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The Polymorphic Principle and the Judicial Role in Statutory Interpretation

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The Polymorphic Principle and the Judicial Role in Statutory Interpretation

by Jonathan R. Siegel*

[We decline to] establish within our jurisprudence, beyond the power of Congress to remedy, the dangerous principle that judges can give the same statutory text different meanings in different cases.

Clark v. Martinez, 125 S. Ct. 716, 727 (2005).

INTRODUCTION

The Supreme Court's statutory interpretation cases present an ongoing clash among methods of statutory interpretation—a clash that reflects a larger dispute over the proper judicial role in our system of government. On the one side, the textualists tend to prefer mechanical, rules-based methods of interpretation that, at least ostensibly, minimize the role of judicial choice in the interpretive process.¹ The other side, often (though not invariably) in the name of implementing congressional intent, prefers a more flexible, standards-based approach, which calls upon courts to make intelligent choices and, on appropriate occasions, to deviate from the most straightforward or canonical reading of statutory text in order to reach the most appropriate result.² The two sides thus have different visions of the judicial role.

In this ongoing clash among interpretive methods, the textualists recently won another battle. Indeed, their victory was unusually powerful. Not only did Justice Scalia convince the Supreme Court to resolve a case on textualist grounds, he convinced six other Justices to join an opinion

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¹ Caleb Nelson, *What is Textualism?*, 91 Va. L. Rev. 347, 350, 374-403 (2005).

² *Id.* at 349, 398.

stating that a particular textualist rule of statutory construction is so strong that it *must* always apply; courts lack power to deviate from it.

The case, *Clark v. Martinez*,³ turned on the question of whether a single term in a single statutory provision must always have a single meaning. If, for example, a statute takes the form, “if (A or B), then C,” must C have the same meaning in cases involving A as in cases involving B? In *Martinez*, the Supreme Court said the answer is always yes.⁴

Like so many issues of statutory interpretation, this seemingly simple question implicates the largest issues, both of statutory interpretation and, ultimately, the proper judicial role in our system of government. *Martinez* presents, in perfect microcosm, the general clash over interpretive methodologies. It is notable on two levels, first, for its creation of a new and unique canon of statutory construction, and second, for what it says about the Supreme Court’s understanding of the judicial role. This Article explores *Martinez* on both levels, using the case as a window into the larger questions of statutory interpretation and the separation of powers.

First, the Article explores whether there is really a canon of statutory construction that requires courts to determine that a single phrase in a single statutory provision always has a single meaning—a canon that this article will refer to as the *strong unitary principle*. Scholars have long considered the canons of construction as a fruitful field of study,⁵ but the question of this particular canon’s existence has received but little attention.⁶ With *Martinez*, the question bursts forth as a general issue in

³ 125 S. Ct. 716 (2005).

⁴ *Id.* at 722-27.

⁵ E.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 25-29 (Amy Gutmann ed., 1997); William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776-1806*, 101 Colum. L. Rev. 990, 1099-1105 (2001); John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 108-26 (2001); Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. Rev. 1023, 1043-44 (1998); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085, 2148-50 (2002); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*, 3 Vand. L. Rev. 395 (1950).

⁶The question was the subject of a recent scholarly symposium exchange with regard to constitutional text. Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 Ark. L. Rev. 1149 (2003); Adrian Vermeule, *Three Commerce Clauses? No Problem*, 55 Ark. L. Rev. 1175 (2003). With regard to statutory interpretation, the question has previously been addressed primarily in the context of statutes that impose both civil liability and criminal penalties for specified conduct; scholars have examined whether, in such statutes, the provisions specifying the forbidden conduct must receive a uniform interpretation that applies to both civil and criminal cases. Lawrence M. Solan, *Statutory Inflation and Institutional Choice*, 44 Wm.

statutory interpretation. The Supreme Court not only determined that it would read the statute before it in accordance with the strong unitary principle, but it held that the principle must always apply.⁷ The Court asserted that any contrary interpretive approach would be “novel” and “dangerous.”⁸

This Article first shows that the Court erred in its descriptive claim that departure from the strong unitary principle would be “novel.” In numerous cases, courts, including the Supreme Court, have applied the contrary principle that a single term or phrase in a single statutory provision may have multiple meanings—an interpretive approach that this article will call the *polymorphic principle*. As this Article will show, courts employ the polymorphic principle in a variety of situations, most commonly when some special rule of statutory interpretation calls for a special construction of statutory text in one circumstance, but has no application in other circumstances.⁹ Courts also sometimes employ the polymorphic principle when necessary as a pure policy matter.¹⁰

The Article then takes on the Court’s normative assertion that the polymorphic principle is “dangerous.” The choice between the strong unitary principle and the polymorphic principle, this Article shows, implicates the most fundamental questions concerning the proper judicial role in our system of government.¹¹ The *Martinez* opinion, this Article suggests, cannot be understood independently of the identity of its author, Justice Scalia. The opinion does not simply endorse a particular rule of statutory construction; it represents a stage in Justice Scalia’s long-term campaign to limit *judicial choice*. By taking away judicial discretion to give a single piece of statutory text multiple meanings, Justice Scalia hopes to further his ultimate goal of limiting the judicial role in our system of government.

This Article attempts to show that Justice Scalia’s campaign and his consequent embrace of the strong unitary principle are misguided. It is an

& Mary L. Rev. 2209 (2003); Margaret V. Sachs, *Harmonizing Civil and Criminal Enforcement of Federal Regulatory Statutes: The Case of the Securities Exchange Act of 1934*, 2001 U. Ill. L. Rev. 1025 (2001).

⁷ 125 S. Ct. at 724.

⁸ *Id.* at 725, 727.

⁹ See *infra* Parts II.B.1, 2 (describing cases of “constitutional avoidance” polymorphism and “subconstitutional” polymorphism).

¹⁰ See *infra* Part II.B.3 (describing cases of “policy” polymorphism).

¹¹ For some previous commentary, see John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 Colum. L. Rev. 1648 (2001); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621 (1990); Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 Geo. Wash. L. Rev. 309 (2001).

error, this Article suggests, to attempt to mechanize the judicial role in statutory interpretation and drive out the necessity for intelligent judicial choice.¹² The Constitution permits the exercise of the degree of judicial choice necessary to implement the polymorphic principle.¹³ Moreover, as with so many textualist practices, the strong unitary principle does not, in fact, limit judicial choice; it only presents the illusion of doing so.¹⁴ Indeed, ironically, the strong unitary principle would often have the effect of *magnifying* the role of judicial choice in statutory interpretation.¹⁵ Thus, even those who seek to limit the role of judicial choice wherever possible should be reluctant to embrace it.

Part I of this Article describes *Clark v. Martinez* and its endorsement of the strong unitary principle. Part II then demonstrates, as a descriptive matter, that courts in fact employ the contrary polymorphic principle. Part II analyzes the different categories of cases in which the polymorphic principle appears and the motivations that drive courts to employ it.

Part III then considers the conflict between the polymorphic principle and the strong unitary principle as a normative matter. This Part views the conflict in the larger context of general theories of statutory interpretation. The Constitution, this Part attempts to show, does not compel Justice Scalia's textualist theory of interpretation; nor does it forbid the degree of judicial choice necessary to implementation of the polymorphic principle.

Part IV concludes by considering the likely future of the polymorphic principle. Although *Martinez* appears very clearly to embrace the strong unitary principle, this Part suggests that the Supreme Court lacks firm commitment in methodological matters and that it will probably revert to the polymorphic principle in the future when the occasion so demands. Accordingly, this Part attempts to give some guidance as to the appropriate use of the polymorphic principle in particular cases and, finally, to explore whether Congress should play a role in choosing between the polymorphic principle and the strong unitary principle.

I. CLARK v. MARTINEZ AND THE UNITARY PRINCIPLE

The Supreme Court has always recognized that the terms in any federal statutory provision take their meaning, in part, from the context provided by the entire statute. A particular aspect of this general principle is the long-standing presumption that if a word or phrase occurs multiple

¹² See *infra* Parts III.B, III.C.

¹³ See *infra* Part III.C.2.

¹⁴ See *infra* Part III.C.3.

¹⁵ See *infra* Part III.C.4.

times in a statute, it has the same meaning each time.¹⁶ Professor Akhil Amar recently called attention to the importance of drawing inferences from multiple appearances of the same or similar terms in the same legal document. He dubbed this interpretive technique “intratextualism” and explored its use in constitutional interpretation.¹⁷

The presumption that recurring words or phrases have the same meaning each time they appear gathers strength as the multiple appearances approach each other in statutory proximity. There is some inference that words have consistent meanings throughout the United States Code, but the inference becomes a presumption only when a term occurs multiple times within a single statute.¹⁸ Moreover, distinctions arise even within such cases: where a term recurs multiple times in closely proximate statutory provisions, the courts will apply the presumption more strongly than when a term recurs in distantly separated sections of the same statute.¹⁹ Recognizing the significance of still closer statutory proximity, the Court has said that the presumption is “at its most vigorous” when a term appears multiple times within a single statutory sentence.²⁰

Even recurrent appearance multiple times within a single sentence does not, however, quite represent the ultimate in potential statutory proximity. Sometimes, a term occurs a *single* time in a *single* statutory provision, but courts must interpret the term in different cases presenting different circumstances. The question then arises whether the single term must always have a single meaning.

A. The (Weak) Unitary Principle

Given that courts presume that a single term has a single meaning when it recurs multiple times within a statute and that they apply this presumption more and more strongly as the multiple occurrences of the term approach each other in statutory proximity, it is no surprise to discover that courts usually determine that a term occurring a single time

¹⁶ *E.g.*, *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003); *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990); *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932).

¹⁷ *See* Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747 (1999).

¹⁸ *Firststar Bank, N.A. v. Faul*, 253 F.3d 982, 991 (7th Cir. 2001) (inference that words recurring in different statutes have the same meaning is “relatively weak”).

¹⁹ *See* *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996) (noting the “close proximity of the[] provisions of the statute” involved). Another form of proximity is temporal; the presumption may apply when Congress uses the same language in two different statutes if it enacts one shortly after the other. *Smith v. City of Jackson*, 544 U.S. ___, slip op. at 4 (2005) (plurality opinion).

²⁰ *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

in a single statutory provision should have a single meaning. This rule of statutory interpretation will be called the “unitary principle.”²¹ To the extent that this principle serves as one indicator of statutory meaning but is not always dispositive in every case to which it applies, the principle will be called the “weak unitary principle.”

A couple of examples will serve to establish the principle’s existence and demonstrate its operation. The Supreme Court recently had occasion to apply the unitary principle when construing section 5 of the Voting Rights Act in *Reno v. Bossier Parish School Board*.²² In a state or political subdivision subject to the Act’s “preclearance” requirement, Section 5 authorizes judicial preclearance of a proposed change in voting practices provided the proposed change “does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.”²³ *Bossier Parish* posed the question of whether a court could preclear a voting change that had a dilutive, but nonretrogressive, purpose (that is, the change had the purpose of creating a voting scheme that diluted minority votes, but no more so than the existing scheme).²⁴

The Court first observed that it had previously held that a dilutive voting change has the *effect* of “denying or abridging the right to vote on account of race or color” within the meaning of section 5 only if the change is retrogressive.²⁵ The Court then resolved *Bossier Parish* by applying the unitary principle. Section 5, the Court noted, ties the single phrase, “denying or abridging the right to vote on account of race or color,” to two possible triggers, “purpose” and “effect.” Having previously held that the quoted phrase covered only retrogressive changes with regard to “effect,” the Court held that the phrase had the same limited meaning with regard to “purpose.” The Court noted that a contrary interpretation would be “simply an untenable construction of the text,”²⁶ and that the Court would “refuse to adopt a construction that would attribute different meanings to the same phrase in the same sentence, depending on which object it is modifying.”²⁷

²¹ Prakash refers to this principle as the “presumption of intrasentence uniformity,” Prakash, *supra* note 6, at 1149, but the “unitary principle” provides a better linguistic match with the “polymorphic principle.”

²² 528 U.S. 320 (2000).

²³ 5 U.S.C. § 1973c; *see Reno v. Bossier Parish School Bd.*, 528 U.S. 320 (2000).

²⁴ *See* 528 U.S. at 335.

²⁵ *See* 528 U.S. at 329 (citing *Beer v. United States*, 425 U.S. 130 (1976)).

²⁶ 528 U.S. at 329.

²⁷ *Id.*

The Court applied the same principle in *Bankamerica Corp. v. United States*,²⁸ which required it to interpret the prohibition, contained in section 8 of the Clayton Act, against interlocking corporate directorates among competing companies “other than banks, banking associations, trust companies, and common carriers.”²⁹ The question was whether this exemption permitted interlocking directorates between any two companies at least *one* of which was a bank, or whether the exemption applied only when *both* companies were banks. The Court solved the case by combining a concession with the unitary principle. The United States conceded that the exemption permitted interlocking directorates between any two corporations, at least one of which was a common carrier. The Court concluded that the same rule must apply to banks. The Court said, “[W]e reject as unreasonable the contention that Congress intended the phrase ‘other than’ to mean one thing when applied to ‘banks’ and another thing as applied to ‘common carriers,’ where the phrase ‘other than’ modifies both words in the same clause.”³⁰

Both these cases demonstrate that a single term in a single statutory provision should normally have a single meaning. If a previous case, a party’s concession, or, presumably, ordinary principles of construction establish that a statutory term has a particular meaning under given circumstances (as, for example, when it interacts with some particular other statutory text), its meaning should not change with changing circumstances. So, if a statute takes the form, “if (A or B) then C,” and courts have established that C has a particular meaning in cases involving A, the unitary principle would indicate that C should have that same meaning in cases involving B.

The unitary principle has not received much attention, except for the case of statutes that have both civil and criminal applications. If a statute forbids certain conduct and attaches both civil liability and criminal penalties to that conduct, the question may arise whether the civil liabilities and criminal penalties attach to precisely the same conduct. Normally, if the statute makes no differentiation between the two, one would assume the answer to be yes. Consider, for example, a statute of the form:

²⁸ 462 U.S. 122 (1983).

²⁹ 15 U.S.C. § 19.

³⁰ 462 U.S. at 129.

- § 1. Conduct X is forbidden.
- § 2. Any person who violates § 1 shall be liable to any injured party for the resulting damages.
- § 3. Any person convicted of violating § 1 shall be sentenced to a term of 1 year in prison.

One would normally assume that § 1 had a single meaning that would apply both to civil actions under § 2 and criminal prosecutions under § 3. This assumption, however, may have a peculiar result when it interacts with the rule of lenity, a principle of statutory interpretation applicable to criminal statutes. If § 1 is ambiguous, the rule of lenity calls for it to receive a narrow construction, so that the public has fair warning of conduct that could result in a criminal sanction.³¹ In such a case, if the *best* understanding of § 1 is broader, must courts nonetheless give the section a narrow construction, even in civil cases arising under § 2, so that the section can have a single meaning? The most common answer given by courts and scholars is yes: the combined effect of the unitary principle and the rule of lenity requires narrow construction, even in civil cases, of ambiguous statutes that impose civil and criminal sanctions on the same conduct.³²

The cases discussed above show that the issue of properly interpreting a “mixed” civil/criminal statute is just one aspect of a more general issue in statutory interpretation. More generally, the question is whether a single term in a single statutory provision should have a single meaning, even when that term must interact with multiple, other statutory provisions in different circumstances. The unitary principle says that the answer is normally yes.

³¹ *E.g.*, *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 409 (2003) (“[W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.”) (internal quotation omitted).

³² *E.g.*, *Leocal v. Ashcroft*, 125 S. Ct. 377, 384 n.8 (applying the rule of lenity in a deportation case, because the statute at issue also applied to criminal cases); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-518 (1992) (plurality opinion) (applying the rule of lenity in a tax case to a statute that also imposed criminal penalties); *Federal Communications Commission v. American Broadcasting Co.*, 347 U.S. 284, 296 (1954) (applying rule of lenity in a civil, administrative setting; “There cannot be one construction for the Federal Communications Commission and another for the Department of Justice.”); *Sachs*, *supra* note 6, at 1030-33.

