65. See, e.g., Scalia, *supra* note 21, at 23–24 (criticizing strict constructionism); see also Nelson, *supra* note 33, at 348 (“[N]o ‘textualist’ favors isolating statutory language from its surrounding context . . .”); *id.* at 355 (“Textualists acknowledge that the same statutory language might be understood differently if adopted in a context that suggests one purpose than if adopted in a context that suggests another.”).

66. For example, although Justice Scalia protests against the use of legislative history in *Zedner*, he has no problem with using a plethora of other extra-statutory sources, including unenacted sources, in developing context. See *infra* note 91.

67. See, e.g., Eskridge, *supra* note 3, at 650 (“Although somewhat more scornful of legislative history than other judicial critics, Justice Scalia and Chief Judge Easterbrook have essentially founded a new school of thought about legislative history.”).

68. But see Nelson, *supra* note 33, at 360 (“Judge Easterbrook seems willing to take account of legislative history more frequently [than Justice Scalia.]”); *id.* at 360 n.38 (collecting cases in which Chief Judge Easterbrook endorsed the use of legislative history).

69. Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 448 (1990).

ings. . . . Legislative history may be invaluable in revealing the setting of the enactment and the assumptions its authors entertained about how their words would be understood.⁷⁰

Justice Alito clearly falls within the Easterbrook camp. In *Pennsylvania*, Justice Alito considered the background of the legislation to determine the meaning of ambiguous statutory language. Based on legislative history showing that Congress designed the legislation to save the federal government significant interest costs rather than to confer a windfall upon the states, Justice Alito concluded that the statutory phrase “was clearly not intended to refer to the long-term holding of federal funds in reserve accounts.”⁷¹ Justice Alito has used legislative history in an Easterbrook-like, context-providing fashion, rather than in an intentionalist manner, by reading the enacted statutory text in light of background context provided by the legislative history. This type of usage—though perhaps offensive to Justice Scalia—does not offend the tenets of textualism.

And what of Justice Alito’s practice of exploring legislative history as a matter of course, as he did in *Zedner* and so many other cases?⁷² Chief Judge Easterbrook has noted that legislative history may be used to show “that words with a denotation ‘clear’ to an outsider are terms of art, with an equally ‘clear’ but different meaning to an insider.”⁷³ In other words, he has decided that legislative history can legitimately be used to, as Justice Scalia disdainfully put it in *Zedner*, “render[] what is plain ambiguous.”⁷⁴ This framework may explain Justice Alito’s reference to legislative history to “confirm” his textual interpretations—rather unusual in the textualist tradition. By consulting legislative history even when the statutory text appears unambiguous on its face, Justice Alito might be ensuring that he does not inadvertently neglect the best interpretation for one that merely seems obvious at first glance.

70. *In re Sinclair*, 870 F.2d 1340, 1342 (7th Cir. 1989) (Easterbrook, J.) (internal citation omitted).

71. *Pennsylvania Office of the Budget v. Dep’t of Health and Human Servs.*, 996 F.2d 1505, 1511 (3d Cir. 1993) (Alito, J.).

72. See *supra* note 46.

73. See *Sinclair*, 870 F.2d at 1342.

74. *Zedner v. United States*, 126 S. Ct., 1976, 1991 (2006) (Scalia, J., concurring).

The difference between Justices Alito and Scalia is not that Justice Scalia denies that statutes can be ambiguous,⁷⁵ but instead that Justice Scalia believes ambiguity requires more than the mere possibility of multiple plausible interpretations.⁷⁶ When confronted with such a statute, Justice Scalia would have the Court “try to find a preferred reading, based on textual and structural arguments, and only if it cannot reach a preferred reading should it conclude the text is ambiguous.”⁷⁷ In reaching a “preferred reading,” however, Justice Scalia often narrows the statute’s domain or creatively construes the rules of grammar and statutory construction to preclude alternative interpretations, thus eliminating the need to consult legislative history.⁷⁸ Whereas Justice Scalia aggressively employs canons of interpretation to eliminate alternative interpretations, Justice Alito has no qualms about identifying and addressing ambiguities.⁷⁹ In essence, where Justice Scalia is ambiguity-avoiding, Justice Alito is ambiguity-seeking. If consulting the legislative history might aid Justice Alito in seeing all possible interpretations and choosing the correct one, he will consult it.

That legislative history might serve to confirm an interpretation of the statutory text, however, does not necessarily imply that “it should also be relevant when it contradicts the plain meaning.”⁸⁰ Justice Alito does not routinely use legislative history to impeach the statutory text.⁸¹ His use of legislative history in this manner is not a call to intentionalism; rather, it more closely reflects the approach Chief Justice Marshall once described: “Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived.”⁸²

In sum, Justice Alito’s practice with respect to legislative history suggests that he uses these materials to shed light on the

75. See Bradley C. Karkkainen, “Plain Meaning”: Justice Scalia’s Jurisprudence of Strict Statutory Construction, 17 HARV. J.L. & PUB. POL’Y 401, 437 (1994).

