

The Polymorphic Principle and the Judicial Role in Statutory Interpretation

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[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) (Scalia, J.).

I. 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 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 reading of statutory text in order to reach the most appropriate result.²

In this 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 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

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1. Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 350, 374–403 (2005) (describing textualists’ preferences for rules and asserting that they are less receptive to background presumptions of judicial discretion).

2. *Id.* at 349, 398.

3. 125 S. Ct. 716 (2005).

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* 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 whether courts actually employ the strong unitary principle has received but little attention.⁶ In *Martinez*, however, the Supreme Court not only determined that it would read the statute before it in accordance with the strong

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 3, 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) (using canons of construction from the founding and consolidating periods to provide insights into recent controversial statutory construction cases); 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) (discussing the existence of opposing canons for almost every point of statutory construction); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 108–26 (2001) (discussing the textualist approach to statutory construction); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2148–50 (2002) (suggesting ways Congress could eliminate uncertainty caused by conflicting canons); Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1043–44 (1998) (explaining Justice Scalia's preference for trans-substantive canons over substantive canons).

6. The 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) (arguing for a single meaning to the phrase “regulating commerce” in the Commerce Clause); Adrian Vermeule, *Three Commerce Clauses? No Problem*, 55 ARK. L. REV. 1175 (2003) (questioning whether Prakash is correct to assert that there are currently multiple commerce clauses and whether it is a problem even if multiple meanings exist). 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. See, e.g., 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) (contending that hybrid statutes should have a uniform interpretation); Lawrence M. Solan, *Statutory Inflation and Institutional Choice*, 44 WM. & MARY L. REV. 2209 (2003) (discussing how institutional structures often mimic polymorphic interpretations).

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 particular 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 implicates fundamental questions about 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 goal of limiting the judicial role in our system of government.

This Article shows that Justice Scalia’s campaign and his consequent embrace of the strong unitary principle are misguided. It is an error to attempt to mechanize the judicial role in statutory interpretation and drive out intelligent judicial choice.¹² The Constitution permits courts to exercise the degree of judicial choice that is 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

7. 125 S. Ct. at 724.

8. *Id.* at 725, 727.

9. See *infra* sections III(B)(1)–(2) (describing cases of “constitutional avoidance” polymorphism and “subconstitutional” polymorphism).

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

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

12. See *infra* subparts IV(B)–(C).

13. See *infra* section IV(C)(2).

14. See *infra* section IV(C)(3).

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

Part IV 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 implement the polymorphic principle. This Part concludes that courts should employ the polymorphic principle in appropriate cases.

Part V 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 provides some guidance as to the appropriate use of the polymorphic principle in particular cases and, finally, explores whether Congress should play a role in choosing between the polymorphic principle and the strong unitary principle.

II. *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.¹⁶ A particular aspect of this general principle is the long-standing presumption that if a word or phrase occurs multiple times in a statute, it has the same meaning each time.¹⁷ 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.¹⁸

15. See *infra* section IV(C)(4).

16. E.g., *Bennett v. Spear*, 520 U.S. 154, 174 (1997) (viewing statutory text "in the context of the entire statute"); *Richards v. United States*, 369 U.S. 1, 11 (1962) (arguing that "a section of a statute should not be read in isolation from the context of the whole Act").

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

18. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

The presumption that recurring words or phrases have the same meaning each time they appear becomes stronger 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.¹⁹ 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.²⁰ 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.²¹

Even multiple appearances within a single sentence do 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 that courts usually determine that a term occurring a single time in a single statutory provision should have a single meaning. This rule of statutory interpretation will be called the “unitary principle.”²² 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 referred to as the “weak unitary principle.”

A couple of examples establish the principle’s existence and demonstrate its operation. The Supreme Court recently had occasion to

19. See *Pub. Citizen v. Nuclear Regulatory Comm’n*, 901 F.2d 147, 155 (D.C. Cir. 1990) (determining the meaning of the word “requirements” in one statute by considering its meaning in other statutes); *Firststar Bank v. Faul*, 253 F.3d 982, 991 (7th Cir. 2001) (criticizing the inference that words recurring in different statutes have the same meaning as “relatively weak”).

20. See *Comm’r v. Lundy*, 516 U.S. 235, 250 (1996) (holding the term “claim” to have the same meaning in different sections of a statute because of the “interrelationship and close proximity of the[] provisions of the statute”). 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*, 125 S. Ct. 1536, 1541 (2005) (plurality opinion).

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

22. Prakash refers to this principle as the “presumption of intrasentence uniformity.” Prakash, *supra* note 6, at 1150. However, I will use the term “unitary principle” because it provides a better linguistic match with the “polymorphic principle.”

apply the unitary principle when construing the Voting Rights Act in *Reno v. Bossier Parish School Board*.²³ The critical language implicating the unitary principle occurs in § 5 of the Act, which requires certain states to get prior federal approval for changes in their voting practices.²⁴ In states subject to this requirement, § 5 authorizes judicial preclearance of a proposed change in voting practices provided that the 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.²⁵

The question implicating the unitary principle was whether the statutory phrase “denying or abridging the right to vote on account of race or color” has the same meaning when it interacts with the statutory term “purpose” as when it interacts with the statutory term “effect.”

Specifically, *Bossier Parish* posed the question of whether a court could preclear a voting change that had a dilutive but nonretrogressive *purpose*—that is, a change that had the purpose of creating a voting scheme that diluted minority votes, but no more so than the existing scheme.²⁶ The Court first observed that it had previously held that a dilutive but nonretrogressive voting change does not have the *effect* of “denying or abridging the right to vote on account of race or color.”²⁷ 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,”²⁸ 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.”²⁹

The Court applied the same principle in *Bankamerica Corp. v. United States*,³⁰ which required it to interpret the prohibition, contained in § 8 of the Clayton Act, against interlocking corporate directorates among competing companies “other than banks, banking associations, trust companies, and common carriers.”³¹ The question was whether this exemption permitted interlocking directorates between any two companies when at least *one* of the

23. 528 U.S. 320 (2000).