B. The Strong Unitary Principle

The cases discussed so far applied the unitary principle as an ordinary principle of construction that provides one indicator of the most likely meaning of statutory text. Neither *Bossier Parish* nor *Bankamerica* suggested that courts must regard the unitary principle as completely inviolable. Nor did either case suggest that a court's disregard for the principle would implicate the separation of powers.

This past Term, however, the Supreme Court took the unitary principle to a new level. The Court declared that the unitary principle is not simply one indicator of statutory meaning, but an inviolable decree. The Court determined not only that a single term in a single statutory provision *should normally* have a single meaning, but that it *must always* have a single meaning, and that any suggestion to the contrary is “novel” and “dangerous” and an affront to the separation of powers. This new principle will be called the *strong unitary principle*.

The occasion for the Court's enunciation of its new principle arose in *Clark v. Martinez*, an immigration case.³³ The case concerned the problem of aliens held in detention for long periods of time pending removal from the country. Once a final order for removal of an alien is entered, the government normally removes the alien during a 90-day “removal period” fixed by statute.³⁴ Sometimes, however, problems arise, as, for example, when no other country agrees to receive the alien.³⁵ In such cases, the government may rely on a statutory provision that authorizes it to detain an alien beyond the removal period. The applicable statute, 8 U.S.C. § 1231, provides:

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, *may be detained beyond the removal period*.³⁶

When an alien fell within the statute, and no other country would receive the alien, the government maintained that it had the authority to detain the alien indefinitely, and, in some cases, detained such aliens for years.³⁷

³³ 125 S. Ct. 716 (2005).

³⁴ 8 U.S.C. § 1231(a)(1)(A); *see Zadvydas v. Davis*, 533 U.S. 678, 682 (2001).

³⁵ *See, e.g.*, 533 U.S. at 684-86 (describing two such cases).

³⁶ 8 U.S.C. § 1231(a)(6) (emphasis added).

³⁷ *See, e.g.*, 533 U.S. at 684-86 (describing such cases).

The question therefore arose whether the statutory provision stating that the Attorney General “may” detain certain aliens “beyond the removal period” authorized indefinite detentions.

The Supreme Court had previously addressed this question in *Zadvydas v. Davis*,³⁸ a case involving aliens who had been admitted to the United States but who subsequently became removable under one of the statutory provisions listed in § 1231.³⁹ As to such aliens, the Court determined, indefinite detention would raise a serious constitutional concern, because it would invade the core of the “liberty” protected by the Due Process Clause.⁴⁰ Without actually holding such indefinite detention unconstitutional, the Court invoked the interpretive principle of “constitutional avoidance.”⁴¹ Over a strenuous, four-Justice dissent that argued that its reading of § 1231 was implausible and simply bore “no relation to the text,”⁴² the Court determined that § 1231 *implicitly* limited detention to the period reasonably necessary to secure an alien’s removal and did not authorize detention after removal was no longer reasonably foreseeable.⁴³ This reading of § 1231 avoided the serious constitutional problem posed by the government’s claim of authority to detain aliens indefinitely.

In an apparent limitation of its holding, however, the Court noted that the case concerned *removable* aliens, that is, aliens admitted to the United States who later became subject to deportation. Aliens never admitted to the United States would, the Court said, “present a very different question.”⁴⁴ This express reservation suggested that indefinite detention of inadmissible aliens might pose a lesser constitutional concern and that the Court might give § 1231 a more straightforward, textual reading as to such aliens.

Not long thereafter, *Martinez* presented just the question the Court had apparently reserved: the question of indefinite detention of inadmissible aliens. Such aliens, like removable aliens, pose a problem if their actual removal cannot be achieved. The case concerned an alien from Cuba who, after being ruled inadmissible, was held beyond the 90-day removal period

³⁸ 533 U.S. 678 (2001).

³⁹ 533 U.S. at 682.

⁴⁰ *Id.* at 690.

⁴¹ This interpretive doctrine provides that “where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.” *Jones v. United States*, 526 U.S. 227, 239 (1999) (internal quotation omitted).

⁴² 533 U.S. at 707 (Kennedy, J., dissenting).

⁴³ *Id.* at 699-702.

⁴⁴ *Id.* at 682.

because Cuba would not receive him.⁴⁵ The government reminded the Court that it had, in *Zadvydas*, called this a “very different question”⁴⁶ and argued that the differences between inadmissible and removable aliens dictated a different statutory result.

The government must have been rather surprised by the outcome. Although the Court had expressly reserved the question of inadmissible aliens in *Zadvydas*, the Court, speaking through Justice Scalia, now held that reservation to be utterly ineffective. The dispositive point, the Court said, was the unitary principle. The Court noted that the statutory phrase, “may be detained beyond the removal period,” applies without differentiation to all categories of aliens mentioned in § 1231. This single phrase, the Court held, *must* have a single meaning. Because § 1231 boils down to saying that “aliens in category A, B, or C may be detained beyond the removal period,” and because the Court had previously interpreted the phrase “may be detained beyond the removal period” in connection with category B, the phrase must have the same meaning in connection with category A.⁴⁷

The Court did not apply the unitary principle as it had in previous cases, as one indicator of statutory meaning. The Court held that the unitary principle is entirely *determinative* of statutory meaning. Moreover, the Court declared that deviations from the principle cannot be tolerated because they would be an affront to the separation of powers.

Having observed that the critical statutory phrase, “may be detained beyond the removal period,” applies without differentiation to the three categories of aliens mentioned in § 1231, the Court said that “[t]o give these same words a different meaning for each category would be to invent a statute rather than interpret one.”⁴⁸ The Court recognized the interpretive problem as a general one. It noted that “[i]t is not at all unusual to give a statute’s ambiguous language a limiting construction called for by one of the statute’s applications, even though other of the statute’s applications, standing alone, would not support the same limitation.”⁴⁹ In such cases, the Court said, “[t]he lowest common denominator, as it were, *must* govern.”⁵⁰

The Court recognized that this strong formulation of the unitary

⁴⁵ The alien had actually lived in the United States for over a decade pursuant to “parole” granted by the Attorney General. 125 S. Ct. at 720. Such parole does not, however, constitute “admission” of the alien. 8 U.S.C. § 1182(d)(5).

⁴⁶ See Brief for Respondent, *Clark v. Martinez*, at 27.

⁴⁷ 125 S. Ct. at 722-23.

⁴⁸ 125 S. Ct. at 722-23.

⁴⁹ *Id.* at 724.

⁵⁰ *Id.* (emphasis added).

principle gives the principle great power. Under the strong unitary principle, a court interpreting a statutory phrase cannot simply focus on the case before it. The Court pointed out that “when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court.”⁵¹

The Court severely attacked the dissent’s proposed departure from the unitary principle. Justice Thomas, joined by the Chief Justice, asserted that the prior holding of *Zadvydas* was “tethered . . . to the specific class of aliens” involved in that case, namely, removable aliens, as to which indefinite detention raised constitutional doubts.⁵² The Court, he argued, should inquire whether reading § 1231 to permit indefinite detention of *inadmissible* aliens would raise similar doubts, and interpret the statute accordingly, even though the result might be “different detention periods for different classes of aliens.”⁵³ The Court sternly rejected what it called this “novel interpretive approach,” which “would render every statute a chameleon.”⁵⁴

The Court capped off its opinion with this dire warning:

[F]or this Court to sanction indefinite detention in the face of *Zadvydas* would establish within our jurisprudence, beyond the power of Congress to remedy, the dangerous principle that judges can give the same statutory text different meanings in different cases.⁵⁵

This is strong stuff. Not only does the Court endorse the strong unitary principle, it appears to believe that that approach was already the established law—witness the Court’s reference to the dissent’s approach as “novel” and the Court’s statement that reading the statute as requested by the dissent and the government “would establish” the principle that judges can give the same statutory text different meanings in different cases; i.e., that principle would be something new. The Court also calls this allegedly novel principle “dangerous” and intimates that it would violate the separation of powers because it would require judges to act as

⁵¹ *Id.* at 724.

⁵² 125 S. Ct. at 730 (Thomas, J., dissenting).

⁵³ *Id.*

⁵⁴ *Id.* at 725.

⁵⁵ *Id.* at 727.

legislators.

Would departure from the unitary principle really be “novel”? Would it be “dangerous”? The remainder of this Article address these questions. First, the next section demonstrates that departures from the unitary principle are not novel at all; although courts certainly apply the unitary principle as a presumptive rule of statutory interpretation, numerous cases shows that the presumption is defeasible. Part III then places the debate over the unitary principle in the larger context of the debate over the proper judicial role in statutory interpretation.

II. THE POLYMORPHIC PRINCIPLE

A review of actual judicial practices reveals that, contrary to *Clark v. Martinez*, courts have not previously embraced the strong unitary principle. Although courts usually presume that a single term employed a single time in a single statutory provision should bear the same meaning in all of its applications, in some cases courts determine that a single statutory term or phrase must bear different meanings under different circumstances. The principle that courts have the freedom to engage in such interpretation in appropriate cases will be referred to as the *polymorphic principle*.

A. Polymorphic Operators

The term “polymorphic” is borrowed from computer science. Computers, like courts, carry out an interpretive task. Like the Supreme Court in *Martinez*, computers must decide whether the symbols they interpret have the same meaning every time, or whether a symbol’s meaning may vary. A “polymorphic operator,” in computer science, is a symbol that may have different meanings depending on context.

Computers carry out instructions provided by programmers in some programming language. Computers perform this task in a fashion that frustrates many a programmer, although some judges might consider it an ideal to which courts ought to aspire: computers use a purely literal method of construction. They do not consult a programmer’s intent on the ground that her literal instructions are ambiguous or lead to an absurd result. If a programmer instructs a computer to do something absurd, the computer will faithfully do it.

Still, for all their maddening literalism, computers have some ability to consider context in interpreting their instructions. It is here that they employ the concept of polymorphic operators. Consider a simple symbol such as “+”. Probably the reader would imagine that “+” has a single, unambiguous meaning, but in fact matters are more complicated.

When a computer sees a line of code such as:

$$x = 5 + 3$$

it understands “=” to be an assignment operator, so the code tells the computer to compute the value of “5 + 3” and assign the result to the variable “x”. The tricky part comes in interpreting the meaning of the symbol “+”. In this example, the computer will, of course, understand the symbol “+” to instruct it to *add* the values of the integers 5 and 3, yielding the integer 8, the value it will assign to the variable *x*.

Easy enough, but what if the line of code were:

$$x = 5.0 + 3.0$$

Now the values to be added are “floating point numbers”—that is, numbers that have both integer and decimal parts, rather than just integers. To a human, this may seem a trivial detail, but to a computer 5 and 5.0 can be quite different entities. In many computer languages, the internal routines for adding 5 to 3 are entirely different from those for adding 5.0 to 3.0.⁵⁶ Thus, in executing the second statement, the computer calls upon quite different internal code than in executing the first.

An even more obviously different example would be this:

$$\text{name} = \text{“John”} + \text{“Smith”}$$

Now the items to be “added” are not numbers at all, but two series of letters, known in the computer world as “strings.” The symbol “+” must have a different meaning in this instruction than it did in the two instructions given above. In most languages, the “+” operation, applied to strings, is defined as concatenation, so that the result of the instruction above would be to assign the string “JohnSmith” to the variable “name.” The reader can appreciate that an entirely different sequence of instructions would be needed to concatenate “John” and “Smith” than would accomplish the addition of 5 and 3.

Thus, the symbol “+,” although generically representing the concept of combination, really has three different meanings in the three examples given above, depending on what is to be combined. It might well have other meanings when used to instruct a computer to combine still other kinds of items such as arrays, structures, or other data types that may exist within a computer language.

⁵⁶ These differences are summed up in the programming maxim, “1.0 + 1.0 hardly ever = 2.0.” The perils of floating-point arithmetic make it inadvisable for programmers to check floating-point numbers for equality.

The result is that “+” is a *polymorphic operator*. The computer understands it to mean different things depending on the context. When instructed to perform the operation “+” on two integers, the computer does one thing (it adds them); when instructed to perform the operation “+” on two strings, the computer does something else (it concatenates them), using different internal code.

B. A Parade of Polymorphisms

So much for computers, let us return to statutes. As noted in Part I, the Supreme Court asserted in *Clark v. Martinez* that the polymorphic principle was “novel.” In fact, it is nothing of the kind. To be sure, courts follow the unitary principle that a single term or phrase in a single statutory provision should *normally* have a single meaning, but that is only the weak unitary principle, which is compatible with the polymorphic principle that courts may, in appropriate cases, give a single phrase multiple meanings.

Instances of the polymorphic principle, though infrequent, are sufficiently numerous that they may be grouped into useful categories. Two dimensions of categorization are used below. First, and primarily, the cases are grouped according to the perceived *motivation* for the use of the polymorphic principle. As the examples below demonstrate, the polymorphic principle commonly comes into play when some special reason motivates a court to interpret a statute a particular way in one of its applications, and the reason does not apply to other applications. The special reason may be the need to avoid a constitutional problem (“constitutional avoidance polymorphism”),⁵⁷ a special interpretive rule developed in the shadow of constitutional principles (“subconstitutional polymorphism”),⁵⁸ an undesirable policy result of reading the statute a particular way in a particular circumstance (“policy polymorphism”),⁵⁹ or the desire to adhere to, but not to extend, a prior decision now perceived as erroneous (“stare decisis polymorphism”).⁶⁰ In any of these circumstances, application of the unitary principle would force a court to override the best reading of the statute in some cases in order to give it a single meaning that could handle the special cases.

Within each motivational category, one may differentiate cases according to the different ways in which the polymorphic principle can manifest itself. Some cases present actual court holdings that a statutory term has different meanings in different cases. Such cases will be dubbed

⁵⁷ See *infra* Part II.B.1.

⁵⁸ See *infra* Part II.B.2.

⁵⁹ See *infra* Part II.B.3.

⁶⁰ See *infra* Part II.B.4.

cases of “express polymorphism.”⁶¹ In other cases the courts have not expressly treated statutory text as polymorphic, but one may infer an inclination to do so, or at least a general belief in the polymorphic principle, on the basis of their opinions (“implied polymorphism”). Such an inference may arise in at least two ways. First, a court or a judge may reserve an issue for future decision in a way that would make no sense under the strong unitary principle.⁶² Second, a court may employ interpretive methods that disregard its duties under the strong unitary principle and its “least common denominator” corollary.⁶³ Finally, some cases reach what appear to be polymorphic results without much consideration of any particular statutory text. Such cases will be said to involve “tacit polymorphism.”⁶⁴

Polymorphism also arises in sources with differing degrees of authority. Sometimes the polymorphic principle is applied by the Supreme Court, sometimes by lower courts. Sometimes the principle may be observed in the opinions of individual judges or Justices.

Obviously, the best evidence of the polymorphic principle is express polymorphism in a Supreme Court holding, and such evidence is provided below. In countering the Supreme Court’s claim that the polymorphic principle is “novel,” however, implied polymorphism and tacit polymorphism, as well as polymorphism in opinions of lower courts or individual judges or Justices, provide some useful evidence. So these appear below as well.

One last word before the parade of polymorphisms begins. Authors, or regular readers, of articles concerning statutory interpretation will be familiar with the problem posed by the need for examples. Scholars who have the good fortune to write in a substantive area of law can expect most of their readers to come to their articles armed with at least a basic understanding of the relevant subject matter. Even if some exposition of the subject matter is needed for the general reader, it is needed only once per article.

Statutory interpretation scholars are different. Their domain is the whole field of statutory law. Examples may come from any statute about anything. Each different example may require the reader to learn fine

⁶¹ See, e.g., *infra* Part II.B.1.b. Cases of express polymorphism do not necessarily contain express statements of the polymorphic principle, but they do contain actual holdings that particular statutory text has different meanings under different circumstances, as opposed to merely suggesting the possibility of such different meanings.

⁶² See, e.g., *infra* Part II.B.1.a.

⁶³ See, e.g., *infra* Part II.B.2.

⁶⁴ See, e.g., *infra* Part II.B.1.c.

points of a different statutory scheme in order to appreciate how some tiny detail illustrates a general point about statutory interpretation.