76. See *id.* at 437 n.149.

77. *Id.* (citing *Dewsnup v. Timm*, 112 S. Ct. 773, 788 (1992) (Scalia, J., dissenting)).

78. See *id.* at 439–56; see also Merrill, *supra* note 5, at 372 (“Textualism . . . seems to transform statutory interpretation into a kind of exercise in judicial ingenuity This exercise places a great premium on cleverness.”).

79. See, e.g., *Khodara Envtl., Inc. v. Blakey*, 376 F.3d 187, 198–200 (3d Cir. 2004) (Alito, J.); *Applebaum v. Nissan Motor Acceptance Corp.*, 226 F.3d 214, 220 (3d Cir. 2000) (Alito, J.).

80. *Zedner v. United States*, 126 S. Ct. 1976, 1991 (2006) (Scalia, J., concurring).

81. See *supra* Part III.B.

82. *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805) (Marshall, C.J.).

context of statutory texts, to interpret them properly, and to ensure that he has not inadvertently deemed plain what actually is ambiguous. This is the third form of interpretation that Justice Scalia failed to consider in his *Zedner* concurrence. This is Justice Alito's newer textualism.

C. *The Newer Textualism Survives Justice Scalia's Critique of Legislative History*

This Section demonstrates that the newer textualism survives Justice Scalia's critique of legislative history.⁸³ His critique generally takes one of two forms. First, it incorporates the criticisms of intentionalism as set out in Part III.A, namely that the realities of the legislative process undermine the reliability of legislative history. Second, it attacks reliance on legislative history as violating the U.S. Constitution. These attacks are dealt with in turn.

1. *Safeguarding Against Faulty Legislative History*

As noted above, textualists generally express skepticism regarding the reliability of legislative history.⁸⁴ Newer textualists should not sweep these important criticisms to the side. Before relying on legislative history, textualist judges should ascertain its reliability, just as they would with any other source, to ensure that the legislative history they consult is authentic and free from manipulation.

A judge should first ensure that legislative history comports with the statutory text itself. He could compare the legislative history's account with other sources, such as newspapers and scholarly articles, to ensure that the legislative history was not fabricated, and he can evaluate the source of the legislative history like a trial court evaluates the persuasiveness of a witness. As Professor Manning argues:

When a party prepares a brief in litigation or a professor writes a law review article, a court is capable of evaluating the persuasiveness of the author's contentions on the merits, even though that author may have an agenda. When the court examines [legislative history], its critical capacity is no less. . . . [A] court should rely on the information found in

83. This Note takes no position on whether Justice Alito's jurisprudence, in particular, survives the following attacks. Instead, it argues that the newer textualism *can* overcome these critiques if applied properly.

84. See *supra* notes 27–31 and accompanying text.

the legislative history only after a full and independent verification of the accuracy and persuasiveness of its contents.⁸⁵

Judges make reliability determinations as a matter of course. The newer textualist judge simply takes upon himself the burden of making these same determinations regarding legislative history.

2. *Comporting with the Nondelegation Doctrine*

According to Justice Scalia, resort to legislative history is improper in part because, as he noted in *Zedner*, “the only language that constitutes ‘a Law’ within the meaning of the Bicameralism and Presentment Clause of Article I, § 7, and hence the only language adopted in a fashion that entitles it to our attention, is the text of the enacted statute.”⁸⁶ Professor Manning unpacks this argument a bit more:

[T]extualists reject the interpretive value of legislative history because it represents *unenacted* legislative intent. . . . And so a court cannot treat those materials as authoritative sources of statutory meaning without offending the bicameralism and presentment requirements prescribed by Article I, Section 7.⁸⁷

Essentially, Justice Scalia contends that legislative history contravenes the doctrine of nondelegation as embodied in the Constitution:⁸⁸ “The legislative power is the power to make laws, not the power to make legislators. It is nondelegable Whatever Congress has not *itself* prescribed is left to be resolved by the executive or (ultimately) the judicial branch.”⁸⁹ Thus, when courts rely on legislative history, according to Justice Scalia, they effectively “permit[] a committee or sponsor to interpret a law on Congress’s behalf.”⁹⁰

All modern textualists, however, rely on extra-statutory sources to provide context. In contemplating the meaning of the statutory term “take” in the Endangered Species Act of 1973, for example, Justice Scalia considered, among other sources, two dictionaries, Blackstone’s *Commentaries*, and a nineteenth-century Supreme

85. Manning, *supra* note 26, at 732–33. See generally *id.* at 731–37.

86. *Zedner v. United States*, 126 S. Ct. 1976, 1990 (2006) (Scalia, J., concurring).