24. 42 U.S.C. § 1973c (2000).

25. *Id.* (emphasis added).

26. *See* 528 U.S. at 335.

27. *Id.* at 329 (citing *Beer v. United States*, 425 U.S. 130 (1976)).

28. *Id.*

29. *Id.*

30. 462 U.S. 122 (1983).

31. Clayton Act, ch. 323, § 8, 38 Stat. 730, 733 (1914) (current version at 15 U.S.C. § 18 (2000)) (amended in 1990, removing “common carriers” from the list).

companies was a bank, or whether the exemption applied only when *both* companies were banks. The Court resolved the case by utilizing the unitary principle after a concession by the government as to the meaning of the phrase at issue in a different context. The United States conceded that the exemption permitted interlocking directorates between any two corporations, when at least one 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.”³²

Both of these cases indicate that a single term in a single statutory provision normally has 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 does 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 in 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 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:

- § 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.³³ If § 1 is ambiguous, the rule of lenity calls for it to receive a

32. *Bankamerica*, 462 U.S. at 129.

33. See *United States v. Enmons*, 410 U.S. 396, 411 (1973) (“First, this being a criminal statute, it must be strictly construed, and any ambiguity must be resolved in favor of lenity.”); *Rewis v. United States*, 401 U.S. 808, 812 (1971) (arguing that “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity”); *Bell v. United States*, 349 U.S. 81, 83 (1955) (noting that, consistent with the principle of lenity, “[i]t may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment”).

narrow construction, so that the public has fair warning of conduct that could result in a criminal sanction.³⁴ 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.³⁵

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.

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.³⁶ The case concerned the problem of aliens held in detention for long periods of time pending removal from the

34. For an application of this rule, see *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 408 (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.” (quoting *McNally v. United States*, 483 U.S. 350, 359 (1987))).

35. *E.g.*, *Leocal v. Ashcroft*, 543 U.S. 1, 10 n.8 (2004) (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, 517–18 (1992) (plurality opinion) (applying the rule of lenity in a tax case to a statute that also imposed criminal penalties); *FCC v. Am. Broad. Co.*, 347 U.S. 284, 296 (1954) (applying the rule of lenity in a civil, administrative setting and asserting that “[t]here cannot be one construction for the Federal Communications Commission and another for the Department of Justice”); *Sachs*, *supra* note 6, at 1030–33.

36. 125 S. Ct. 716 (2005).

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.³⁷ Sometimes, however, problems arise, as, for example, when no other country agrees to receive the alien.³⁸ In such cases, the government, relying on a statutory provision that authorizes it to detain an alien “beyond the removal period,” has claimed the authority to detain the alien *indefinitely*, and such aliens have spent years in legal limbo.³⁹

The statute upon which the government relies, 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*.⁴⁰

To see the relevance of the unitary principle, note that the statute grants the government a single authority—the authority to detain aliens beyond the removal period—with regard to three separate categories of aliens. If one calls the specified inadmissible aliens “category A,” the specified removable aliens “category B,” and aliens subject to the specified determinations of the Attorney General “category C,” then the structure of the statute appears more clearly:

An alien ordered removed who is [in category A, category B, or category C] may be detained beyond the removal period.

Clark v. Martinez implicated the unitary principle by presenting the question of whether the government’s authority to detain aliens “beyond the removal period” has the same meaning with regard to aliens in categories A, B, and C.

A previous case, *Zadvydas v. Davis*,⁴¹ concerned aliens in category B—aliens who had been admitted to the United States but who subsequently became removable under one of the statutory provisions listed in § 1231.⁴² In *Zadvydas*, the Court determined that the government’s authority to detain such aliens “beyond the removal period” did not amount to an authority to detain them *indefinitely*. Indefinite detention, the Court noted, would raise a serious constitutional concern, because it would invade the core of the “liberty” protected by the Due Process Clause.⁴³ Without actually holding

37. 8 U.S.C. § 1231(a)(1)(A) (2000); *see Zadvydas v. Davis*, 533 U.S. 678, 682 (2001) (summarizing established alien removal procedures and examining how long beyond the standard 90-day removal period the statutory procedures authorize the Attorney General to detain a lawfully admitted, now-removable alien).

38. *See, e.g., Zadvydas*, 533 U.S. at 684–86 (describing two such cases).

39. *See, e.g., id.* (describing such cases).

40. 8 U.S.C. § 1231(a)(6) (2000) (emphasis added).

41. 533 U.S. 678 (2001).

42. *Id.* at 682.

43. *Id.* at 690.

such indefinite detention unconstitutional, the Court invoked the interpretive doctrine of “constitutional avoidance.”⁴⁴ Over a strenuous, four-Justice dissent that argued that the majority’s reading of § 1231 was implausible and simply bore “no relation to the text,”⁴⁵ 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.⁴⁶ 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.”⁴⁷ 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 because Cuba would not receive him.⁴⁸ The government reminded the Court that it had, in *Zadvydas*, called this a “very different question”⁴⁹ 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

44. *Id.* at 689. 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) (quoting *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)).

45. *Zadvydas*, 533 U.S. at 707 (Kennedy, J., dissenting).

46. *Id.* at 689, 699.

47. *Id.* at 682.

48. *Clark v. Martinez*, 125 S. Ct. 716, 721 (2005). The alien had actually lived in the United States for over a decade pursuant to “parole” granted by the Attorney General. *Id.* at 720. Such parole does not, however, constitute “admission” of the alien. 8 U.S.C. § 1182(d)(5) (2000).

49. See Brief for the Petitioners at 27, *Crawford v. Martinez*, No. 03-878 (U.S. May 7, 2004), *decided sub nom.* *Clark v. Martinez*, 125 S. Ct. 716 (2005).