The difficulty of learning all the details necessary to understand numerous different statutory examples can make a statutory interpretation article tiresome. Omit the examples, however, and the article becomes vacuous. The tedium of too many examples, and the hollowness of too few, are the Scylla and Charybdis between which statutory interpretation scholars must constantly navigate.

When seven Supreme Court Justices join an opinion claiming that a particular method of statutory interpretation is “novel,”⁶⁵ the claim demands a response. Only examples can convincingly demonstrate the truth, which is that, whatever else the polymorphic principle may be, novel it is not. This section attempts to present just the right number of examples—not merely one or two, which might be dismissed as errors, but not every available example, either. These examples illuminate not only the existence of the polymorphic principle, but the different motivations that underlie its use and the different forms in which it may operate. This purely descriptive section is followed by normative analysis in Part III.

1. “Constitutional Avoidance” Polymorphism

As *Martinez* itself suggests, a common motivation for use of the polymorphic principle arises when a statutory provision has one application that raises constitutional concerns. In such a case, the interpretive doctrine of “constitutional avoidance” counsels courts to interpret the statute so as to avoid serious constitutional problems.⁶⁶ The strong unitary principle would then require that any phrase that receives a particular construction so as to avoid constitutional problems in one circumstance receive that same construction in all circumstances. Applying that rule, however, might yield undesirable results. In such cases, a court may choose to follow the polymorphic principle instead. The desire to confine the impact of constitutional doubt to circumstances in which it actually applies has given rise to polymorphism in all of its various forms: express, implied, and tacit.

a. Implied Polymorphism: the False Claims Act

Taking the simplest example first (even though it is an example of implied rather than express polymorphism), the polymorphic principle can be seen in the interpretation of the False Claims Act, which prohibits the submission of a false or fraudulent claim to the United States and provides that any person who submits such a claim is liable for three times the

⁶⁵ 125 S. Ct. at 725.

⁶⁶ *E.g.*, *Jones v. United States*, 526 U.S. 227, 239 (1999).

amount of damages sustained by the government.⁶⁷ The Act allows enforcement of this liability in two ways: either by an action by the United States acting through its own officials or by a “*qui tam*” action, in which a private party (known as the “relator”) brings suit in the name of the United States and, if successful, receives a share of the proceeds.⁶⁸

*Vermont Agency of Natural Resources v. United States ex rel. Stevens*⁶⁹ concerned the special issues raised by False Claims Act actions against states. A private relator brought a *qui tam* suit against a state agency, and the defendant claimed that it could not be sued under the Act. The Act imposes liability on “[a]ny person” submitting a false claim,⁷⁰ and a state agency, the defendant claimed, is not a “person” under the Act.

The Supreme Court agreed. Although it relied primarily on the general principle that the term “person” does not usually include the sovereign,⁷¹ the Court also cited the desire to avoid the potential Eleventh Amendment difficulties that would arise from suits against a state entity initiated by private *qui tam* relators.⁷² The Court did not hold that such suits would violate the Eleventh Amendment, but it thought the question sufficiently serious to invoke the principle of constitutional avoidance.⁷³

Justice Ginsburg, however, joined by Justice Breyer, added this caveat in a concurring opinion: Eleventh Amendment considerations would not apply in a suit against a state initiated by federal officials, as opposed to a *qui tam* relator.⁷⁴ States have no immunity from suits by the United States,⁷⁵ and, in such suits, the Court has not been so reluctant to find state entities covered by general statutory terms such as “person.”⁷⁶ Justice Ginsburg said that she “read the Court’s decision to leave open the question whether the word ‘person’ encompasses States when the United States itself sues under the False Claims Act.”⁷⁷ In other words, she left open the possibility that courts should treat the word “person” as a polymorphic operator that would sometimes include states and sometimes

⁶⁷ 31 U.S.C. § 3729.

⁶⁸ 31 U.S.C. § 3730.

⁶⁹ 529 U.S. 765 (2000).

⁷⁰ 31 U.S.C. § 3729.

⁷¹ 529 U.S. at 780.

⁷² 529 U.S. at 787.

⁷³ *Id.*

⁷⁴ 529 U.S. at 789 (Ginsburg, J., concurring).

⁷⁵ *E.g.*, *United States v. Texas*, 507 U.S. 529, 530, 539 (1993); *United States v. Texas*, 143 U.S. 621, 646 (1892).

⁷⁶ 529 U.S. at 789 (Ginsburg, J., concurring).

⁷⁷ *Id.* at 789 (Ginsburg, J., concurring).

not include them.

Of course, Justice Ginsburg's opinion does not, by itself, show that the term "person" in § 3729(a) is a polymorphic operator—even a statement by the Court leaving the question open would not do that. The Court may still someday determine that states are *never* "persons" under the False Claims Act. But Justice Ginsburg's statement that she regards the question as open is an implied polymorphism, because it implies a belief in the polymorphic principle. If the Court or a Justice believed in the strong unitary principle, what business could the Court or that Justice have leaving the question open? The strong unitary principle would require that, once the Court has interpreted the word "person" not to include states in cases brought by *qui tam* relators, the word *must* have the same meaning in cases brought by federal officers. Justice Ginsburg's understanding that *Stevens* left the question open implies that she embraces the polymorphic principle.⁷⁸

Indeed, the immigration cases discussed earlier (*Martinez*, which articulated the strong unitary principle, and *Zadvydas*, the previous case under the same immigration statute) provide a similar example of implied polymorphism in an opinion of the Court itself—albeit an example the Court has now disavowed. As Justice Thomas's dissenting opinion in *Martinez* observed, in *Zadvydas* the Court held that the statutory phrase "may be detained beyond the removal period" prohibited indefinite detention of removable aliens, but the Court expressly reserved the question of that same phrase's application to inadmissible aliens, who would, the Court said, "present a very different question."⁷⁹ As Justice Thomas rightly complained in *Martinez*, if the strong unitary principle was an accepted feature of federal statutory interpretation jurisprudence, then "the careful distinction *Zadvydas* drew between admitted aliens and nonadmitted aliens was irrelevant at best and misleading at worst."⁸⁰ Under the strong unitary principle, the construction given to the phrase "may be detained beyond the removal period" would necessarily apply to *all* of the statutory categories of aliens. The Court's reservation of the issue of inadmissible aliens in *Zadvydas* is clearly inconsistent with the view that the strong unitary principle was an established principle of interpretation at the time of that case.

⁷⁸ Two district courts have in fact subsequently held that states are "persons" within the meaning of the False Claims Act when sued by the United States acting through its officials. *United States ex rel. Chittister v. Department of Community and Economic Development*, No. 1:CV-99-2057 (M.D. Pa. Sept. 23, 2002); *United States v. University Hosp. at Stony Brook*, 2001 WL 1548797 (E.D.N.Y. 2001). At the district court level, therefore, the False Claims Act provides an example of express polymorphism.

⁷⁹ 533 U.S. at 682.

⁸⁰ 125 S. Ct. at 731 (Thomas, J., dissenting).

b. Express Polymorphism: the Medicare Act

Vermont Agency exhibits polymorphism, but only implied polymorphism, and only in a Justice's separate opinion. Of course what the reader really wants to see is express polymorphism in an actual Supreme Court opinion. The Medicare Act provides an example.

The critical issue concerns how parties may seek judicial review of Medicare benefits. The Medicare Act provides a comprehensive scheme under which benefits are paid and under which recipients may seek review of benefits decisions. The Act attempts to channel all challenges to Medicare decisions into this special process, which requires a claimant first to present a claim for benefits and then, if dissatisfied, to seek judicial review of the administrative ruling on the claim.⁸¹ The Act attempts to block any other suits, such as suits under the general federal question jurisdiction, by providing in section 405(h):

No action against the United States . . . or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter.⁸²

In a series of cases familiar to administrative law scholars, the Supreme Court has attempted to clarify just how far § 405(h)'s jurisdictional preclusion goes.⁸³ In particular, the Court has struggled to understand whether the prohibition on using § 1331 jurisdiction to recover on "any claim arising under this subchapter" covers only challenges to particularized benefits decisions or whether it also bars a challenge to a general Medicare regulation. The Court gave the phrase the narrower reading in *Bowen v. Michigan Academy of Family Physicians*.⁸⁴ That case concerned a statutory and constitutional challenge to a Medicare regulation applicable to Part B of the Medicare program, which is an optional health care plan that supplements the automatic coverage

⁸¹ 42 U.S.C. § 405(g).

⁸² 42 U.S.C. § 405(h). This provision is actually a part of the Social Security Act, which sets up a similar scheme for judicial review of Social Security benefits decisions. The Medicare Act provides that section 405 applies to the Medicare Act "to the same extent as" it applies to the Social Security Act. 42 U.S.C. § 1395ii.

⁸³ In addition to the cases discussed in the text below, see *Heckler v. Ringer*, 466 U.S. 602 (1984); *United States v. Erika, Inc.*, 456 U.S. 201 (1982); *Weinberger v. Salfi*, 422 U.S. 749 (1975).

⁸⁴ 475 U.S. 667.

provided by Part A.⁸⁵ The Court observed that, under the statutory provisions governing Part B, if parties dissatisfied with the method for calculating benefits could not challenge the regulation in an ordinary § 1331 action, they would have *no* forum in which to challenge the regulation.⁸⁶ The Court noted that such a construction of § 405(h) would violate the presumption of judicial review and would give rise to a “serious constitutional question” in that it would bar consideration of constitutional challenges to the methods for calculating benefits under Part B.⁸⁷ The Court avoided this question by construing § 405(h) not to bar challenges to the validity of Medicare regulations.⁸⁸

The Court reached a different result, however, when Section 405(h) came before it again in *Shalala v. Illinois Council on Long Term Care, Inc.*⁸⁹ Once again, the case concerned a general challenge to the Medicare regulations, this time under Part A. This time, however, the Court determined that § 405(h) barred the challenge. The language of § 405(h), the Court observed, made no distinction between fact-specific challenges to particular benefits decisions and legal challenges to regulations.⁹⁰ Moreover, the Court noted, the case did not present a situation in which holding Medicare’s specialized review provisions to be exclusive would deprive the plaintiffs of any forum in which to seek review.⁹¹

The result of these cases is this: a challenge to a Medicare regulation may or may not constitute a “claim arising under” the Medicare program within the meaning of § 405(h), depending on whether or not the application of the § 405(h) bar would create a situation in which there would be *no* forum in which the challenge could receive any review. The Court chose to limit the application of the constitutional avoidance principle to cases in which the constitutional concern actually exists, even though doing so required treating the phrase “claim arising under this subchapter” as a polymorphic operator.⁹²

⁸⁵ *Id.* at 668, 674-75.

⁸⁶ 476 U.S. at 679-81.

⁸⁷ 476 U.S. at 681 n.12.

⁸⁸ *Id.* at 680. Congress subsequently amended the Act to provide for more judicial review under Part B. 42 U.S.C. § 1395ff.

⁸⁹ 529 U.S. 1 (2000).

⁹⁰ *Id.* at 13-14.

⁹¹ 529 U.S. at 17-20.

⁹² The dissenters called attention to this point. Justice Scalia argued that there was no “basis for holding that 42 U.S.C. § 1395ii has a different meaning with regard to Part A than with regard to Part B.” 529 U.S. at 32 (Scalia, J., dissenting). Justice Thomas claimed that the Court had confused the constitutional avoidance *motivation* of *Michigan Academy* with the case’s *holding* that § 405(h) did not bar challenges to Medicare

c. Tacit Polymorphism: the National Labor Relations Act

A final example of constitutional avoidance polymorphism illustrates the phenomenon of “tacit polymorphism.” This phenomenon occurs when a court, in effect, applies the polymorphic principle to statutory text, but does so without expressly interpreting any particular statutory text.

*National Labor Relations Board v. Catholic Bishop of Chicago*⁹³ presented the questions of whether the National Labor Relations Act (NLRA) covers the employment relationship between a religious school and its teachers, and whether, if so, the Act is constitutional.⁹⁴ The Supreme Court avoided the second question by applying the constitutional avoidance principle to the first. Rather than “resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses,”⁹⁵ the Court determined that the statute did not cover teachers at religious schools.

But what about other employees at religious schools? The Court’s opinion, which focused heavily on the “unique role of the teacher in fulfilling the mission of a church-operated school,”⁹⁶ seemed to leave open the possibility that the NLRA might cover a religious school’s other employees. A subsequent Ninth Circuit opinion, *National Labor Relations Board v. Hanna Boys Center*,⁹⁷ held that the NLRA does indeed require religious schools to bargain collectively with employees such as child-care workers, cooks, and maintenance workers.⁹⁸

The different outcomes of *Catholic Bishop* and *Hanna Boys Center* could make perfect sense as applications of the Free Exercise Clause, but both of these cases purport to be interpreting the NLRA, not the Constitution.⁹⁹ As a matter of statutory interpretation, these cases appear to involve the polymorphic principle. Religious schools, the courts appear to be saying, are sometimes “employers” subject to the NLRA and sometimes not.

regulations. *Id.* at 39 (Thomas, J., dissenting).

⁹³ 440 U.S. 490 (1979).

⁹⁴ *Id.* at 491.

⁹⁵ 440 U.S. at 507.

⁹⁶ *Id.* at 501.

⁹⁷ 940 F.2d 1295 (9th Cir. 1991).

⁹⁸ *Id.* at 1302-03.

⁹⁹ See *Catholic Bishop*, 440 U.S. at 504 (“We therefore turn to an examination of the National Labor Relations Act to decide whether it must be read to confer jurisdiction . . .”); *Hanna Boys Center*, 940 F.2d at 1302 (“We are not constrained, . . . as the Supreme Court was in *Catholic Bishop*, to construe the NLRA more narrowly than its plain language invites.”).

The polymorphism is, however, tacit. In *Catholic Bishop*, the Supreme Court, possibly to avoid acknowledging the degree to which it was glossing statutory language, or possibly just because of the loose interpretive practices of the era,¹⁰⁰ made no reference to any particular statutory text.¹⁰¹ *Hanna Boys Center*, similarly, quoted no statutory language.¹⁰² The courts' failure to discuss the statutory text at all concealed their need to treat the NLRA's terms as polymorphic operators in order to avoid First Amendment questions. There is not a hint of an exemption for religious schools in the NLRA's text, and certainly no hint of a *partial* exemption. In effect, the courts created a partial exemption by holding that church-operated schools sometimes are, and sometimes are not, "employers" within the meaning of the Act.¹⁰³ When a court simply superimposes a constitutional overlay onto statutory text without considering the interpretive problems involved, and the result is effectively to impose multiple meanings on statutory terms, the court may be said to engage in "tacit" polymorphism.¹⁰⁴

2. "Subconstitutional" Polymorphism

A second motivation for application of the polymorphic principle occurs when, even though a statute, under any possible interpretation, would be perfectly constitutional, the statute nonetheless treads in an area where constitutional concerns have given rise to a special rule of statutory

¹⁰⁰ The 1970s, in retrospect, appear as a period in which the Supreme Court was particularly apt to follow the sarcastic interpretive maxim that when the legislative history is ambiguous, it is permitted to consider the statutory text. *Cf.* Scalia, *supra* note 5, at 31.

¹⁰¹ After saying that it would "turn to an examination of the National Labor Relations Act," 440 U.S. at 504, the Court in fact said only this: "Admittedly, Congress defined the Board's jurisdiction in very broad terms; we must therefore examine the legislative history of the Act to determine whether Congress contemplate that the grant of jurisdiction would include teachers in [church-operated] schools." *Id.*

¹⁰² 940 F.2d at 1300-02.

¹⁰³ *Cf.* 440 U.S. at 511 (Brennan, J., dissenting) (describing the Court's ruling as creating "one more exception" to the statutory definition of "employer").