87. Manning, *supra* note 26, at 696–97.

88. See U.S. CONST. art. I, § 1 (“All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).

89. Scalia, *supra* note 21, at 35.

90. Manning, *supra* note 26, at 706.

Court case that predated the statute.⁹¹ No one would argue that these extra-statutory sources must be subject to the Bicameralism and Presentment Clause. Why then should legislative history be subject to such requirements?

Justice Scalia's constitutional critique of legislative history rests on the notion of using legislative history as an *authoritative* source of congressional intent. Yet, the newer textualism does not purport to use legislative history as authoritative; rather, it considers legislative history merely as a *persuasive* source of context, not unlike the common textualist practice of consulting extra-statutory sources for context. By consulting legislative history as a possible source of statutory context, and not as an authoritative source of legislative intent, the newer textualist avoids the constitutional issues presented in Justice Scalia's critique.

Two opinions by Chief Judge Easterbrook demonstrate the difference between legislative history used as a means of impermissible delegation and as a means of providing legitimate statutory context. In *Brill v. Countrywide Home Loans, Inc.*,⁹² Chief Judge Easterbrook considered the argument, accepted by several lower courts, that the Class Action Fairness Act's legislative history compels shifting a persuasive burden to the proponent of remand, even though such an interpretation has no basis in the statutory text.⁹³ Though many lower courts "treated this passage [of a Senate committee report] as equivalent to a statute" and shifted the burden, Chief Judge Easterbrook rejected that argument, noting that "when the legislative history stands by itself . . . unconnected to any enacted text, it has no more force than an opinion poll of legislators . . ."⁹⁴ Chief Judge Easterbrook thus rejects legislative history as an authoritative source of law.

Chief Judge Easterbrook's opinion in *Continental Can Co. v. Chicago Truck Drivers (Independent) Pension Fund*,⁹⁵ however, demonstrates an appropriate use of legislative history as persuasive and context-providing. In *Continental Can*, Chief Judge Easterbrook considered a statutory provision that turned on whether "'substan-

91. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 717 (1995) (Scalia, J., dissenting). For an expanded discussion of the case and its implications, see Manning, *supra* note 26, at 702.

92. 427 F.3d 446 (7th Cir. 2005).

93. *Id.* at 447-48.

94. *Id.* at 448. Justice Alito has ruled similarly. See *supra* Part III.B.

95. 916 F.2d 1154 (7th Cir. 1990).

tially all” of a pension fund’s assets come from “employers primarily engaged in the long and short haul trucking industry.”⁹⁶ In quantifying the ambiguous phrase, “substantially all,” Chief Judge Easterbrook considered a floor statement explaining that the Internal Revenue Service uses that phrase to mean at least 85 percent, and therefore, “the substantially all requirement would only be satisfied where at least 85 percent of the contributions to the plan are made by employers who are primarily engaged in the specified industries.”⁹⁷ Chief Judge Easterbrook verified the allegations made in the legislative history by comparing them to the relevant statutes and regulations, and then noted that the floor statement “was in line with a frequent meaning of the phrase and must have supplied the meaning for the bulk of Members and the President, if the phrase was ever present to their minds.”⁹⁸ Additionally, he rejected a senator’s competing interpretation found in the legislative history, which argued that “substantially all” meant at least 50.1 percent, as being “idiosyncratic” and out of line with the statutory text.⁹⁹

By treating the legislative history as a persuasive source of information that can be accepted or rejected, rather than as an authoritative source of law that cannot be questioned, Chief Judge Easterbrook demonstrates a use of legislative history not unlike textualist uses of other extra-statutory sources.¹⁰⁰ Again, applied properly, the newer textualism does not offend Justice Scalia’s constitutional criticisms of legislative history.

D. A Normative Defense of the Newer Textualism

The newer textualism presents a method of statutory interpretation that is normatively superior to the traditional textualist approach for one simple reason: It adds a single, modest tool to

96. *Id.* at 1155 (quoting 29 U.S.C. § 1383(d)(2)).

97. *Id.* at 1156 (quoting 126 CONG. REC. 23,040 (1980) (statement of Rep. Thompson)).

98. *Id.* at 1157.

99. *Id.* at 1158.