“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.⁵⁰

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.”⁵¹ 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.”⁵² In such cases, the Court said, “[t]he lowest common denominator, as it were, *must govern*.”⁵³

The Court recognized that this strong formulation of the unitary principle gives the principle significant interpretive consequence. 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.”⁵⁴

The Court severely attacked the dissent’s proposed departure from the unitary principle. In his dissent, 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.⁵⁵ 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.”⁵⁶ The Court sternly rejected what it called this

50. *Martinez*, 125 S. Ct. at 722–23.

51. *Id.*

52. *Id.* at 724.

53. *Id.* (emphasis added).

54. *Id.*

55. *Id.* at 730 (Thomas, J., dissenting).

56. *Id.*

“novel interpretive approach,” which “would render every statute a chameleon.”⁵⁷

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.⁵⁸

This is strong stuff. Not only does the Court endorse the strong unitary principle, it appears to believe that this 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 legislators.

Would departure from the unitary principle really be “novel”? Would it be “dangerous”? The remainder of this Article addresses these questions. The next part 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 show that the presumption is defeasible. Part IV then places the debate over the unitary principle in the larger context of the debate over the proper judicial role in statutory interpretation.

III. 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

57. *Id.* at 725.

58. *Id.* at 727.

vary. A “polymorphic” operator, in computer science, is a symbol that may have different meanings depending on context.⁵⁹

Computers carry out instructions provided by programmers in a 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. Thus, in executing the second statement, the computer calls upon quite different internal code than in executing the first.⁶⁰

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

59. BRUCE J. MACLENNAN, *PRINCIPLES OF PROGRAMMING LANGUAGES* 68 (3d ed. 1999).

60. *Id.*; Luca Cardelli & Peter Wegner, *On Understanding Types, Data Abstraction, and Polymorphism*, 17 *COMPUTING SURVS.* 471, 476–77 (1985).

the string “JohnSmith” to the variable “name.”⁶¹ 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.

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 II, 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. The analysis below uses two dimensions of categorization. First, and primarily, it groups the cases 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. Such special reasons include the need to avoid a constitutional problem (“constitutional avoidance polymorphism”),⁶² a special interpretive rule developed in the shadow of constitutional principles (“subconstitutional polymorphism”),⁶³ an undesirable policy result of reading the statute a particular way in a particular circumstance (“policy polymorphism”),⁶⁴ or the desire to adhere to, but not to extend, a prior decision now perceived as

61. MACLENNAN, *supra* note 59, at 415–16.

62. *See infra* section III(B)(1).

63. *See infra* section III(B)(2).

64. *See infra* section III(B)(3).

erroneous (“stare decisis polymorphism”).⁶⁵ In any of these circumstances, application of the strong unitary principle could force a court to override the best reading of the statute in some cases in order to give it a single meaning that can handle the special cases.

Within each motivational category, one can differentiate cases according to the different ways in which the polymorphic principle manifests itself. Some cases present actual court holdings that a statutory term has different meanings in different cases. Such cases will be dubbed cases of “express polymorphism.”⁶⁶ 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.⁶⁷ Second, a court may employ interpretive methods that disregard its duties under the strong unitary principle and its “lowest common denominator” corollary.⁶⁸ 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.”⁶⁹

Polymorphism also arises in judicial opinions 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.⁷⁰ In countering the Supreme Court’s claim that the polymorphic principle is “novel,” however, implied

65. See *infra* section III(B)(4).

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

67. For example, in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), Justice Ginsburg wrote in her concurring opinion that a state was not a “person” in a *qui tam* suit filed under the False Claims Act, but that the question of whether a state was a “person” in a False Claims Act suit filed by the federal government remained open. See *infra* subsection III(B)(1)(a).

68. For example, a court may interpret a statute in a civil case without considering whether the interpretation would violate the rule of lenity if the same statutory text were applied in a criminal case. See *infra* note 120 (describing the *Pacifica* case).

69. For example, in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Supreme Court held that religious schools need not bargain collectively with teachers because the requirement might violate the First Amendment, whereas the Ninth Circuit held in *NLRB v. Hanna Boys Center*, 940 F.2d 1295 (9th Cir. 1991), that religious schools must bargain collectively with secular employees, such as maintenance workers, who perform no teaching function. Neither opinion quoted statutory language, concealing the courts’ need to treat the term “employer” as a polymorphic operator to avoid First Amendment questions. See *infra* subsection III(B)(1)(c).

70. See *infra* subpart III(B).

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 points of a different statutory scheme in order to appreciate how some tiny detail illustrates a general point about statutory interpretation. Often, the reader must give the statutory details the degree of careful attention that would be necessary to comprehend a mathematical proof, understanding each line clearly before moving to the next.

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,”⁷¹ 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, as briefly as possible, 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 demonstrate 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 IV.

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

71. *Clark v. Martinez*, 125 S. Ct. 716, 725 (2005).

constitutional problems.⁷² 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 forms: express, implied, and tacit. Some examples follow.

a. A State May Be a “Person”—and Not a “Person”—Under the False Claims Act.—Taking the simplest example first (even though it involves only implied, not express, polymorphism), the federal False Claims Act imposes liability on “[a]ny person” who submits a false claim to the United States.⁷³ Does the general term “person” include a U.S. *state* that submits a false claim? In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,⁷⁴ the Supreme Court said no.⁷⁵ The case, however, presented the question in a special, constitutionally sensitive context. The False Claims Act allows suits by the United States acting through its own officers; it also permits “*qui tam*” actions, in which a private party initiates suit on behalf of the government and shares in the proceeds if successful.⁷⁶ *Stevens* was a *qui tam* action, and, while the Court’s interpretation of the term “person” relied on the general principle that that term does not usually include the sovereign,⁷⁷ the Court also cited the desire to avoid the potential Eleventh Amendment difficulties that would arise from a suit against a state initiated by a private party.⁷⁸ 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.⁷⁹

In a concurring opinion, Justice Ginsburg noted that these Eleventh Amendment considerations would not apply to a suit against a state initiated by federal officials, as opposed to a *qui tam* action, because states have no

72. *E.g.*, *Jones v. United States*, 526 U.S. 227, 239 (1999) (holding that the federal carjacking statute defined three distinct offenses, as opposed to a single offense with a choice of three penalties, because, while the statute was susceptible to either construction, the latter raised concerns of due process violations).