¹⁰⁴ It might be possible to avoid polymorphism by characterizing the holding of *Catholic Bishop* as an interpretation of the term "employee" in the NLRA, rather than "employer," if the reading were, "an employee other than a teacher at a religious school." The problem, however, is that a sufficiently nuanced interpretation could always make it appear that a court or judge is following the unitary principle—Justice Ginsburg's opinion in *Vermont Agency*, for example, could be explained by imagining that she regards the term "person" in the False Claims Act as meaning "a person other than a state entity being sued by a qui tam relator." The essence of the unitary principle, however, is that a statutory term should receive a single construction that is not dependent on factual changes that implicate other statutory terms.

interpretation, such as a “clear statement” rule. Such a special interpretive rule may apply to one application of a statutory provision but not others. In such cases, courts face the question of whether, as the Court put it in *Martinez*, “[t]he lowest common denominator . . . must govern.”¹⁰⁵

The answer is—not always. For example, *Library of Congress v. Shaw*¹⁰⁶ concerned the question of whether a court may award interest on attorney’s fees awarded to a federal employee under Title VII of the Civil Rights Act of 1964.¹⁰⁷ The Act’s fee-shifting provision provides that a court may allow a prevailing party (other than the United States), “a reasonable attorney’s fee” and provides for the United States to be liable “the same as a private person.”¹⁰⁸ Even though the provision for a “reasonable attorney’s fee” allows a court to award interest on attorney’s fees against a private defendant,¹⁰⁹ the Court determined that this same phrase does not provide for interest on attorney’s fees against the United States.

This polymorphic interpretation stemmed from the special, subconstitutional interpretive rules applicable to waivers of sovereign immunity. It would not be unconstitutional for Congress to allow courts to award interest against the United States, because Congress may waive the federal government’s sovereign immunity. Nonetheless, the issue of sovereign immunity gives rise to special concerns. Because waiver of sovereign immunity is a legislative prerogative,¹¹⁰ courts endeavor to avoid creating any waiver not approved by Congress, by applying the interpretive principle that waivers of federal sovereign immunity must be strictly construed.¹¹¹ Moreover, awards of interest against the federal government are particularly disfavored. Such awards are subject to the “no-interest rule,” a further interpretive principle that is even more stringent than the already strict principle of construction generally applicable to waivers of federal sovereign immunity.¹¹²

In light of this stringent interpretive principle, the Court determined in *Shaw* that it could not interpret Title VII’s allowance of a “reasonable”

¹⁰⁵ 125 S. Ct. at 724.

¹⁰⁶ 478 U.S. 310 (1986).

¹⁰⁷ As amended in 1972, Title VII provides federal employees as well as private employees with protection against employment discrimination. 42 U.S.C. § 2000e-16.

¹⁰⁸ 5 U.S.C. § 2000e-5(k).

¹⁰⁹ 478 U.S. at 313.

¹¹⁰ *E.g.*, *Schillinger v. U.S.*, 155 U.S. 163, 166 (1894).

¹¹¹ *E.g.*, *Lane v. Pena*, 518 U.S. 187, 192 (1996).

¹¹² *Shaw*, 478 U.S. at 318 (“The no-interest rule provides an added gloss of strictness” upon the usual rules for interpreting waivers of sovereign immunity).

attorney's fee as providing for interest.¹¹³ In so holding, the Court treated the phrase "reasonable attorney's fee" polymorphically. The phrase allowed for interest on attorney's fees awarded against private parties,¹¹⁴ but not against the United States.

Interestingly, the Court, only three years earlier, had specifically noted that the unitary principle may require narrow construction of a fee-shifting provision that applies to both private parties and the United States. In *Ruckelshaus v. Sierra Club*,¹¹⁵ in considering the fee-shifting provision of the Clean Air Act, the Court noted that the provision "affects fee awards against the United States, as well as against private individuals"¹¹⁶ and held that it therefore "must be construed strictly in favor of the sovereign."¹¹⁷ *Shaw*, however, demonstrates that the unitary principle applied in *Sierra Club* is the *weak* unitary principle. The Court may apply the polymorphic principle in appropriate cases. *Shaw* is an example of express subconstitutional polymorphism.¹¹⁸

Another very clear example of express subconstitutional polymorphism arises from the well-known civil rights statute, 42 U.S.C. § 1983. This statute provides that "[e]very person" who, under color of state law, violates someone's federal rights, "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for

¹¹³ *Id.* at 320.

¹¹⁴ *Id.* at 313.

¹¹⁵ 463 U.S. 680 (1983).

¹¹⁶ *Id.* at 685.

¹¹⁷ *Id.* at 685-86 (internal quotations omitted).

¹¹⁸ Scholarly fairness requires me to note that the claim that *Library of Congress v. Shaw* applies the polymorphic principle is not quite perfect, because the Court did not have occasion to hold that Title VII allows for interest on fee awards against private parties. It is conceivable that the Court meant to leave that question open, and in a later case it could have applied the unitary principle to determine that Title VII must be understood to deny interest on all fee awards. Still, the evidence to the contrary is sufficiently strong to justify including *Shaw* in the catalogue of cases applying the polymorphic principle. Although the Court does not *hold* that Title VII permits interest on fee awards against private parties, it does state that "[t]he Court of Appeals noted that in a Title VII suit against a private employer, interest on attorney's fees may be recovered." 478 U.S. at 313. This sentence seems approving. There is no suggestion of the subjunctive; it does not appear that the Court reserves the issue or assumes it only *arguendo*. The Court supports the statement with citation to an actual lower court holding. *Id.* Moreover, after *Shaw*, as before, lower courts and commentators continued to hold or state that Title VII permitted interest on attorney's fees in cases against private defendants. *In re Burlington Northern, Inc. Employment Practices Litigation*, 810 F.2d 601, 609 (7th Cir. 1986); CHARLES R. RICHEY, MANUAL ON EMPLOYMENT DISCRIMINATION LAW AND CIVIL RIGHTS ACTIONS IN THE FEDERAL COURTS (1988). Thus, lower courts and commentators understood *Shaw* to have treated the phrase "reasonable attorney's fees" polymorphically.

redress.”¹¹⁹ In *Will v. Michigan Department of State Police*,¹²⁰ the Supreme Court determined that a state officer acting in an official capacity both *is* and *is not* a “person” within the meaning of this statute. In light of the principle that Congress must act clearly when it desires to “alter the usual constitutional balance between the States and the Federal Government,”¹²¹ the Court held that a state official acting in an official capacity is not a “person” within the meaning of section 1983 when sued for damages.¹²² In a footnote, however, the Court observed that “of course” such an official “when sued for injunctive relief, *would* be a person under § 1983.”¹²³ Thus, a state officer sued officially is not a person in connection with § 1983’s provision for an “action at law” but is a person in connection with the provision for a “suit in equity.”¹²⁴

3. Policy Polymorphism

Sometimes, the motivation for application of the polymorphic principle appears to arise simply from the court’s perception that the result of applying the unitary principle will be undesirable as a policy matter. In such cases, courts construe statutory text in such different ways as is necessary under different circumstances so as to achieve desirable results.

Section 5 of the Voting Rights Act, mentioned above in connection with the *Bossier Parish* case,¹²⁵ provides a good example. As noted earlier, section 5 permits judicial preclearance of a proposed change in voting procedures provided the change “does not have the purpose and

¹¹⁹ 42 U.S.C. § 1983 (emphasis added).

¹²⁰ 491 U.S. 58 (1989).

¹²¹ 491 U.S. at 65 (internal quotation omitted).

¹²² *Id.* at 71.

¹²³ *Id.* at 71 n.10 (emphasis added).

¹²⁴ Subconstitutional polymorphism also occurs in implied form in connection with the application of the rule of lenity to “mixed” statutes that impose civil and criminal liability on the same conduct. In the well-known case of *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (the “seven dirty words” case), for example, the Supreme Court had to construe the statutory prohibition of “indecent” radio broadcasts. This prohibition is contained in a criminal statute, 18 U.S.C. § 1464, but the Communications Act also authorizes the FCC to revoke the license of or to impose a civil penalty upon a station that violates the prohibition. 47 U.S.C. §§ 312, 503. In construing the meaning of “indecent,” the Court remarked that “the validity of the civil sanctions is not linked to the validity of the criminal penalty. . . . [W]e need not consider any questions relating to the possible application of § 1464 as a criminal statute.” 438 U.S. at 739 n.13. As the dissent pointed out, this reasoning was inconsistent with the strong unitary principle. *Id.* at 780 n.8 (Stewart, J., dissenting). The Court’s refusal to consider the potential application of the statute in criminal cases constitutes an implied polymorphism.

¹²⁵ *See supra* Part I.A.

will not have the effect of denying or abridging the right to vote on account of race or color.”¹²⁶ *Bossier Parish* applied the unitary principle to conclude that the phrase “denying or abridging the right to vote on account of race or color” should have the same meaning whether it is triggered by the “purpose” or “effect” prong of section 5.¹²⁷

As *Bossier Parish* acknowledged, however, an earlier case, *City of Richmond v. United States*,¹²⁸ took a polymorphic approach to section 5. *Richmond* concerned a city’s annexation of additional land. The annexation lowered the percentage of African-Americans in the city from 52% to 42%. The Court held that the annexation did not have the forbidden *effect* of denying or abridging the right to vote on account of race. Almost every annexation, the Court observed, causes some change in a city’s racial composition.¹²⁹ So long as the postannexation voting system provides for fair representation of racial minorities, the Court held, an annexation does not have the “effect” forbidden by section 5.¹³⁰

Nonetheless, the Court held that section 5 imposed the further requirement that an annexation be supported by a legitimate, nondiscriminatory purpose.¹³¹ If the only purpose of an annexation were to reduce the percentage of a racial minority group in a city’s population, the Court held, the annexation would violate section 5. The Court was quite aware that its holding meant that section 5 would have different meanings with regard to its “purpose” prong and its “effect” prong. The Court pointedly observed that:

[I]t may be asked how it could be forbidden by § 5 to have the purpose and intent of achieving only what is a perfectly legal result under that section.¹³²

The Court answered its own question on policy grounds:

The answer is plain, and we need not labor it. An official action, whether an annexation or otherwise, taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or

¹²⁶ 5 U.S.C. § 1973c; see *Reno v. Bossier Parish School Bd.*, 528 U.S. 320 (2000).

¹²⁷ See *supra* Part I.A.

¹²⁸ 422 U.S. 358 (1975).

¹²⁹ 422 U.S. at 368.

¹³⁰ *Id.* at 371.

¹³¹ *Id.* at 375.

¹³² 422 U.S. at 373.

under the statute. . . . An annexation proved to be of this kind and not proved to have a justifiable basis is forbidden by § 5, whatever its actual effect may have been or may be.¹³³

Richmond provides an example of express policy polymorphism. The words “denying or abridging the right to vote” have one meaning with regard to effects and a different meaning with regard to purpose.¹³⁴ Indeed, in *Bossier Parish* the Court itself “acknowledged that *Richmond* created a discontinuity between the effect and purpose prongs of § 5.”¹³⁵ Thus, section 5 provides not only an example of express polymorphism, but an expressly judicially acknowledged example.¹³⁶

¹³³ 422 U.S. at 378-79.

¹³⁴ The Court adhered to this polymorphic interpretation a decade later in *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987). In that case, it was particularly clear that the city’s proposed annexation could not have a retrogressive *effect* on the voting rights of racial minority groups, because the city, prior to the annexation, had *no* minority voters. *Id.* at 465, 470-71. Nonetheless, the Court held that the annexation could not be precleared under section 5 because the city had not demonstrated that the annexation lacked the *purpose* of diluting minority voting strength. *Id.* at 472.

¹³⁵ 528 U.S. at 330.

¹³⁶ Another excellent example of policy polymorphism (at the lower court level) comes from the patent statute. The Patent Act requires that a patent issue only to an invention that is new, useful, and not obvious. 35 U.S.C. §§ 101, 102, 103. The requirement that the invention be “new” is embodied in a complex set of rules in § 102, which have received remarkable and sometimes tortured interpretations. *See* ROGER E. SCHECHTER & JOHN R. THOMAS, *INTELLECTUAL PROPERTY* 323 (2003) (“the statute cannot be read in isolation from the array of judicial precedent that has interpreted nearly each of its words”). Among these interpretations, at least one is polymorphic: the interpretation of the requirement, in § 102(b), that a patent may not issue if the claimed invention was in “public use” for more than a year prior to the patent application date. *Metallizing Engineering Co. v. Kenyon Bearing & Auto Parts Co.*, 153 F.2d 516 (2d Cir. 1946), presented the question of whether this provision bars a patent for a manufacturing process if the patent applicant used the process in secret but sold the product of the process before the critical date. Speaking through Learned Hand, the court said yes, and it justified its opinion on the policy ground that a patentee should not be allowed to extend the term of the patent monopoly by secretly practicing the process in a way that gives a competitive advantage. *Id.* at 520. But in the later case of *W.L. Gore & Associates, Inc. v. Garlock, Inc.*, 721 F.2d 1540 (Fed. Cir. 1983), the court held that if someone other than the patent applicant is doing exactly the same thing (i.e., using the process secretly and selling the product), that does *not* constitute a “public use” within the meaning of § 102(b), because “[a]s between a prior inventor who benefits from a process by selling its product but . . . keeps the process from the public, and a later inventor who promptly files a patent application . . ., the law favors the latter.” *Id.* at 1550. Thus, secretly practicing a process and selling the output both *is* and *is not* a “public use” of the process within the meaning of § 102(b), depending on who does it.

4. “*Stare Decisis*” Polymorphism

One last motivation for use of the polymorphic principle arises when a court disagrees with a prior case interpreting a statute, but desires to adhere to the case as a matter of precedent. The doctrine of *stare decisis* operates with particular force in statutory interpretation because the legislature can always correct what it perceives to be erroneous interpretations of its statutes.¹³⁷ However, a court might desire to avoid having a prior error control a statute’s further applications. Confining the effect of prior errors may be possible only through application of the polymorphic principle.

Once again, section 5 of the Voting Rights Act provides an example. When the Court, in *Bossier Parish*, applied the unitary principle to conclude that section 5’s prohibition on judicial preclearance of voting changes “denying or abridging the right to vote on account of race or color” has the same meaning with regard to both a change’s “effect” and its “purpose,”¹³⁸ four Justices dissented. Justice Souter’s opinion, joined by Justices Stevens, Ginsburg, and Breyer, expressed disagreement with the prior holding, in *Beer v. United States*, that a voting change that diluted minority votes had an “effect” forbidden by section 5 only if the change was retrogressive.¹³⁹ Because Justice Souter “adhere[d] to the strong policy of respecting precedent in statutory interpretation,” he stated that he would not reexamine *Beer* itself.¹⁴⁰ He also, however, stated that “that policy does not demand that recognized error be compounded indefinitely.”¹⁴¹ He therefore advocated “[g]iving wider scope to purpose than to effect under § 5.”¹⁴² Though only a minority opinion, Justice Souter’s opinion provides a clear example of express *stare decisis* polymorphism.

5. Polymorphism in Constitutional Interpretation

Finally, although this Article is primarily concerned with the polymorphic principle in statutory interpretation, it is worth noting that the Supreme Court has also applied the polymorphic principle when interpreting the Constitution. The Commerce Clause provides that Congress shall have power to “regulate Commerce with foreign Nations,

¹³⁷ Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 *Geo. Wash. L. Rev.* 317, 317 (2005).

¹³⁸ *Bossier Parish*, 528 U.S. at 329.

¹³⁹ 528 U.S. at 342 (Souter, J., concurring in part and dissenting in part).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 368.

and among the several States, and with the Indian Tribes.”¹⁴³ The words “regulate Commerce” appear but once, yet the Supreme Court has interpreted the commerce power differently as it applies to foreign commerce, interstate commerce, and commerce with the Indian Tribes.¹⁴⁴ This appears to be a policy polymorphism.

* * * * *

In sum, numerous cases—far more than could be dismissed as mere errors, outliers, or aberrations—refute the Supreme Court’s claim that the polymorphic principle is “novel.”¹⁴⁵ Although the courts, in accordance with the weak unitary principle, presume that a single phrase in a single statutory provision has a single meaning, this presumption is defeasible. In appropriate cases, the Supreme Court, lower courts, and individual judges and Justices have all applied the polymorphic principle, expressly, impliedly, and tacitly. The examples given above make clear the motivation for use of the polymorphic principle: it comes into play when some special motivation—based perhaps in the Constitution, in subconstitutional principles, or in pure policy—requires a special construction of one application of a statute, and the court desires to prevent that special motivation from spilling over into all applications. While the polymorphic principle applies only infrequently, it is established in the cases of the federal courts at all levels.