100. Although Chief Judge Easterbrook verified the floor statement in *Continental Can* with the relevant Treasury regulations, Professor Manning contends that he probably should have verified the meaning of the phrase “substantially all” in areas of law “more closely analogous to federal pension law.” Manning, *supra* note 26, at 736–37. Although *Continental Can* might present questions of whether Chief Judge Easterbrook went far enough with respect to his independent verification, *see supra* Part IV.C.1, the case aptly demonstrates the difference between using legislative history as authority and using legislative history as persuasive evidence.

the traditional textualist's toolbox without displacing existing tools or deviating from the principles of textualism. The newer textualism only diverges from traditional textualist jurisprudence when ambiguity is in play.¹⁰¹ Where Justice Scalia might resort to extra-statutory sources apart from legislative history, as well as grammatical and canonical tools often used to divine a singular interpretation, Justice Alito, as a practitioner of the newer textualism, retains all of those tools plus the use of legislative history. Though limited in scope, as described in Parts IV.B and IV.C, the newer textualist's use of legislative history suffers from neither the realist pitfall of intentionalism nor the constitutional problem of nondelegation, so long as it is used in a careful, legitimately textualist manner.

Moreover, the newer textualism presents a more realistic textualism. Whereas Justice Scalia's textualism often involves the use of sterile and, perhaps, arbitrary grammatical rules,¹⁰² the newer textualism's willingness to consider a "well-informed, contemporaneous account of the relevant background to the enactment"¹⁰³ as context for the statute might make textualism more palatable to the general public. Though it is true that the newer textualist must safeguard against using legislative history planted solely "to produce desired interpretative outcomes,"¹⁰⁴ this additional burden seems more than outweighed by the benefit of statutory context that can be derived from legitimate use of legislative history.

V. CONCLUSION

Seventeen years ago, Professor Eskridge documented the rise of Justice Scalia's particular method of statutory interpretation that he deemed the new textualism. Justice Scalia's persistent

101. When ambiguity is not present at first glance, the newer textualism only differs from other textualist methodologies in its confirmation of the plain text of the statute. When, as in *Zedner*, this confirmation adds nothing substantive to the reasoning behind the decision, neither traditional nor newer textualism comes out ahead. Yet where the initial reading of the statute yields an obvious plain meaning, but a review of the legislative history leads one to question whether a statutory term should instead be interpreted as a term of art, the newer textualist foray into legislative history is normatively better than a traditional textualist approach that risks overlooking the term of art.

102. See *supra* notes 75–78 and accompanying text.

103. Manning, *supra* note 26, at 732.

104. *Id.*

refusal to concur in practically any use of legislative history resulted in the rest of the Court bending to his will. With the elevation of Justice Alito, however, the Court might see the rise of a newer type of textualism, one that consults legislative history not for an authoritative statement of congressional intent, but to help determine the context in which the statute itself should be read. This is not a new phenomenon. Chief Judge Easterbrook has been considering legislative history in this manner for years. Yet, with Justice Alito's elevation to the Supreme Court, the newer textualism might attain a new prominence.

Justice Alito could have written his opinion in *Zedner* without the reference to legislative history that offended Justice Scalia. Yet the most junior member of the Court pressed forward with this unnecessary section of the opinion. Taken as a whole, *Zedner* indicates two things. First, it demonstrates that using legislative history is an important part of Justice Alito's method of statutory interpretation that he will not concede even in the face of a scathing rebuke. Second, that no other member of the Court joined Justice Scalia's concurrence signals that the newer textualism does not yet have a significant opposition. Since the newer textualism presents a flexible and more palatable alternative to Justice Scalia's version of textualism, yet still respects core textualist theory, its prominence on the center stage of the Supreme Court might well lead to its spread throughout the judicial system.¹⁰⁵

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105. Shortly before this Note was to be published, the Supreme Court handed down an opinion that led Justice Scalia to dissent against what he deemed "the elevation of judge-supposed legislative intent over clear statutory text." *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, No. 05-1508, slip op. at 1 (U.S. Apr. 17, 2007), <http://www.supremecourtus.gov/opinions/06pdf/05-1508.pdf> (Scalia, J., dissenting). Although Justice Breyer's majority opinion, which Justice Alito joined, began with the relevant statute's "background and basic purposes," *id.* at 7, its rationale rested on the alleged ambiguity of the statutory provision and acknowledged the supremacy of the statutory text: "neither the legislative history nor the reasonableness of the Secretary's method would be determinative if the plain language of the statute unambiguously indicated that Congress sought to foreclose the Secretary's interpretation." *Id.* at 11. Whether the statutory provision was ambiguous is up for debate, but contrary to Justice Scalia's assertions, the language in Justice Breyer's opinion clearly indicated that his opinion is not in the anti-textualist style of *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892). Justice Alito's refusal to concede that the statutory provision was unambiguous, particularly in an opinion not written by him, does not impugn his newer textualist credentials.

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