73. 31 U.S.C. § 3729 (2000).

74. 529 U.S. 765 (2000).

75. *Id.* at 787–88 (holding that the False Claims Act does not subject a State or state agency to liability in a suit brought by a private individual on behalf of the United States).

76. 31 U.S.C. § 3730 (2000).

77. *Stevens*, 529 U.S. at 780.

78. *Id.* at 787.

79. *Id.* (“We of course express no view on the question whether an action in federal court by a *qui tam* relator against a State would run afoul of the Eleventh Amendment, but we note that there is ‘a serious doubt’ on that score.”).

immunity from suits by the United States.⁸⁰ Justice Ginsburg therefore “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.”⁸¹

Justice Ginsburg’s opinion is an example of implied polymorphism. She did not actually determine that a state sometimes is, and sometimes is not, a “person” under the False Claims Act, but her statement that she views the question as open necessarily implies that she embraces the polymorphic principle. The strong unitary principle would require that, once the Court interpreted the word “person” not to include states in *qui tam* cases, the word *must* have the same meaning in cases brought by federal officers. Justice Ginsburg, instead, took the polymorphic view that a court may choose to limit the influence of the “constitutional avoidance” principle to the circumstances that actually give rise to constitutional doubt.⁸²

Subsequently, two district courts have held that states are “persons” within the meaning of the False Claims Act when sued by the United States acting through its officials.⁸³ At the district court level, therefore, the False Claims Act provides an example of express polymorphism.

b. A Challenge to a Medicare Regulation May or May Not Constitute a “Claim Arising Under” the Medicare Program.—For an example of express constitutional avoidance polymorphism, we turn to the Medicare Act, and, in particular, the way in which beneficiaries may seek

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

81. *Id.*

82. The immigration cases that led to the articulation of the strong unitary principle, *Martinez* and *Zadvydas*, see *supra* subpart II(B), 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 expressly reserved judgment as to *inadmissible* aliens, who, the Court said, “would present a very different question.” *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001). As Justice Thomas rightly complained, 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,” *Clark v. Martinez*, 125 S. Ct. 716, 731 (2005) (Thomas, J., dissenting), because 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 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.

83. *United States ex rel. Chittister v. Dep’t of Cmty. & Econ. Dev.*, No. 1:CV-99-2057, at 14 (M.D. Pa. Sept. 23, 2002) (“[I]n the absence of clear congressional prohibition under the FCA—or a prohibition under the Eleventh Amendment or any other constitutional barrier—the court finds no reason to presume that the term ‘person’ excludes a suit brought by the United States against [a state] or its agencies.”); *United States v. Univ. Hosp.*, No. 97-CV-3463, 2001 WL 1548797, at *2–3 (E.D.N.Y. Oct. 26, 2001) (discussing the circumstances giving rise to the passage of the False Claims Act and the legislative history of the 1986 amendments to the act, and concluding “that in an action by the United States against a state, claiming a violation of the False Claims Act, the state is a ‘person’”).

judicial review of decisions regarding Medicare benefits. The Medicare Act attempts to channel all such review into a single 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.⁸⁴ The Act attempts to block other suits, such as suits under the general federal question jurisdiction, by providing in § 405(h) that “[n]o 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.”⁸⁵

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.⁸⁶ In particular, the Court has struggled to understand whether the prohibition against using § 1331 jurisdiction to recover on “any claim arising under this subchapter” bars a challenge to a general Medicare regulation. The answer: sometimes yes, sometimes no.

*Bowen v. Michigan Academy of Family Physicians*⁸⁷ and *Shalala v. Illinois Council on Long Term Care, Inc.*⁸⁸ each presented a general challenge, brought under ordinary federal question jurisdiction, to Medicare regulations. The Court permitted the challenge in the first case but held that § 405(h) barred it in the second.⁸⁹ The critical difference was not anything in the language of § 405(h), but the fact that, under the circumstances of *Michigan Academy*, if the challenge were not permitted to proceed, the challengers would have had *no* forum in which to challenge the regulation.⁹⁰ The Court believed that such a construction of § 405(h) would give rise to a “serious constitutional question” in that it would bar consideration of constitutional challenges to methods for calculating Medicare benefits.⁹¹ The Court avoided this question by construing § 405(h) not to bar challenges to the validity of Medicare regulations.⁹² *Illinois Council*, however, did not present a situation in which holding Medicare’s specialized review provisions to be exclusive would leave the plaintiffs with no forum in which

84. The Medicare Act does not establish its own provision for judicial review of benefits decisions, but rather incorporates 42 U.S.C. § 405(g), which is the judicial review provision of the Social Security Act. 42 U.S.C.A. § 1395ff(b)(1)(A) (West Supp. 2005).

85. 42 U.S.C. § 405(h) (2000). The Medicare Act incorporates this provision from the Social Security Act and provides that it applies “to the same extent as” it applies to the Social Security Act. 42 U.S.C. § 1395ii (2000).

86. 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); and *Weinberger v. Salfi*, 422 U.S. 749 (1975).

87. 476 U.S. 667 (1986).

88. 529 U.S. 1 (2000).

89. *Michigan Academy*, 476 U.S. at 680–81; *Illinois Council*, 529 U.S. at 5.

90. 476 U.S. at 679–81.

91. *Id.* at 681 n.12.

92. *Id.* at 680. Congress subsequently amended the Act. 42 U.S.C. § 1395ff (2000).

to seek review, and so the Court held that § 405(h) barred the plaintiffs' challenge.⁹³

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 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. This is an express polymorphism. 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.⁹⁴

c. Religious Schools Are "Employers," but Not "Employers," Under 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, but does so without expressly interpreting any particular statutory text.