III. THE POLYMORPHIC PRINCIPLE AND THE JUDICIAL ROLE

So much, then, for the Supreme Court’s claim that the polymorphic principle is “novel.” But what about the claim that it is “dangerous”? The previous section demonstrated, as a purely descriptive matter, that courts, including the Supreme Court, have (until *Martinez*) considered themselves free to give a single statutory phrase multiple meanings in appropriate, if rare, cases. It remains to consider the polymorphic principle as a normative matter and to decide whether it *should* play a role in statutory interpretation.

Doing so requires consideration of issues both of practicality and

¹⁴³ U.S. CONST., art. I, § 8.

¹⁴⁴ See, e.g., *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 434 (1932) (“the power when exercised in respect of foreign commerce may be broader than when exercised as to interstate commerce”). For a full analysis of this polymorphism, see Prakash, *supra* note 6, at 1165-72.

¹⁴⁵ *Clark v. Martinez*, 125 S. Ct. at 725

theory. The choice between the polymorphic principle and the strong unitary principle, like so many issues of statutory interpretation, implicates the most general questions regarding the proper judicial role. As this Part shows, the Court's decision to stake out a claim for the strong unitary principle is inextricably tied to Justice Scalia's sustained campaign to limit the judicial role in statutory interpretation. The choice for the polymorphic principle ultimately rests on an understanding of the error in Justice Scalia's position.

This Part first examines whether the strong unitary principle makes sense either as a purely linguistic matter or as a matter of the general principles applicable to the canons of statutory construction. After concluding that both of these approaches in fact support the polymorphic principle, this Part turns to the heart of the likely reason for Justice Scalia's embrace of the strong unitary principle: his view that the principle is demanded by the separation of powers. This Part attempts to demonstrate that the judicial role properly encompasses the degree of judicial choice required by the polymorphic principle.

A. A Pure Linguistic Approach

The strong unitary principle tacitly assumes that it is simply impossible for a single term or phrase in a single statutory provision to have multiple meanings in different circumstances.¹⁴⁶ However, as a purely linguistic matter, it is possible, though admittedly uncommon, for a single term in a single sentence to have multiple meanings. In the sentence, "I ran ten miles on Monday and a marathon on Thursday," the word "ran" has the same meaning with regard to both the ten-mile run and the marathon, but in the sentence, "I ran ten miles on Monday and the Marathon Oil Company on Thursday," the word evidently means one thing with regard to the ten miles and something quite different with regard to Marathon. A similar effect is apparent in the famous riposte of John Wilkes, who, upon being told by the Earl of Sandwich that he would die either on the gallows or of the pox, replied, "that depends, my Lord, upon whether I embrace your principles, or your mistress."¹⁴⁷ Evidently the single word "embrace" bears two different senses in this sentence.¹⁴⁸

This kind of double entendre is not only uncommon but is usually, as

¹⁴⁶ *Cf. Martinez*, 125 S. Ct. at 723 ("the statute can be construed 'literally' to authorize indefinite detention . . . or . . . it can be read to 'suggest [less than] unlimited discretion' to detain It cannot, however, be interpreted to do both at the same time.").

¹⁴⁷ See JOHN BARTLETT, *FAMILIAR QUOTATIONS* 368 (15th ed. 1980) (giving the quotation in slightly different form). This quotation is often attributed to Benjamin Disraeli (who is said to have given it in reply to William Gladstone), but I take Bartlett as the reliable arbiter of these matters.

¹⁴⁸ For other examples, see Prakash, *supra* note 6, at 1157-58.

these examples show, an attempt at humor (Wilkes’s attempt being rather more successful than my own). Humor is not a quality one typically associates with statutes, so it seems appropriate to assume, as a general matter, that a legislature has not created statutory double entendres.¹⁴⁹ But it is not linguistically impossible for a single term in a single sentence to bear multiple meanings. One must look to something other than the rules of the English language to find a principle that a single term in a single statutory provision *must* always bear a single meaning.

B. A Canonical Approach

The strong unitary principle also finds little support in the general practices associated with canons of statutory interpretation. Indeed, the general practices cut strongly against it. The Supreme Court has confirmed countless times that “canons of construction are no more than rules of thumb that help courts determine the meaning of legislation.”¹⁵⁰ The canons create presumptions, but they are defeasible presumptions. The strong unitary principle is strangely—and unwisely—different.

Consider, for example, the closely related canon that courts will presume that a word or phrase used multiple times within a single statute has the same meaning each time. The Supreme Court has stated this canon innumerable times.¹⁵¹ Yet in ordinary speech the same word may certainly bear different meanings when used twice, even within a single sentence (“We must all hang together, or assuredly we shall all hang separately”),¹⁵² and in statutory interpretation the Court has always recognized that the canon is only one guide to statutory meaning that other indications may overcome, even when the multiple uses of a single term are statutorily proximate and exactly parallel.

¹⁴⁹ See *id.* at 1158 (noting that one does not expect to find double entendres in the Constitution).

¹⁵⁰ *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253 (1992).

¹⁵¹ *E.g.*, *National Aeronautics and Space Admin. v. Federal Labor Relations Authority*, 527 U.S. 229, 235 (1999); *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996); *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 570 (1995); *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *Department of Revenue of Ore. v. ACF Industries, Inc.*, 510 U.S. 332, 342, (1994); *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992); *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990); *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986); *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972); *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932).

¹⁵² BARTLETT, *supra* note 147, at 348 (quoting Benjamin Franklin). Between Wilkes and Franklin, we can see that politicians, who, after all, are responsible for legislation, are particularly adept at bringing out the multiple meanings that words may have.

For example, in *Atlantic Cleaners & Dyers v. United States*,¹⁵³ the Supreme Court considered the application of section 3 of the Sherman Anti-Trust Act. Section 1 of the Act declares illegal:

[e]very contract, combination, . . . or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations[.]¹⁵⁴

Section 3 declares illegal:

[e]very contract, combination, . . . or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia[.]¹⁵⁵

The two sections are exactly parallel and the words “trade or commerce” appear in them identically, so there would seem to be a particularly strong case for expecting the words to have the same meaning in each section.

That was precisely the point made by the *Atlantic Cleaners* defendants, who were alleged to have violated section 3 by restraining trade or commerce in the District of Columbia. They asserted that section 1 of the Act was necessarily limited by the scope of Congress’s power under the Commerce Clause, and that their conduct, which involved only the provision of services, not trade in goods, was beyond the scope of the commerce power and therefore could not have constituted “trade or commerce” within the meaning of section 1. Because section 3 uses exactly the same words, the defendants asserted that their conduct could not constitute “trade or commerce” within the meaning of section 3 either.

The Supreme Court rejected this argument. Although acknowledging that the two sections used the same words and that “[u]ndoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning,”¹⁵⁶ the Court also noted that “the presumption is not rigid.”¹⁵⁷ The Court observed that, whereas Congress’s power over interstate and foreign commerce is limited by the Commerce Clause, Congress has plenary power over all matters, including commerce, in the District of Columbia. Therefore, the Court was “free to interpret section 3 dissociated from section 1 as though it were a separate

¹⁵³ 286 U.S. 427 (1932).

¹⁵⁴ 15 U.S.C. § 1.

¹⁵⁵ 15 U.S.C. § 3.

¹⁵⁶ 286 U.S. at 433.

¹⁵⁷ *Id.*

and independent act” and to hold the defendants liable under section 3, even assuming *arguendo* that their conduct could not violate section 1.¹⁵⁸ (The case thus provided a differentiation between the meanings of the one term in the two sections that was akin to “constitutional avoidance” polymorphism as described above.¹⁵⁹) Many subsequent opinions have confirmed that identical words in different sections of the same act may have different meanings in appropriate circumstances.¹⁶⁰

Atlantic Cleaners demonstrates the important principle that the canons of statutory construction should be a court’s servant, not its master. The reason is clear: the canons are general, but judicial action is particularized. The general advice embodied in the canons, which are designed to cover the entire range of possible statutes, cannot anticipate every possible circumstance in which the canons might come into play. To reach sound results, courts must be free to determine, in appropriate cases, that a particular statute does not conform to the general canons.¹⁶¹ The strong unitary principle violates this rule by tying a court’s hands.

Moreover, given the defeasible nature of the other canons, the strong unitary principle introduces a strange discontinuity to the law of statutory construction. It places dispositive weight on what would appear to be purely arbitrary congressional drafting choices. For example, at the time Congress passed the Sherman Act, it might have drafted it just a little differently: it might have combined sections 1 and 3 to produce a single section that declared illegal “every contract, combination, or conspiracy in restraint of trade or commerce among the several states, with foreign nations, in any Territory of the United States, or in the District of Columbia.” Surely a Member of Congress would have expected it to make no difference whether one statutory section prohibited restraint of all four categories of trade or commerce, whether the first two categories appeared in one section and the other two in a separate but exactly parallel section, or whether each category had its own section. This seems a purely arbitrary choice, and it would be a strange jurisprudence that would allow courts to exercise sound judgment in deciding whether to differentiate the meaning of identical words appearing in two different sections but absolutely forbid such judgment when words appear in one

¹⁵⁸ 286 U.S. at 435.

¹⁵⁹ See *supra* Part II.B.1.

¹⁶⁰ E.g., *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 595-96 (2004), and cases cited therein.

¹⁶¹ Cf. Eskridge, *supra* note 5, at 1101-03 (concluding, after analysis of early practice, that “application of the various textualist canons of statutory construction is anything but mechanical” and that canons “ought not be applied without consideration of statutory goals and purposes, as well as other legal values”).

section but have two different applications. Judicial discretion in the former case is universally accepted and should apply equally to the latter.¹⁶²

C. The Separation of Powers Approach

Given that the polymorphic principle is possible linguistically, makes sense pragmatically, and treats the unitary principle the same as other canons of statutory construction instead of giving it a unique and problematic character, why did the Supreme Court reject it in *Martinez*? Why would the Court so determinedly handcuff itself to a canon? In seeking the answer to this question we find the true heart of the debate between the polymorphic principle and the strong unitary principle.

The answer is intimately tied up with the identity of the author of the *Martinez* opinion: Justice Scalia. Justice Scalia is engaged in a sustained campaign to limit judicial choice. He sees limiting judicial choice as a necessary aspect of the separation of powers. For him, the polymorphic principle represents not merely an inferior method of construing statutory text but a violation of the limited judicial role in our system of government.

This section addresses the polymorphic principle from a separation of powers perspective. After first explaining Justice Scalia's perspective, this section explains its error. First, it is a mistake to believe that the judicial role cannot involve the kind of choice that the polymorphic principle requires courts to make; second, in any event, that degree of judicial choice is inevitable and efforts to restrict it must ultimately prove illusory; and third, ironically, the strong unitary principle has the effect of *magnifying* the role of judicial choice in statutory interpretation.

1. Justice Scalia and Judicial Choice

Justice Scalia is the Supreme Court's most persistent and doctrinaire thinker with regard to matters of statutory interpretation. Though he is most prominently identified with his long campaign against the use of legislative history,¹⁶³ this effort is but a part of his larger campaign against *judicial choice*. Justice Scalia consistently argues for limiting the judicial

¹⁶² Cf. Vermeule, *supra* note 6, at 1180. Vermeule makes a similar observation about the Constitution's Commerce Clause: the Framers might have drafted it just a little differently, and provided three Commerce Clauses instead of one Commerce Clause with three subclauses, without, in all likelihood, thinking that they were making a crucial decision about the clause's meaning. Yet under the strong unitary principle, "slight variations in organizational structure have substantial effects on meaning." *Id.*

¹⁶³ Justice Scalia has long argued against the use of legislative history in statutory interpretation, and he has carried his campaign to the point of refusing to join any portion of an opinion that relies on legislative history, even if he joins the rest of the opinion.

role in our system of government.

Justice Scalia has criticized the adulation given to the “great judge” of the common-law era as inappropriate for a modern, democratic society in which most law is statutory.¹⁶⁴ Judges, he argues, should not approach statutes with the “Mr. Fix-it mentality” of the common law judge, whose goal is to determine the most desirable outcome of a particular case and to evade any impediments to its achievement.¹⁶⁵ Judges must recognize that their lack of political accountability makes any lawmaking by them at best uncomfortable in a democracy, and they must avoid the “usurpation” that would follow from approaching statutes with a common-law judge’s mentality.¹⁶⁶

Most of Justice Scalia’s specific prescriptions with regard to statutory interpretation, although often supported by numerous different arguments, find their roots in this core notion of limiting judicial choice. Justice Scalia supports textualism as the prime method of statutory interpretation; he argues that courts are bound by the text of statutes rather than by legislative intent in part because “under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities.”¹⁶⁷ He campaigns against the use of legislative history in part because it permits too much “manipulability” for the “willful judge,” and “facilitate[s] rather than deter[s] decisions that are based upon the courts’ policy preferences, rather than neutral principles of law.”¹⁶⁸ Justice Scalia questions the use of some interpretive canons and presumptions, because he questions whether courts have the authority to choose to “interpret the laws that Congress passes to mean less or more than what they fairly say.”¹⁶⁹ All of these interpretive proclivities seek to limit judicial choice.

The strong unitary principle naturally fits into Justice Scalia’s campaign. If courts can sometimes give a single statutory phrase multiple meanings, they must *choose* when to do so. To Justice Scalia, this amounts to “invent[ing] a statute rather than interpret[ing] one.”¹⁷⁰ That is, he regards the polymorphic principle as “dangerous”¹⁷¹ because it involves judicial choice.

¹⁶⁴ Scalia, *supra* note 5, at 7-9, 13.

¹⁶⁵ *Id.* at 13-14.

¹⁶⁶ *Id.* at 10, 14.

¹⁶⁷ *Id.* at 17-18.

¹⁶⁸ *Id.* at 35-36.

¹⁶⁹ *Id.* at 29.

¹⁷⁰ 125 S. Ct. at 722-23.

¹⁷¹ *Id.* at 727.

Justice Scalia's distaste for judicial choice and his consequent embrace of textualism follow from the "faithful agent" model of the judicial role. The "faithful agent" model posits that the judicial role in statutory cases is solely to act as the faithful agent of the legislature, not to make policy choices of its own.¹⁷² This model is said to be justified by (perhaps mandated by) our constitutional structure and particularly by the concept of separation of powers. The Constitution gives the legislative power to the politically accountable Congress; politically unaccountable judges have no business making policy choices of the kind that our Constitution entrusts to the political branches. By removing one possible mechanism for the exercise of judicial choice, the strong unitary principle serves the goal of ensuring that the politically accountable Congress makes the policy choices in our society.

Of course, the foregoing description may seem like an unfair caricature of Justice Scalia and of textualism. As Professor Manning reminds us, even textualists recognize that judges necessarily exercise some degree of policymaking discretion when construing ambiguous statutory language.¹⁷³ The essence of modern textualism, according to Manning, is not the pretense that statutory language objectively determines the answer to every question that might come before a court, but the rejection of the view that a court may disregard clear statutory text simply because the text departs from a statute's overall purpose or leads to a harsh result.¹⁷⁴

Still, if there is any caricature involved, it is inherent in the adoption of the strong unitary principle and in the language of the *Martinez* opinion.

¹⁷² See, e.g., Manning, *supra* note 5, at 5.

¹⁷³ Manning, *supra* note 11, at 1655; see *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) ("[A] certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine—up to a point—how small or how large that degree shall be.").

¹⁷⁴ Manning, *supra* note 11, at 1655-57. Professor Manning's project of making textualism a workable doctrine of statutory interpretation is admirable (and no one does it better), but, in my respectful view, it can never succeed except by abandoning textualism's central premises—i.e., by turning textualism into something other than textualism. I have explained this view in other articles, which show that some degree of the judicial power which Manning says textualism rejects is necessary to explain sound and generally accepted judicial practices. See Siegel, *supra* note 5, at 1045-49 (noting the judicial power to depart, in appropriate circumstances, from clear statutory text that contradicts strong background principles); Siegel, *supra* note 11, at 324-35 (noting the judicial power, in appropriate circumstances, to correct statutory drafting errors). The recent suggestion of my colleague Jonathan Molot that textualism and other theories of statutory interpretation have gradually merged, see Jonathan Molot, *The Rise and Fall of Textualism* (forthcoming), overlooks, I would respectfully suggest, this central point.