The courts have employed tacit polymorphism in determining whether religious schools have to bargain with labor unions. The National Labor Relations Act imposes the duty of collective bargaining on every "employer,"⁹⁵ but the Supreme Court has held that religious schools do not have to bargain collectively with their teachers.⁹⁶ By contrast, the Ninth Circuit has held that religious schools do have to bargain collectively with employees such as child-care workers, cooks, and maintenance workers.⁹⁷ The difference, once again, arises from the principle of constitutional avoidance. The Supreme Court was concerned that compelling religious schools to bargain with teachers' unions might violate the religion clauses of the First Amendment because of the important role that teachers play in the

93. 529 U.S. at 17–20 (holding that § 405(h) barred the plaintiffs' challenge because "*Michigan Academy* . . . [holds] . . . that § 1395ii does not apply § 405(h) where application of § 405(h) would not simply channel review through the agency, but would mean no review at all").

94. The dissenters in *Illinois Council* 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." *Id.* 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 regulations. *Id.* at 39 (Thomas, J., dissenting).

95. 29 U.S.C. § 158(a)(5) (2000). The term "employer" is defined in § 152 in a way that provides no exemption for religious schools. *See* 29 U.S.C. § 152(2) (2000) ("The term 'employer' includes any person acting as an agent of an employer . . . but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, . . . or any labor organization . . . , or anyone acting in the capacity of officer or agent of such labor organization.").

96. *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 506 (1979).

97. *NLRB v. Hanna Boys Ctr.*, 940 F.2d 1295, 1302–03 (9th Cir. 1991).

religious mission of a religious school.⁹⁸ The Ninth Circuit, however, saw no such problem with respect to secular employees who perform no teaching function.⁹⁹ The difference in the constitutional context led to different constructions of the National Labor Relations Act (NLRA). Religious schools, the courts appear to be saying, are sometimes “employers” subject to the NLRA and sometimes not.

This appears to be an application of the polymorphic principle, but a tacit one. The Supreme Court’s decision, 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 The Ninth Circuit, similarly, quoted no statutory language.¹⁰² The courts’ failure to discuss the statutory text at all concealed their need to treat the term “employer” in the NLRA as a polymorphic operator in order to avoid First Amendment questions. 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.¹⁰³

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 interpretation, such as a “clear

98. *Catholic Bishop*, 440 U.S. at 501 (noting that governmental support for teachers poses an “impermissible risk” of governmental involvement in religious schools).

99. *Hanna Boys*, 940 F.2d at 1302–03.

100. The 1970s, in retrospect, appear to be 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 (suggesting that reality has overtaken parody in recent years as petitioners have come to accept the sarcastic maxim as a rule in its own right).

101. After saying that it would “turn to an examination of the National Labor Relations Act,” 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 contemplated that the grant of jurisdiction would include teachers in [church-operated] schools.” *Catholic Bishop*, 440 U.S. at 504.

102. *Hanna Boys*, 940 F.2d at 1300–02.

103. 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.” *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000); *see supra* subsection III(B)(1)(a). 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.

statement” rule.¹⁰⁴ 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.

a. Title VII’s Provision for a “Reasonable Attorney’s Fee” Allows, and Does Not Allow, Interest On a Fee Award.—Title VII of the Civil Rights Act of 1964 provides that a court may allow a prevailing party (other than the United States), “a reasonable attorney’s fee.”¹⁰⁶ It also provides for the United States to be liable “the same as a private person.”¹⁰⁷ Yet even though the provision for a “reasonable attorney’s fee” allows a court to award interest on attorney’s fees against a private defendant, the Supreme Court determined, in *Library of Congress v. Shaw*, that this same phrase does not provide for interest on attorney’s fees against the United States.¹⁰⁸

This polymorphic interpretation stemmed from the special, subconstitutional interpretive rules applicable to waivers of sovereign immunity. It would be perfectly constitutional for Congress to allow courts to award interest against the United States, because Congress may waive the federal government’s sovereign immunity. Nonetheless, awards of interest against the federal government are disfavored. Such awards are subject to the “no-interest rule,”¹⁰⁹ an interpretive principle even more stringent than the already strict principle of construction generally applicable to waivers of federal sovereign immunity.¹¹⁰ In light of this stringent interpretive principle, the Court determined that it could not interpret Title VII’s allowance of a “reasonable” attorney’s fee as providing for interest in a judgment against the United States.¹¹¹ 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,¹¹² but not against

104. There are a variety of contexts in which courts require Congress to speak clearly if it wants to achieve certain unusual results. Such “clear statement” rules require, for example, that Congress legislate clearly if it desires a statute to abrogate state sovereign immunity, *e.g.*, *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989), or alter the usual balance between the federal and state governments, *e.g.*, *United States v. Lopez*, 514 U.S. 549, 562 (1995), or have effect outside the territory of the United States, *e.g.*, *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

105. *Clark v. Martinez*, 125 S. Ct. 716, 724 (2005).

106. 42 U.S.C. § 2000e-5(k) (2000).

107. *Id.*

108. 478 U.S. 310, 314–23 (1986).

109. *Id.* at 316–17 (“[T]his Court, executive agencies, and Congress itself consistently have recognized that federal statutes cannot be read to permit interest to run on a recovery against the United States unless Congress affirmatively mandates that result. The no-interest rule is expressly described as early as 1819 . . .”).

110. *Id.* at 318 (stating that “[t]he no-interest rule provides an added gloss of strictness” upon the usual rules for interpreting waivers of sovereign immunity).

111. *Id.* at 320.