What, other than a strong distaste for judicial choice, could explain the conclusion that the unitary principle is not merely a sound general principle, but an inflexible rule that courts *must* always follow? Justice Scalia has gone beyond saying that the courts' policymaking role must be limited and interstitial. On this one point, at least, he regards judicial choice as "dangerous" and wholly forbids it.¹⁷⁵

2. Judicial Choice and the "Faithful Agent" Model

The chief difficulty with Justice Scalia's reasoning is that even the "faithful agent" model of the judicial role should not bar courts from making the kind of choices called for by the polymorphic principle. The constitutional principle of separation of powers unquestionably *limits* the judiciary to a far more modest role than that of making the primary policy choices entrusted to the legislature, but the limits are not so strict as to wholly eliminate the role of judicial choice, even under the "faithful agent" model.

Two reasons support this view. The first is textual and historical. The text of the Constitution does not clearly set forth the judicial role. It does not specify a method of statutory interpretation nor does it spell out the judicial role in statutory interpretation. It does not say that courts are to be faithful agents of the legislature. It simply provides that the federal courts shall be vested with the "judicial Power."¹⁷⁶

As I and others have argued, this power is best understood in historical context. The "judicial Power" that the Constitution assigns to the courts should take at least some of its content from the judicial practices that would have been familiar to the Framers and ratifiers. An analysis of those practices shows that, by vesting the courts with the "judicial Power," the Framers and ratifiers would have understood that they were entrusting the courts with some degree of discretion.¹⁷⁷ Exactly how much discretion is an appropriate subject for debate. From the time of the framing down to the present day, however, courts have always exercised some power to maintain coherence in the law, some power to correct statutory drafting errors, and, in general, some power to depart from statutory text.¹⁷⁸

The great trick, of course, is knowing when departure from statutory text is appropriate. I have previously agreed that courts certainly do not have power to depart from statutory text at will, nor on the mere ground

¹⁷⁵ 125 S. Ct. at 727.

¹⁷⁶ U.S. Const. art. III, § 1.

¹⁷⁷ See Siegel, *supra* note 5, at 1094-98; Eskridge, *supra* note 5, *passim*; GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 91-119 (1982).

¹⁷⁸ See Siegel, *supra* note 5, at 1094-98; Eskridge, *supra* note 5, *passim*; CALABRESI, *supra* note 177, at 91-119.

that particular statutory text leads to a result that appears to conflict with a statute's overall purpose.¹⁷⁹ In my view, explained in detail elsewhere, background principles of law play a critical role in determining the appropriate occasions for exercise of this limited judicial power. Within any field of law there usually exist background principles that make up a whole structure of which any one statute forms only a part. Courts should construe statutes in the context provided by these background principles, and a startling departure from background principles apparently demanded by statutory text may be the clue that indicates the appropriateness of a court's engaging in something other than purely textualist construction.¹⁸⁰ Such judicial action is an essential part of what courts have always done and therefore forms a part of the "judicial Power" vested in the federal courts.

The second point is that this view is fully consistent with the "faithful agent" model. Some scholars reject historical analysis as a guide to the judicial role.¹⁸¹ The structure of the Constitution, they assert, renders inapt comparisons to judicial practices in England or in states that did not have a similar structure of separated powers.¹⁸² The separation of powers within our constitutional structure, the political accountability of Congress, and judges' lack of political accountability, demand that courts act as Congress's faithful agents.

Accepting this view, however, still does not dictate textualism as a method of statutory interpretation. The most faithful agent is not the one who slavishly follows the text of a principal's written instructions, no matter what. Even faithful agents recognize the necessity for departure from such instructions on appropriate occasions.

Again, I have argued this point in detail elsewhere and will give only a brief summary here. A faithful agent recognizes that some instructions from the principal are incorrectly worded. This point applies to statutory interpretation. Even Justice Scalia recognizes a limited judicial power to correct statutory drafting errors—"scrivener's errors," he calls them—that lead to absurd results, at least when the intended result is obvious.¹⁸³ A judge exercising this corrective power is being a faithful agent of Congress, even though the power is really inconsistent with the textualist view of statutory interpretation.¹⁸⁴

¹⁷⁹ Siegel, *supra* note 5, at 1055-56.

¹⁸⁰ *Id.* at 1055-57; Siegel, *supra* note 11, at 348-49.

¹⁸¹ *E.g.*, Manning, *supra* note 11, at 1663.

¹⁸² *Id.* at 1662-65.

¹⁸³ *See* Siegel, *supra* note 11, at 325-32.

¹⁸⁴ *See id.* at 333-35.

Once this power is conceded, it becomes clear that the “faithful agent” model of the judicial role does not eliminate judicial choice in statutory interpretation. The faithful agent must exercise a sound discretion in interpreting the principal’s instructions. Of course one may properly debate how broad a discretion the agent should exercise. My own view, which calls upon courts to take background principles of law as an important guide, gives them more freedom than the strictly textualist approach, though less than the intentionalist approach.¹⁸⁵ The key point, however, is that it is an error to reject interpretive methods simply because they involve judicial choice. Such choice may be perfectly consistent with the faithful agent model.

This analysis of the judicial role matches our intuitive understanding of what principals really want their faithful agents to do. It would be a rare principal who truly desired an agent to exercise no judgment in determining whether to depart from the text of the principal’s instructions. As Lon Fuller famously remarked, “[t]he stupidest housemaid knows that . . . when her master tells her to ‘drop everything and come running’ he has overlooked the possibility that she is at the moment in the act of rescuing the baby from the rain barrel.”¹⁸⁶ Or consider again that most faithful of agents, the computer. When your Windows machine crashes, you can be sure that it is faithfully executing the exact instructions given to it by its programmers. Few users, however, regard this fidelity to the programmers’ instructions as desirable at the moment it happens. The crashing computer is more like a unionized employee engaged in a “work to rule” slowdown—another agent who demonstrates that principals do not always desire their agents to follow their instructions to the exact letter.

In any event, it is not really necessary to demonstrate that a faithful agent may sometimes *depart* from a principal’s written instructions in order to justify the degree of judicial choice necessary to implement the polymorphic principle. The polymorphic principle does not involve departure from statutory text, but only giving statutory text meanings that it can bear. It lies within the ordinary realm of construction open to the faithful agent.

Consider again the *Atlantic Cleaners* case mentioned above. Purely linguistic analysis in that case would have strongly suggested that the phrase “trade or commerce” had the same meaning in sections 1 and 3 of

¹⁸⁵ Siegel, *supra* note 11, at 348.

¹⁸⁶ Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 Harv. L. Rev. 616, 625 (1949). (Actually Fuller is speaking here through his invented character, Judge Foster. *Id.*)

the Sherman Act, where it appears in exactly parallel constructions.¹⁸⁷ The Court, however, properly considered Congress's purpose in enacting the statute, which, it determined, included exercising all the power that Congress possessed, so as to deal with restraint of trade or commerce in the most comprehensive and effective possible way.¹⁸⁸ In light of this purpose, the Court determined that it was appropriate to construe sections 1 and 3 as though they appeared in two separate statutes, with the latter construed so as to reflect Congress's greater power over commerce in the District of Columbia.¹⁸⁹ As noted above, innumerable cases have confirmed the power of a court to give different meanings to multiple appearances of a single term in a single statute; no one argues that courts doing so are violating their duty to act as faithful agents of Congress.

The degree of judicial choice involved in cases of the *Atlantic Cleaners* type is no different from that called for by the polymorphic principle. If a court can treat two sections of the same statute as though they appear in two separate, purely notional statutes, it should have a like discretion to treat a single section with two subclauses as though it were really two separate, notional sections. At no point does this technique require a court to give statutory text a meaning it will not bear. The faithful agent, who may uncontroversially recognize that the same text can bear different meanings when appearing multiple times, can on appropriate occasions recognize that a single text can bear multiple meanings even when appearing a single time.

It is an error, therefore, for the Court to attempt to squeeze judicial choice out of the interpretive process as strongly as it has by endorsing the strong unitary principle. Even accepting the view that our Constitution imposes the "faithful agent" model of interpretation upon the courts, that model permits judicial choice that may, on infrequent but appropriate occasions, include the choice to depart from statutory text. It certainly permits the even smaller degree of judicial choice called for by the polymorphic principle.

3. Eliminating Judicial Choice – Reality and Illusion

Moreover, even if one accepted the view that courts should use an interpretive methodology that eliminates as much judicial choice as possible, such a view would still not justify adoption of the strong unitary principle. The strong unitary principle does not really eliminate judicial choice. It just creates the illusion of doing so.

Others have argued that Justice Scalia's textualism, although

¹⁸⁷ 15 U.S.C. §§ 1, 3.

¹⁸⁸ 286 U.S. at 435.

¹⁸⁹ *Id.*

purportedly providing an objective, value-neutral methodology that judges can apply to reach determinate answers, in fact creates only the illusion of objectivity, while leaving judges ample opportunities for manipulation.¹⁹⁰ This point applies to the strong unitary principle. Indeed, the very nature of the strong unitary principle virtually guarantees that it will be called into play to mask, not to eliminate, judicial choice.

Any case in which the strong unitary principle makes a real difference must be a case in which there is a substantial argument for application of the polymorphic principle. That is, there must be some substantial argument for why a court should give a single statutory phrase different meanings under different circumstances. In such a case, even assuming the court firmly adheres to the strong unitary principle and restricts itself to choosing one, single meaning for the statutory phrase, that is still a judicial choice. Necessarily, it is a significant choice. If one possible meaning for the statutory phrase were simply right and the other simply wrong, the court would not need the strong unitary principle to tell it what to do; it would just choose the right meaning anyway.

There is, therefore, no getting away from judicial choice in cases potentially involving the polymorphic principle. The strong unitary principle, to be sure, takes away one particular judicial choice. Once a court interprets the statutory phrase in one case, it is deprived of the power to give the phrase a different meaning in the next case. To that extent, choice is reduced. The effect, however, is simply to raise the stakes as to the initial judicial choice. Justice Scalia's opinion in *Martinez* makes this clear: in giving the statutory phrase its initial interpretation, he explains, the court "must consider the necessary consequences of its choice."¹⁹¹ The court must consider how the interpretation will apply in the full range of possible circumstances, including those not presented by the case immediately before it,¹⁹² and choose one meaning for them all. That is still a choice, and Justice Scalia provides no convincing explanation for why one high-stakes judicial choice is better than two judicial choices of lesser consequence.

Of course, there might be cases in which the contested statutory phrase has its meaning clearly controlled in one application by a rule of statutory interpretation. In such cases, perhaps, one could argue that the strong unitary principle truly eliminates judicial choice, because the meaning in the one application is objectively fixed and the strong unitary principle

¹⁹⁰ This argument is developed in William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 Mich. L. Rev. 1509 (1998); see also Stephen A. Plass, *The Illusion and Allure of Textualism*, 40 Vill. L. Rev. 93 (1995).

¹⁹¹ 125 S. Ct. at 724.

¹⁹² *Id.*

then extends that meaning to all applications. But again, if the case is one in which the strong unitary principle makes a difference, there must be something about the other applications that creates at least some doubt as to the clarity of the meaning of the contested statutory phrase, which in turn suggests that there really was some judicial choice—a high-stakes choice—involved in the initial interpretation.¹⁹³

Justice Scalia believes that there is something particularly unworthy about searching for exceptions to interpretations previously adopted when those interpretations yield an undesirable result in a later case and something particularly commendable about sticking to initial decisions in such cases.¹⁹⁴ Certainly one must credit Justice Scalia with respect for his principles in cases such as *Martinez*, where it seems clear that he personally disagreed with the result, which he had previously castigated in *Zadvydas*,¹⁹⁵ yet voted for it all the same. Making exceptions in later cases, however, may not reflect unprincipled or arbitrary judging,¹⁹⁶ but rather a sincere attempt to implement the best interpretation of the statute involved; the undesirable result might serve as an indicator that the correct implementation of the statute is different in the later case. If we trust judges to make a principled choice in initially interpreting a statute, it is not clear why we cannot trust them to make a second principled choice in a later case and why we *must* instead raise the stakes on the initial choice.

So the strong unitary principle fails to deliver on its promise of reducing judicial choice in statutory interpretation. It may limit the number of times a court must exercise judicial choice, but it proportionately raises the stakes with regard to those times.

4. The Ratchet Effect of the Strong Unitary Principle

Indeed, for those whose goal is to restrict the role of judicial choice, the situation is even worse than the previous section suggests. The strong unitary principle would in many cases have the effect of *magnifying* the role of judicial choice in statutory interpretation and of *increasing* the degree to which courts depart from the legislative will. It would have this effect because the strong unitary principle takes the initial judicial choice, which may be a highly contestable choice that implements judicial wilfulness at the expense of what the legislative has prescribed, and compels its application even more broadly than might otherwise be required.

¹⁹³ As the next section shows, this was certainly true in *Martinez*.

¹⁹⁴ See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chic. L. Rev. 1175, 1179-80, 1187 (1989).

¹⁹⁵ 533 U.S. at 702-05 (Scalia, J., dissenting).

¹⁹⁶ See Scalia, *supra* note 194, at 1179-80.

Consider, for example, the effect of applying the strong unitary principle in conjunction with the doctrine of constitutional avoidance. As Justice Thomas observed in his dissenting opinion in *Martinez*, the doctrine of constitutional avoidance takes two forms.¹⁹⁷ In one form, sometimes called the “narrow” or “classical” doctrine of avoidance, it demands only that when a statute has two potential constructions, one of which would be constitutional and the other unconstitutional, a court should give the statute the constitutional construction. In the other (“broad” or “modern”) form, the doctrine of constitutional avoidance requires a court to construe a statute so as to avoid even a substantial *doubt* as to its constitutionality.¹⁹⁸

To the extent that courts invoke the broad doctrine of constitutional avoidance, they are engaging in judicial choice. As Adrian Vermeule has observed, the broad doctrine of constitutional avoidance overprotects constitutional norms.¹⁹⁹ It is one thing to say, as the narrow doctrine of avoidance says, that courts must construe statutes so as to avoid *actual* unconstitutionality. To the extent that courts do so, they take nothing away from legislative power that the Constitution has not already taken; they merely prevent a statute from having an effect it cannot constitutionally have. When courts construe a statute so as to avoid constitutional *doubt*, however, they impinge on the legislative power. The principle of legislative supremacy would demand that courts give effect to duly enacted statutes to the full extent permitted by the Constitution.²⁰⁰ To the extent that courts construe statutes so as to avoid a mere constitutional doubt, without actually determining that the statute would be unconstitutional under one possible construction, they fail to give effect to what might well have been a constitutional exercise of the legislative power.

¹⁹⁷ 125 S. Ct. at 732-33 (Thomas, J., dissenting).

¹⁹⁸ *See id.* The Court discussed the difference between the two forms of the doctrine in *Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991). *See also* Adrian Vermeule, *Saving Constructions*, 85 Geo. L.J. 1945, 1948-49 (1997) (discussing the difference between the two doctrines and giving them the names mentioned in the text). The “narrow” or “classical” doctrine is usually said to be the older and original form, *e.g.*, 125 S. Ct. at 732 (Thomas, J., dissenting); Vermeule, *supra*, at 1958-59, and has its roots in cases as early as *Mossman v. Higginson*, 4 U.S. 12 (1800). The “broad” or “modern” version is usually said to have originated in *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909), *see Rust*, 500 U.S. at 191 (so attributing it); Vermeule, *supra*, at 1958 (same), although as early as 1830 the Court construed a statute so as to avoid “the most serious doubts” about the constitutionality of an alternative construction. *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. 433, 448 (1830).

¹⁹⁹ Vermeule, *supra* note 198, at 1963.

²⁰⁰ *Id.* at 1963.