112. *Id.* at 313.

the United States.¹¹³ *Shaw* is an example of express subconstitutional polymorphism.¹¹⁴

b. State Officers Acting in Their Official Capacity Both Are and Are Not “Persons” Within the Meaning of 42 U.S.C. § 1983.—A 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 redress.”¹¹⁵ In a single case, *Will v. Michigan Department of State Police*,¹¹⁶ 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 subconstitutional principle that Congress must act clearly when it desires to “alter the usual constitutional balance between the States and the Federal Government,”¹¹⁷ the Court held that a state official acting in an official capacity is not a “person” within the meaning of § 1983 when sued for damages.¹¹⁸ In a footnote, however, the Court observed that “of course” such an official “when sued for injunctive

113. *Id.* at 322–23. Only three years earlier, the Court had 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 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,” and held that it therefore “must be construed strictly in favor of the sovereign.” *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685–86 (1983) (citing *McMahon v. United States*, 342 U.S. 25, 27 (1951)). *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.

114. Scholarly fairness requires me to note that my 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.” *Shaw*, 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. *E.g.*, *In re Burlington N., Inc. Employment Practices Litig.*, 810 F.2d 601, 609–10 (7th Cir. 1986); see CHARLES R. RICHEY, *MANUAL ON EMPLOYMENT DISCRIMINATION LAW AND CIVIL RIGHTS ACTIONS IN THE FEDERAL COURTS* G-24 (1988). Thus, lower courts and commentators understood *Shaw* to have treated the phrase “reasonable attorney’s fees” polymorphically. Subsequently, in the Civil Rights Act of 1991, Congress amended Title VII to provide for interest awards against the United States, 42 U.S.C. § 2000e-16(d) (2000), so the Supreme Court never had occasion to resolve the issue under the old statute.

115. 42 U.S.C. § 1983 (2000).

116. 491 U.S. 58 (1989).

117. *Id.* at 65 (internal quotation omitted).

118. *Id.* at 71.

relief, *would* be a person under § 1983.”¹¹⁹ 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.”¹²⁰

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 different ways as is necessary under different circumstances to achieve desirable results. Section 5 of the Voting Rights Act, mentioned above in connection with the *Bossier Parish* case,¹²¹ provides a good example. As noted earlier, § 5 permits judicial preclearance of a proposed change in voting procedures provided the 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.”¹²² *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 § 5,¹²³ but an earlier case, *City of Richmond v. United States*,¹²⁴ took a polymorphic approach.

Richmond concerned a city’s annexation of additional land, which lowered the percentage of African Americans in the city. The Court held that the annexation did not have the forbidden *effect* of denying or abridging the right to vote on account of race.¹²⁵ Nonetheless, the Court held that the annexation could violate § 5 if its only *purpose* was to reduce the percentage

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

120. 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 (2000), 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 (2000). 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 question 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. *See 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.

121. *See supra* subpart II(A).

122. 42 U.S.C. § 1973c (2000); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 324 (2000).

123. *See supra* subpart II(A).

124. 422 U.S. 358 (1975).

125. Almost every annexation, the Court observed, causes some change in a city’s racial composition. *Id.* at 368. 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 § 5. *Id.* at 371.

of a racial minority group in the city's population.¹²⁶ The Court was quite aware that its holding meant that § 5 would have different meanings with regard to its "purpose" prong and its "effect" prong. As the Court pointedly observed: "[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."¹²⁷

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 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.¹²⁸

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.¹²⁹ Indeed, in *Bossier Parish* the Court "acknowledged that *Richmond* created a discontinuity between the effect and purpose prongs of § 5."¹³⁰ Thus, § 5 provides not only an example of express polymorphism, but a judicially acknowledged example.¹³¹

126. *Id.* at 375.

127. *Id.* at 378.

128. *Id.* at 378–79.

129. 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 § 5 because the city had not demonstrated that the annexation lacked the *purpose* of diluting minority voting strength. *Id.* at 472.

130. 528 U.S. 320, 330 (2000).

131. Another excellent example of policy polymorphism (at the lower court level) comes from the Patent Act. The Patent Act requires that a patent issue only to an invention that is new, useful, and not obvious. 35 U.S.C. §§ 101–103 (2000). 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) (noting that "the statute cannot be read in isolation from the array of judicial precedent that has interpreted nearly each of its words"). Among these is 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. The Second Circuit, in *Metallizing Engineering Co. v. Kenyon Bearing & Auto Parts Co.*, 153 F.2d 516 (2d Cir. 1946), held that this provision bars a patent for a manufacturing process if the patent applicant used the process in secret and sold the product of the process before the critical date. Speaking through Learned Hand, the court relied on the policy ground that a patentee should not be allowed to extend the term of the patent monopoly by secretly practicing a 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

4. *“Stare Decisis” Polymorphism.*—One other 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.¹³² 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, § 5 of the Voting Rights Act provides an example. When the Court in *Bossier Parish* applied the unitary principle to conclude that § 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,”¹³³ four Justices disagreed. Justice Souter’s opinion first disagreed with the prior holding, in *Beer v. United States*,¹³⁴ that a voting change that diluted minority votes had an “effect” forbidden by § 5 only if the change was retrogressive.¹³⁵ Because Justice Souter “adhere[d] to the strong policy of respecting precedent in statutory interpretation,” he stated that he would not reexamine *Beer* itself.¹³⁶ He also, however, stated that “that policy does not demand that recognized error be compounded indefinitely.”¹³⁷ He therefore advocated “[g]iving wider scope to purpose than to effect under § 5.”¹³⁸ 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, and among the several States, and with the

§ 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, for policy reasons, 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.

132. Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 317 (2005).

133. 528 U.S. at 329.

134. 425 U.S. 130 (1976).

135. *Id.* at 342 (Souter, J., concurring in part and dissenting in part).

136. *Id.*

137. *Id.*

138. *Id.* at 368.

Indian Tribes.”¹³⁹ 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.¹⁴⁰ This appears to be a policy polymorphism.

C. Summary

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.”¹⁴¹ 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 reason for use of the polymorphic principle: it commonly 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 at all levels of the federal courts.

IV. 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. What remains is 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 of both practicality and theory. The choice between the polymorphic principle and the strong unitary principle, like so many issues of statutory interpretation, implicates the broadest 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

139. U.S. CONST. art. I, § 8, cl. 3.

140. *See, e.g.,* *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 434 (1932) (arguing that “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.