Thus, the doctrine of constitutional avoidance is effectively a judicial power grab. To be sure, courts invoke the doctrine in the name of Congress—they claim to believe that Congress desires courts to construe statutes so as to avoid constitutional issues.²⁰¹ This attribution of congressional desire is, however, implausible.²⁰² It would seem more realistic to presume that Congress wants what it enacted in a statute, giving that statute its best possible construction (indeed, one might even regard such a presumption as constitutionally required whether it is realistic or not). If, under the best construction, the statute is unconstitutional, then, of course, Congress cannot get what it wants, but if the statute, as best construed, only raises a constitutional doubt, and turns out to be constitutional on close examination, it would seem more realistic and appropriate to presume that Congress wants the statute enforced. The doctrine of constitutional avoidance would, therefore, appear to be an exercise of judicial choice that decreases congressional power.

Moreover, the cases show that the avoidance doctrine can have a very substantial impact on statutory interpretation. The doctrine is theoretically limited by the rule that courts will give statutes only “fairly possible”²⁰³ constructions and will not “press statutory construction to the point of disingenuous evasion even to avoid a constitutional question.”²⁰⁴ In fact, however, courts frequently invoke the rule even when doing so requires them to give a statute a construction that has no basis whatever in the statutory language—as, for example, in *Zadvydas*, when the Supreme Court determined that the statutory provision that certain aliens “may be detained beyond the removal period,”²⁰⁵ implicitly *limits* the Attorney General’s authority to detain removable aliens.²⁰⁶ The Supreme Court exercised judicial choice in this case, as is evidenced by the 5-4 split among the Justices and by the dissent’s complaint about the Court’s

²⁰¹ See *Rust*, 500 U.S. at 191 (“This canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations.”).

²⁰² Vermeule, *supra* note 198, at 1962.

²⁰³ *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

²⁰⁴ *Salinas v. United States*, 522 U.S. 52, 60 (1997) (internal quotation omitted).

²⁰⁵ 8 U.S.C. § 1231(a)(6).

²⁰⁶ *Zadvydas v. Davis*, 533 U.S. 678 (2001); *cf.* *National Labor Relations Board v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (holding that the National Labor Relations Act does not cover the relationship between religious schools and their teachers); *id.* at 511 (Brennan, J., dissenting) (pointing out that the Court’s interpretation was not “fairly possible”); *United States v. Marshall*, 908 F.2d 1312, 1335 (7th Cir. 1990) (Posner, J., dissenting) (noting that courts “often do interpretive handsprings” to avoid a constitutional question).

“obvious disregard of congressional intent.”²⁰⁷ Examples such as this one show that courts exercise substantial discretion in determining how far to go in avoiding constitutional issues. The doctrine of constitutional avoidance is not only an exercise of judicial choice, but it arrogates a considerable degree of power to the courts.

Now consider how the broad avoidance doctrine interacts with the strong unitary principle. Once a court gives statutory text a particular construction in one application in order to avoid constitutional doubt, the strong unitary principle demands that that construction apply to *all* applications of the text, even applications that raise no constitutional doubt, because the “lowest common denominator” must control.²⁰⁸ The result is that the strong unitary principle ratchets up the judicial interference with the congressional will. First, the courts seize power by construing a statute under the avoidance principle so as to block its possibly constitutional effect; then, the strong unitary principle multiplies the judicial interference with the congressional enactment by extending that construction to other applications of the statute that may not even pose any constitutional problem.

Zadvydas and *Martinez* provide an excellent illustration of this effect. First, in *Zadvydas*, the Court invoked the avoidance doctrine to give the immigration laws an interpretation that was textually quite implausible, but judicially preferable, on the ground that there was some doubt as to the constitutionality of indefinite detention of removable aliens. Justice Scalia was among those insisting that the Court had “obvious[ly] disregard[ed] . . . congressional intent.”²⁰⁹ Then, in *Martinez*, the Court applied the strong unitary principle to extend that implausible interpretation to the case of inadmissible aliens, without even claiming that indefinite detention of such aliens would raise any constitutional doubts.²¹⁰ Thus, the strong unitary principle had the effect of extending the violence that the Court had initially done to the statute into further applications where it might not have been necessary under the avoidance doctrine alone.

Similar ratchet effects would follow from applying the strong unitary principle in other situations involving an initial judicial choice. For

²⁰⁷ 533 U.S. at 705 (Kennedy, J., dissenting).

²⁰⁸ *Martinez*, 125 S. Ct. at 724.

²⁰⁹ 533 U.S. at 705 (Kennedy, J., dissenting).

²¹⁰ Of course, one might take the view that all indefinite detentions of any person not charged with a crime raise at least some constitutional doubt. Under that view, *Martinez*, although still giving the immigration statute a textually implausible reading, would be no worse than *Zadvydas*. But in *Martinez* the Court gave the statute an implausible reading without claiming that the natural reading would raise constitutional doubts in the case at hand.

example, in *Library of Congress v. Shaw*, as noted earlier, the Supreme Court construed Title VII so as not to provide for interest on attorney's fee awards entered against the United States.²¹¹ The Court's opinion was quite implausible as a matter of statutory construction,²¹² the Court reached its result only by applying the countertextual no-interest rule. If the Court had then followed the strong unitary principle, it would have had to conclude that interest awards were not available on *any* attorney's fees awarded under Title VII, whether against a private party or the United States. The initial choice to follow the no-interest rule would have significantly interfered with the entire scheme of Title VII, by extending a rule applicable only to the federal government into the much larger sphere of private employment.²¹³ (In fact, as noted above, the Court applied the polymorphic principle.)

Thus, not only does the strong unitary principle fail to eliminate judicial choice, in many cases it would have the perverse effect of *magnifying* judicial choice. Once courts make the initial choice to depart from congressional intent in the name of some other value served by a judicially developed principle of statutory interpretation, the strong unitary principle would extend that judicial choice into further statutory applications, where it might serve neither the congressional intent nor the other, judicially desired value.

5. Practical Arguments Concerning the Strong Unitary Principle

Two other arguments that one could make—and that Justice Scalia probably would make—for the strong unitary principle should also be noted: that clear rules of the kind provided by the principle would reduce litigation costs and would provide Congress with a clear background against which to legislate. Justice Scalia has made arguments of this kind in connection with other principles of statutory interpretation, such as

²¹¹ 478 U.S. 310 (1986).

²¹² Title VII specifically provided for the United States to be liable “the same as a private person.” 42 U.S.C. § 2000e-5(k). Given that courts could award interest on attorney's fees awarded against private parties, it would seem indubitable that the statutory language, if given its normal meaning, would subject the United States to such interest awards as well. *See* 478 U.S. at 324-25 (Brennan, J., dissenting).

²¹³ Indeed, although *Shaw* involved only interest on attorney's fees, similar logic would have applied to interest against the United States on Title VII back pay awards, which the strong unitary principle would then have extended to interest on all Title VII back pay awards, including those against private parties. Such a construction would have constituted a serious interference with the policy of Title VII, because back pay is often awarded a long time after the wrong involved and the award could be significantly degraded by the failure to award interest.

avoiding the use of legislative history.²¹⁴

The short answer to these arguments is that these benefits, assuming them to exist, have not been thought sufficient, in the case of other canons of construction, to overcome the benefit of maintaining judicial flexibility to reach the best construction of a particular statute. As noted earlier, other canons, including the closely related canon that words appearing multiple times within a single statute are presumed to have the same meaning each time, serve as guides, not as inflexible rules. The “standards v. rules” debate is a long-standing one,²¹⁵ but, at least with regard to statutory construction, the usual answer is that general principles are too general to merit complete adherence in all cases.

The longer answer is that the claimed benefits are also doubtful. As to litigation costs, it seems unlikely that the strong unitary principle could become so firmly established that litigants would just give up in cases where there is some strong reason to apply the polymorphic principle. Courts rarely adhere to even apparently settled principles of statutory construction so firmly as to avoid all need for litigation.²¹⁶

In any event, the choice of the initial statutory interpretation would have to be fought out circuit by circuit, until such time as the Supreme Court steps in, so there would be no saving there. Indeed, the strong unitary principle might increase litigation costs by increasing the number of conflicts that the Supreme Court must resolve. If the Court took the strong unitary principle seriously, then, where a statute says, “if (A or B), then C,” a case from one circuit giving C a particular meaning in connection with A would have to be regarded as conflicting with a case from a different circuit giving C a different meaning in connection with B. Under current practice, the two cases might be regarded as a mere “false conflict,” but the strong unitary principle would make the conflict a true one, putting further strain on the time of the Supreme Court, which is one of the system’s scarcest resources.

As to the prospect of providing clear rules against which Congress can legislate, I have previously argued that this apparently commendable goal is something of a chimera.²¹⁷ Its achievement requires assuming an unrealistic degree of perfection in the congressional drafting process. So

²¹⁴ On lowering litigation costs, see, *e.g.*, *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring); on providing Congress with clear rules against which to legislate, see, *e.g.*, *Finley v. United States*, 490 U.S. 545, 556 (1989) (Scalia, J.).

²¹⁵ See generally Scalia, *supra* note 194.

²¹⁶ See *infra* Part IV.A.

²¹⁷ Siegel, *supra* note 11, at 341-43.

long as we remain human beings, not gods,²¹⁸ Congress will on occasion draft statutes that defy the supposedly “clear” rules of construction. That is why it is best to retain the rules as general guides but not to render them completely inflexible.

* * * * *

In sum, the strong unitary principle is not only incorrect linguistically and a poor fit with general practices with regard to the canons of statutory construction, but it does not follow from the separation of powers or the “faithful agent” model of the judicial role. Courts can and do exercise the degree of judicial choice called for by the polymorphic principle. Moreover, even if one adopted the goal of minimizing judicial choice to the extent possible, the strong unitary principle would not follow. The strong unitary principle provides only the illusion of eliminating judicial choice. Indeed, in many cases, it has the ironic effect of magnifying the role of judicial choice in the process of statutory construction.

IV. THE POLYMORPHIC FUTURE

It remains to consider the future of the polymorphic principle. This Part suggests that, notwithstanding *Martinez*, the polymorphic principle is probably alive and well. Therefore, this Part attempts to set forth some guidelines for its use and to consider the role of Congress in regulating it.

A. Polymorphism and Stare Decisis

Whatever one thinks of the propriety or wisdom of the polymorphic principle, one might imagine that *Martinez* simply resolves the issue. Has the Supreme Court firmly rejected the polymorphic principle and rendered discussion of the matter pointless? Is the issue now determined for future cases by stare decisis?

Probably not. To be sure, *Martinez*’s language appears quite stark. The Court (by a solid, 7-2 majority) declares polymorphism to be a “dangerous principle.”²¹⁹ It says that statutory language *cannot* have two meanings at the same time.²²⁰ It says that where one statutory application calls for ambiguous language to have a limited meaning, a court cannot give the same language a broader meaning in a different application; rather, the “lowest common denominator . . . *must* control.”²²¹ Thus, the

²¹⁸ See Siegel, *supra* note 5, at 1107 (citing H.L.A. Hart, *The Concept of Law* 128 (2d ed. 1994)).

²¹⁹ 125 S. Ct. at 727.

²²⁰ *Id.* at 723.

²²¹ *Id.* at 724 (emphasis added).

Court seems to have considered the general interpretive issue thoroughly and self-consciously and to have set its face against the polymorphic principle as squarely as it can.

The Supreme Court's cases, however, strongly suggest that the Court lacks real methodological commitments in matters of statutory interpretation. When the Court decides a statutory interpretation case, *stare decisis* effect attaches to the interpretation that the Court gives to a statute, but the Court does not adhere to the interpretive methods used to reach that interpretation. Time and again one sees the Court stating a principle of statutory interpretation without apparent qualification in one case, only to ignore it in the next.

Consider, for example, the frequently arising question of whether a court may consult a statute's legislative history when the statute's text is unambiguous. At times—particularly in cases where it does not really matter, because legislative history supports the apparent meaning of statutory text—the Supreme Court forbids this practice in apparently uncompromising language, such as, “[w]hen the words of a statute are unambiguous, . . . judicial inquiry is complete,”²²² or “when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.”²²³ But in other cases, the Court contents itself with the more moderate statement that “[a]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive”²²⁴ or with noting that only a “most extraordinary showing” of intention in legislative history will justify departure from clear statutory text.²²⁵ In at least some cases where apparently clear statutory text is truly at odds with purposes that may be deduced from legislative history, the Court unblushingly consults the history.²²⁶

²²² *Connecticut Nat. Bank v. Germain*, 503 U.S. 24, 254 (1992) (internal quotation omitted); *see also id.* at 255-56 (Stevens, J., concurring) (explaining that the legislative history supports the statutory text).

²²³ *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004).

²²⁴ *United States v. Wells*, 519 U.S. 482, 497 (1997) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

²²⁵ *Salinas v. U.S.*, 522 U.S. 52, 57 (1997).

²²⁶ *E.g.*, *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 586-89 (2004) (consulting legislative history in determining that the Age Discrimination in Employment Act's prohibition on “discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age,” 29 U.S.C.A. § 623(a)(1), prohibits only discrimination based on *old* age, not discrimination in favor of older workers and against younger ones); *id.* at 603 (Thomas, J., dissenting) (complaining that “[t]he plain language of the ADEA clearly allows for suits brought by the relatively young when discriminated against in favor of

The Court also issues diametrically opposed pronouncements about proper ways of using legislative history in those cases in which it is consulted. For example, the Court has contradicted itself on the question of whether, in determining whether a statutory amendment made a possibly surprising change in a statutory scheme, a court may rely on the *absence* of any acknowledgment of the change in the amendment's legislative history. In *Harrison v. PPG Industries, Inc.*,²²⁷ the Court strongly cautioned against reliance on such "negative" legislative history. The Court said, "[i]n ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark."²²⁸ Yet in the later case of *Chisom v. Roemer*,²²⁹ the Court rejected a particular statutory construction "because we are convinced that if Congress had such an intent, . . . at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history."²³⁰ For good measure, the Court added, "Congress's silence in this regard can be likened to the dog that did not bark."²³¹ The

the relatively old."); *see also* *Conroy v. Aniskoff*, 507 U.S. 511, 514-518 & 518 n.12 (1993) (stating that it is permissible to consult legislative history even where "[t]he statutory command . . . is unambiguous, unequivocal, and unlimited"); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987) (consulting legislative history even though "the plain language of this statute appears to settle the question before us"); *United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 543-544 (1940) ("When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'").

²²⁷ 446 U.S. 578 (1980).

²²⁸ *Id.* at 592.

²²⁹ 501 U.S. 380 (1991).

²³⁰ *Id.* at 396.

²³¹ *Id.* at 396 n.23. Sherlock Holmes enthusiasts will recognize the allusion to *Silver Blaze*, but will also know that the commonplace reference to "the dog that didn't bark," while more suitable for one-line use than the actual original, loses something of the original's brilliance. In the original story, Holmes is trying to solve the mysterious disappearance of *Silver Blaze*, a racehorse, which was kidnapped from its stall one night shortly before a big race. In the course of his investigation, Holmes questions a stable lad, and learns that several sheep kept by the stable have recently gone lame. Holmes chuckles and calls this "singular epidemic among the sheep" to the attention of the official police representative, Inspector Gregory:

I saw by the Inspector's face that his attention had been keenly aroused.

"You consider that to be important?" he asked.

"Exceedingly so."

"Is there any other point to which you would wish to draw my attention?"

"To the curious incident of the dog in the night-time."

"The dog did nothing in the night-time."

Court thus disregarded its specific, apparently unqualified prohibition on the use of precisely this interpretive technique, and even its rejection of this specific interpretive metaphor.