141. *Clark v. Martinez*, 125 S. Ct. 716, 725 (2005).

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 perspectives 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 demonstrates 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.¹⁴² 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 the Marathon Oil Company. 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 must depend, my Lord, upon whether I first embrace your Lordship's principles, or your Lordship's mistresses."¹⁴³ Evidently the single word "embrace" bears two different senses in this sentence.¹⁴⁴

This kind of usage is uncommon, but hardly impossible. Indeed, it occurs often enough that it has a technical name; it is called a *sylllepsis*.¹⁴⁵ As the examples given above show, syllepsis is often an attempt at humor (Wilkes's attempt being rather more successful than my own).¹⁴⁶ Humor is

142. See *id.* at 723 ("[T]he 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.").

143. JOHN BARTLETT, *FAMILIAR QUOTATIONS* 368 (15th ed. 1980). 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.

144. For other examples, see Prakash, *supra* note 6, at 1157–58.

145. See H.W. FOWLER, *A DICTIONARY OF MODERN ENGLISH USAGE* 610 (2d ed. 1965) (explaining syllepsis and distinguishing it from zeugma, a similar figure of speech).

146. See *id.* (calling syllepsis "a peculiarly exasperating form of worn-out humour"); THEODORE M. BERNSTEIN, *THE CAREFUL WRITER: A MODERN GUIDE TO ENGLISH USAGE* 400,

not a quality one typically associates with statutes, so it seems appropriate to assume, as a general matter, that a legislature has not created a statutory syllepsis.¹⁴⁷ 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.”¹⁴⁸ 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.¹⁴⁹ 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”),¹⁵⁰ 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.

For example, in *Atlantic Cleaners & Dyers v. United States*,¹⁵¹ the Supreme Court considered the application of § 3 of the Sherman Antitrust Act. The Act contains two parallel sections declaring certain restraints of trade to be illegal. Section 1 of the Act declares illegal

402 (1989) (stating that syllepsis is “usually not a serious figure of speech” but is not a “writing fault”).

147. See Prakash, *supra* note 6, at 1158 (noting that one would not expect to find “double entendres” in the Constitution).

148. *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253 (1992).

149. *E.g.*, *NASA v. Fed. Labor Relations Auth.*, 527 U.S. 229, 235 (1999); *Comm’r v. Lundy*, 516 U.S. 235, 250 (1996); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995); *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *Dep’t of Revenue of Or. v. ACF Indus., 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. Sec’y of Treasury*, 475 U.S. 851, 860 (1986); *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972); *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932).

150. BARTLETT, *supra* note 143, 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.

151. 286 U.S. 427 (1932).

[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.¹⁵²

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 Columbia¹⁵³

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 § 3 by restraining trade or commerce in the District of Columbia. They asserted that § 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 § 1. Because § 3 uses exactly the same words, the defendants asserted that their conduct could not constitute “trade or commerce” within the meaning of § 3 either.¹⁵⁴

The Supreme Court rejected this argument. Although it acknowledged 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,”¹⁵⁵ the Court also noted that “the presumption is not rigid.”¹⁵⁶ 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 § 3 dissociated from § 1 as though it were a separate and independent act” and to hold the defendants liable under § 3, even assuming *arguendo* that their conduct could not violate § 1.¹⁵⁷ Many subsequent opinions have confirmed that identical words in different sections of the same act may have different meanings in appropriate circumstances.¹⁵⁸

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.

152. 15 U.S.C. § 1 (2000).

153. *Id.* § 3.

154. 286 U.S. at 432–33.

155. *Id.* at 433.

156. *Id.*

157. *Id.* at 435. The case thus provided a differentiation between the meanings of the one term in the two sections that was akin to the “constitutional avoidance” polymorphism as described above. See *supra* section III(B)(1).

158. See, for example, *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 595–96 (2004), and the cases cited therein.

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.¹⁵⁹ 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, which provides possibly the strongest argument against it. The strong unitary principle 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 §§ 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 section but have two different applications. Judicial discretion in the former case is universally accepted and should apply equally to the latter.¹⁶⁰

C. *The Polymorphic Principle and the Separation of Powers*

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

159. See 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" so that, for example, the canon *noscitur a sociis* "ought not be applied without consideration of statutory goals and purposes, as well as other legal values").

160. See 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.*

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 subpart 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 will 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,¹⁶¹ this effort is but a part of his larger campaign against *judicial choice*. Justice Scalia consistently argues for limiting the judicial 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.¹⁶² 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.¹⁶³ 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.¹⁶⁴

Most of Justice Scalia's specific prescriptions with regard to statutory interpretation, although often supported by numerous different arguments,

161. 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. Scalia, *supra* note 5, at 29–30 (“[L]egislative history should not be used as an authoritative indication of the statute's meaning.”). See *id.* at 36 (“I think it is time to call an end to a brief and failed experiment [of the use of legislative history], if not for reasons of principle then for reasons of practicality. I have not used legislative history to decide a case for, I believe, the past nine terms.”); see also Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 18 (1998).

162. Scalia, *supra* note 5, at 7–9, 13.

163. *Id.* at 13–14.

164. *Id.* at 10, 14.

find their roots in this core goal 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.”¹⁶⁵ He campaigns against the use of legislative history in part because it permits too much “manipulability” for the “willful judge,” and it “facilitate[s] rather than deter[s] decisions that are based upon the courts’ policy preferences, rather than neutral principles of law.”¹⁶⁶ 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.”¹⁶⁷ 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.”¹⁶⁸ That is, he regards the polymorphic principle as “dangerous”¹⁶⁹ because it involves judicial choice.

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 a court’s role in statutory cases is solely to act as the faithful agent of the legislature, not to make policy choices of its own.¹⁷⁰ 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, and as Justice Scalia acknowledges, even textualists recognize that judges necessarily exercise some degree of discretion when construing ambiguous

165. *Id.* at 17–18.