Similarly, the Court has contradicted itself with regard to the role that a statute's overall purpose should play in its interpretation. In *Rodriguez v. United States*,²³² the Court referred to a lower court's reliance on overall purpose as "most impermissibl[e]."²³³ The Court explained the fallacy inherent in such reliance: "[N]o legislation pursues its purposes at all costs. . . . [I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law."²³⁴ Just a few years later, however, in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,²³⁵ the Court rejected a strong textual argument²³⁶ by relying in part on "the broad purpose" of the statute at hand.²³⁷ Justice Scalia plaintively responded, "I thought we had renounced the vice of 'simplistically assum[ing] that *whatever* furthers the statute's primary objective must be the law.'"²³⁸

The Court sometimes makes flat statements such as "[i]t is beyond our province to rescue Congress from its drafting errors."²³⁹ At other times, however, the Court does exactly that.²⁴⁰ Even Justice Scalia accepts that courts may correct scrivener's errors on appropriate, albeit rare, occasions.²⁴¹

"That was the curious incident," remarked Sherlock Holmes.

Arthur Conan Doyle, *Silver Blaze*, in 2 WILLIAM S. BARING-GOULD, THE ANNOTATED SHERLOCK HOLMES 277 (1967). The phrase "the dog that didn't bark" never appears in the original story. Thus, "the dog that did nothing" would be a truer reference to the original, but even a Sherlockian purist would have to admit that "the dog that didn't bark" makes more sense for an audience that might be unfamiliar with the original story. Cf. MARK HADDON, THE CURIOUS INCIDENT OF THE DOG IN THE NIGHT-TIME (2003).

²³² 480 U.S. 522 (1987) (per curiam).

²³³ *Id.* at 525 (emphasis added).

²³⁴ *Id.* at 525-26.

²³⁵ 515 U.S. 687 (1995).

²³⁶ *Id.* at 715-25 (Scalia, J., dissenting).

²³⁷ *Id.* at 698 (emphasis added).

²³⁸ *Id.* at 726 (Scalia, J., dissenting).

²³⁹ *Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004) (internal quotation omitted).

²⁴⁰ *E.g.*, *United States Nat. Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 455, 462 (1993) (correcting "a simple scrivener's error" that caused "punctuation marks [to be] misplaced").

²⁴¹ *Holloway v. U.S.*, 526 U.S. 1, 19 n.2 (1999) (Scalia, J., dissenting); *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 528-529 (1989) (Scalia, J., concurring in the judgment).

Nor are these methodological inconsistencies simply the inevitable result of cycling and voting paradoxes on a multi-member Court. Individual Justices also demonstrate methodological inconsistency. For example, Justice Scalia typically is the Court's strongest vote to support the *Chevron* principle that an ambiguous provision in an administrative agency's organic statute constitutes a delegation of power to the agency to resolve the ambiguity, regardless of the reason why the ambiguity may have occurred.²⁴² Yet even he quietly joined the Court's opinion in *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*,²⁴³ in which the Court determined that in some, extraordinary cases, a court can simply tell that a matter is so important that it is unlikely that Congress would have left it for an agency to decide.²⁴⁴ Thus, individual Justices, like the Court as a whole, seem to lack truly firm methodological commitments.²⁴⁵

The Court's statutory interpretation cases raise a nice issue with regard to the scope of *stare decisis*. The Court has said that, "[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."²⁴⁶ As shown above, however, the Court's actual cases make clear that when the Court issues opinions interpreting statutes, *stare decisis* effect attaches to the ultimate holding as to the meaning of the particular statute interpreted, but not to general methodological pronouncements, no matter how apparently firm. One might well ask why the Court regards itself as less bound by its decisions regarding methods than by the results of the methods as

²⁴² See *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 865 (1984) (listing various possible reasons why an ambiguity might occur in a statute and stating, "[f]or judicial purposes, it matters not which of these things occurred"); *United States v. Mead Corp.*, 533 U.S. 218, 257 (Scalia, J., dissenting) ("Chevron sets forth an across-the-board presumption Ambiguity means Congress intended agency discretion."); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 454-55 (1987) (Scalia, J., concurring in the judgment) (objecting to the Court's suggestion that *Chevron* deference would not apply to a "pure question of statutory construction"); *N.L.R.B. v. United Food and Commercial Workers Union*, 484 U.S. 112, 134 (1987) (Scalia, J., concurring) (reiterating that the test for *Chevron* deference is simply whether a statute is silent or ambiguous).

²⁴³ 529 U.S. 120 (2000).

²⁴⁴ *Id.* at 159-60.

²⁴⁵ Similarly, Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, recently complained in a dissenting opinion that the Court was not properly following the strong unitary principle. *Pace v. DiGuglielmo*, 125 S. Ct. 1807, 1819 & n.5 (2005) (Stevens, J., dissenting). As noted in the text immediately *infra*, all four of these Justices have previously embraced the polymorphic principle.

²⁴⁶ *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996).

applied.²⁴⁷

That question, however, interesting though it is, is reserved for some other article. For present purposes, it suffices to note that the Court's apparently unqualified rejection of the polymorphic principle in *Clark v. Martinez* cannot be taken as binding for the future. Although occasions for application of the polymorphic principle arise infrequently, one may expect to see some future opinion in which the Court reverts to form and applies the polymorphic principle.

This prospect seems particularly likely when one takes a closer look at the voting patterns of the Justices involved. Justice Scalia might be expected to adhere to the strong unitary principle for the future—as noted, he applied it in *Martinez*, even though doing so yielded a result he surely disfavors, as shown by his dissent in *Zadvydas*. Looking, however, at the six other Justices who joined Justice Scalia's opinion for the Court in *Martinez*, we can see that *all six* have also written or joined opinions applying the polymorphic principle. Justice Ginsburg, joined by Justice Breyer, evinced strongly implied constitutional avoidance polymorphism in her concurrence in *Vermont Agency*. Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, urged the use of express stare decisis polymorphism in *Bossier Parish*. And Justices O'Connor and Kennedy joined Justice White's opinion applying express subconstitutional polymorphism in *Will v. Michigan Department of State Police*. Even the Chief Justice, who dissented in *Clark v. Martinez*, joined the Court in *Illinois Council*, which used express constitutional avoidance polymorphism, and in *Richmond*, which used express policy polymorphism.

It seems likely, therefore, that Justice Scalia is the Court's sole firm believer in the strong unitary principle.²⁴⁸ The other Justices who joined

²⁴⁷ Rosenkranz observes that “the Justices do not seem to treat methodology as part of the holding of case law.” Rosenkranz, *supra* note 5, at 2144. He points out that Justice Scalia, for example, does not consider himself bound by the Court's frequent demonstration that it regards legislative history as a legitimate tool of statutory construction. *Id.* The examples given in the text show that the matter goes beyond individual Justices. The Court itself does not seem to regard cases as setting binding precedent concerning methodology.

²⁴⁸ Justice Thomas, in his dissenting opinion in *Clark v. Martinez*, professes adherence to the unitary principle, *see* 125 S. Ct. at 730 (Thomas, J., dissenting), and attempts to characterize his understanding of the statute at issue as involving “a single and unchanging, if implausible, meaning.” *Id.* Still, this reading, that “the detention period authorized by § 1231(a)(6) depends not only on the circumstances surrounding a removal, but also on the type of alien ordered removed,” *id.*, involves the kind of verbal trick discussed earlier, under which any interpretation of any statute could be characterized as unitary by reading sufficient nuance into the critical term or phrase. Effectively, Justice Thomas advocates a polymorphic reading of the statute. (In fairness,

Justice Scalia's opinion in *Martinez* approve of the result, but are unlikely to consider themselves firmly bound by the case's methodology. The polymorphic principle will probably prevail again.

B. Practical Polymorphic Advice

Given that polymorphism is probably going to return, it is appropriate to consider how it should be used in practice. This section attempts to set forth some guidelines for the use of the polymorphic principle.

The guidelines, of course, cannot provide a perfect, mechanically applicable rule that tells courts exactly when to apply the polymorphic principle. But that is not troubling. There is no perfect rule that tells courts when to depart from the general canon that terms or phrases appearing multiple times in a single statute should bear the same meaning each time, but courts manage all the same. They exercise judgment in determining when incongruities that would result from applying the canon outweigh its natural force. The same is true with regard to the polymorphic principle. The only ultimate guideline is that the unitary principle is the general rule, but that incongruities that result from applying it to a particular statute may cause a court to conclude that the statute demands application of the polymorphic principle.

That said, a couple of thoughts regarding practical application of the polymorphic principle may be noted. First, the principle seems most appropriate when some special rule of statutory interpretation, which deflects courts from the most natural interpretation of statutory text, applies to one application of a statutory phrase but not to others. Thus, it is not surprising to find the polymorphic principle appearing most commonly in cases involving constitutional avoidance or other, special, subconstitutional rules of interpretation.²⁴⁹ In straightforward situations where no such special rule applies, the unitary principle seems more appropriate. Thus, for example, in 28 U.S.C. § 1332(a), which grants district courts the diversity jurisdiction in cases involving four possible party configurations provided the amount in controversy “exceeds the sum or value of \$75,000,” one would strongly expect that the amount-in-controversy requirement would apply uniformly, inasmuch as there is no special rule of interpretation that applies to the amount requirement's interaction with just one of the party configurations.

Second, where a special rule does deflect a court from the most natural reading of a statutory phrase with regard to one application, and the court therefore needs to decide whether the special reading should apply to all

one should note that Justice Thomas really wanted the Court to overrule its prior decision in *Zadvydas* and adopt a unitary reading of the statute that would permit indefinite detention of aliens in any of the statute's categories. *Id.* at 736.)

²⁴⁹ See *supra* Parts II.B.1, II.B.2.

applications, the court might find guidance in considering which is the primary application of the statute and which the unusual case. If the special construction principle applies to the statute's main application, it might be more appropriate to carry that reading over to all applications, but if the special principle applies to the less central application, it might be most appropriate to read the statute polymorphically, so that the main application is not infected by the special case.

Thus, under this guideline, perhaps the most appropriate application of the polymorphic principle in the cases discussed earlier would be that of *Library of Congress v. Shaw*, which concerned the award of interest on attorney's fees under Title VII. Title VII applies to both private employers and to the federal government, but in terms of simple numbers, its application to cases of private employment must surely be expected to dwarf its application to cases against the federal government, because the private sector is so much larger. If the courts have determined that awards of interest are essential in cases against private parties in order for the purposes of Title VII to be fully realized, it would be inappropriate to let the relatively special case of the federal government, where a special rule makes interest unavailable, control the statute's main application.

This guideline might also suggest that courts should not feel as strongly obliged to adhere to the unitary principle as they have in the one area where the matter has received much attention, namely, the case of statutes that impose civil and criminal penalties on the same conduct. With regard to some of these statutes, such as the Racketeer Influenced Corrupt Organizations Act (RICO), application of the unitary principle seems appropriate. Criminal enforcement is a central theme of RICO. To the extent that the rule of lenity might suggest narrowing RICO's provisions, that narrowing would occur in RICO's main arena. On the other hand, consider a statute as to which enforcement is overwhelmingly civil and any criminal penalties are a rarely-invoked statutory detail. As to such statutes, it would seem odd to deny the statute the full effect that would follow from giving its provisions the *best* reading, just because the rare criminal prosecution might demand a narrower reading. Indeed, application of the unitary principle creates the paradox that, although Congress would probably imagine itself to be *strengthening* a statute by adding criminal penalties to it, in some respects the addition of such penalties has the effect of *weakening* the statute, because courts may then feel obliged to apply the rule of lenity even when applying the statute in civil cases. This curious paradox suggests that courts should be somewhat more open to applying the polymorphic principle in such situations.

Fortunately, as Professor Lawrence Solan has observed, the issue is often, as a practical matter, taken care of by the institutional structures that arise with regard to enforcement of such "mixed" statutes. Courts may

give the statute its most natural reading in civil cases, despite the pull of the rule of lenity. Nonetheless, the institution of prosecutorial discretion may tend to ensure that the government brings criminal prosecutions only in cases presenting the most obvious and egregious statutory violations. Such prosecutorial practices mimic the rule of lenity. Under such an institutional structure, the effect of the polymorphic principle is achieved—the statute is given the best reading in civil cases and the rule of lenity is, in effect, applied to criminal cases—even though the courts do not expressly invoke the polymorphic principle.²⁵⁰

C. The Role of Congress

Finally, it is appropriate to consider the role of Congress with regard to the polymorphic principle. Indeed, in *Martinez*, the Court suggested that protecting Congress was one of the reasons for its adoption of the strong unitary principle. The Court asserted that the polymorphic principle would not only be “novel” and “dangerous,” but that it would be “beyond the power of Congress to remedy.”²⁵¹

Whatever the value of the Court’s other arguments, this one is certainly incorrect. Congress has authority to prescribe rules of statutory interpretation.²⁵² Congress could include, in any particular statute, a “unitary principle” provision, which could specify that “each term or phrase in this statute has, with regard to any single time it appears, a single meaning.” Congress’s power to include such a provision in any single statute could be no more controversial than its power to include a “definitions” section, which is universally accepted.

Moreover, what Congress can do with regard to each particular statute, it could also do by means of one, general statute. If Congress desired to pass a “Strong Unitary Principle Act,” it could, by that single statute, specify that courts should understand *all* of its statutes to embody the strong unitary principle. Some scholars have occasionally suggested that such general interpretive statutes would impermissibly encroach on the judicial power,²⁵³ but, as I have explained in detail elsewhere, such arguments are implausible and contrary to precedent.²⁵⁴ Even if, somehow, Congress lacked the power to prescribe the strong unitary principle as a general rule of interpretation for the future, it could certainly pass one statute that amends all existing statutes so as to prescribe the

²⁵⁰ Solan, *supra* note 6, at 2218-37.

²⁵¹ 125 S. Ct. at 727.

²⁵² Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 Vand. L. Rev. 1457, 1500-05 (2000); *see also* Rosenkranz, *supra* note 5, at 2102-40.

²⁵³ *See* Siegel, *supra* note 252, at 1501.

²⁵⁴ *Id.* at 1501-03.

strong unitary principle as a rule for their construction. Thus, at the very least, Congress, if it did not care for the polymorphic principle, could block its use by first passing one statute to cover the existing corpus of federal statutory law and by then including the strong unitary principle as a boilerplate part of the “definitions” section of each subsequently-enacted statute. Contrariwise, Congress could also expressly authorize courts to do what they do anyway—apply the polymorphic principle where appropriate.

The Supreme Court is wrong, therefore, to suggest that it must avoid the polymorphic principle in order to protect Congress from something beyond Congress’s power to correct. Indeed, subject to the usual caveat about the dangers of drawing inferences from congressional silence, Congress’s failure to repudiate the polymorphic principle, in the face of the courts’ use of it over the years, might be taken as indicating that Congress does not object to it. Perhaps Congress thinks that the courts are doing a good job by generally following the dictate of the weak unitary principle but deviating from that principle on appropriate, infrequent occasions. In any event, Congress could codify the strong unitary principle if it desired to do so.

But should it? Probably not. As noted earlier, the essence of the canons of construction is their generality. They apply to the whole universe of potential statutes. The reason that the canons are only general guides is that it is difficult to find a principle of construction that reaches truly sound results in *every* case. It is impossible to anticipate every statutory circumstance to which a canon might someday apply. Codifying the strong unitary principle would surely lead to unfortunate results in some future case in which Congress does not fully realize the difficulties of unitary construction of some particular statutory text. There is just no way of entirely eliminating the need for judgment to be exercised by the agents who apply the statutes to particular cases, *i.e.*, the courts.

Probably, therefore, it is best for Congress to leave things as they are. The good sense of the unitary principle will guarantee that it will always remain the basic, general interpretive guide. In exceptional cases, the courts will exercise their sound judgment to determine that a particular statute calls for application of the polymorphic principle.

CONCLUSION

The Supreme Court erred both descriptively and normatively in *Clark v. Martinez*. As a descriptive matter, it is simply not true to assert that the polymorphic principle is “novel.” Nor, as a normative matter, is it “dangerous.” In appropriate cases, the polymorphic principle can be a proper exercise of sound judicial discretion.

It is an error to believe that the process of statutory interpretation can ever be mechanized or reduced to a set of determinate, nondiscretionary rules. Any attempt to do so is likely to provide only the illusion of objectivity while maintaining the necessity for judicial choice. We should not be ashamed of judicial choice. Appropriately limited judicial choice has been a feature of the judicial power since the beginning, and it plays a vital role in our system of government. Certainly our system allows, and indeed demands, the range of judicial choice necessary to implement the polymorphic principle.