166. *Id.* at 35–36.

167. *Id.* at 29.

168. *Clark v. Martinez*, 125 S. Ct. 716, 722–23 (2005).

169. *Id.* at 727.

170. *See, e.g.,* Manning, *supra* note 5, at 5 (discussing the theory that, in the American constitutional system, it is the duty of federal judges to be “faithful agents” of the legislature and “follow its commands” under the guidelines of the Constitution).

statutory language.¹⁷¹ 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.¹⁷²

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. 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.¹⁷³

2. *Judicial Choice and the "Faithful Agent" Model.*—The chief difficulty with Justice Scalia's reasoning is that a proper understanding 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.

Two reasons support this view. The first is that the Constitution creates a more complex role for the judiciary than that of "faithful agent" as textualists appear to use that term. The second is that, even accepting the view that judges must be "faithful agents" of the legislature, the best understanding of what it means to be a "faithful agent" permits the courts to exercise the degree of judicial choice necessary to implement the polymorphic principle.

The first point rests on the text of the Constitution and its historical context. The Constitution does not specify a method of statutory interpretation nor does it spell out the judicial role in statutory

171. Manning, *supra* note 11, at 1655; *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.").

172. 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 that 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).

173. *Martinez*, 125 S. Ct. at 727.

interpretation.¹⁷⁴ 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.”¹⁷⁵

As I and others have argued, this power is best understood in historical context.¹⁷⁶ 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.¹⁷⁷ 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.¹⁷⁸ 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.¹⁷⁹

The great trick, of course, is knowing when departure from statutory text is appropriate. I have previously agreed with the textualist claim that courts do not have power to depart from statutory text at will, nor on the mere ground that particular statutory text leads to a result that appears to conflict with a statute’s overall purpose.¹⁸⁰ In my view, background principles of law play a critical role in determining the appropriate occasions

174. Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2070 (2002) (arguing that “the Constitution simply leaves statutory interpretation to be resolved by the ‘judicial power’ without specifying how that interpretation should be conducted”); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 98 (2000) (asserting that “the Constitution cannot plausibly be read to say a great deal about statutory interpretation doctrine, and even what it does say is often so minimal and so abstract as to leave open all the contested questions of interpretive choice”).

175. U.S. CONST. art. III, § 1.

176. Eskridge, *supra* note 5; see W. H. Loyd, *The Equity of a Statute*, 58 U. PA. L. REV. 76, 76–86 (1909); Siegel, *supra* note 5, at 1094–98.

177. Eskridge, *supra* note 5.

178. *Id.*, *passim* (tracing the historical basis for a discretionary judicial power from early English practices, to understandings at the time of the founding, to practices by early federal judges, to current doctrine); Siegel, *supra* note 5, at 1094–98 (discussing the historical understanding of the “judicial power,” as evidenced by Blackstone’s Commentaries and early Supreme Court decisions, as one in which the courts were able to deviate from the statutory text in some cases).

179. Eskridge, *supra* note 5, *passim*; Siegel, *supra* note 5, at 1094–98.

180. Siegel, *supra* note 5, at 1055–56. The focus of my statutory interpretation scholarship has been to counter those who insist too strongly on adherence to statutory text, but I do not mean to spare those who make the opposite error. For an example of a decision that, in my view, mistakenly departs from statutory text in order to achieve what the Court regarded as a desirable policy outcome, see *Jackson v. Birmingham Board of Education*, 125 S. Ct. 1497 (2005), holding that Title IX of the Education Amendments of 1972, which prohibits discrimination in federally funded education programs “on the basis of sex,” prohibits retaliation against those who complain of discrimination against others. As the dissenting opinion pointed out, such retaliation, which can occur without regard to the sex of the person retaliated against, is not discrimination “on the basis of sex.” See *id.* at 1510 (Thomas, J., dissenting).

for exercise of this limited judicial power.¹⁸¹ 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 a clue indicating the appropriateness of engaging in something other than purely textualist construction.¹⁸² 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. Thus, to the extent that textualists argue that the Constitution requires courts to follow a “faithful agent” model of the judicial role that forbids all judicial departures from statutory text, they are relying on a textually and historically inappropriate understanding of the Constitution.

But beyond that, the second point is that a conception of the judicial role that permits some departures from statutory text is fully consistent with the “faithful agent” model. Some scholars reject the foregoing historical analysis as a guide to the judicial role.¹⁸³ 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.¹⁸⁴ 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.

181. Siegel, *supra* note 5, at 1055 (discussing the judicial use of contextualism as limited to only those situations in which there is a governing background principle).

182. Siegel, *supra* note 11, at 348–49 (arguing that contextualism avoids the “foolish results that textualism sometimes demands” because it allows judges to consider background principles, which, in certain cases, “may be so strong . . . as to justify a departure from even plain statutory text”); Siegel, *supra* note 5, at 1055–57. Thus, for example, I have argued that the background principle that evidentiary hearings exist to resolve factual disputes justified the well-known and widely accepted decisions in *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), and *Federal Power Commission v. Texaco*, 377 U.S. 33 (1964), which excused agencies from holding hearings that appeared to be required by clear statutory text, in situations where there was no factual dispute that the hearings could have resolved. Siegel, *supra* note 5, at 1045–49. Even though purely textualist statutory construction would have led courts to require the hearings, the result required by the statutory text was so startlingly out of keeping with such an important background principle that it was appropriate for the courts to depart from statutory text.

183. *E.g.*, Manning, *supra* note 5, at 56–78 (arguing that “the original understanding of ‘the judicial Power’” in the constitutional framework “fits more tightly with the faithful agent theory of statutory interpretation” than with English and other historical interpretations).

184. *See, e.g.*, Manning, *supra* note 11, at 1663 (2001) (“[G]iven the structural innovations in the U.S. Constitution generally, and in the judiciary article in particular, it is unclear that the Founders—if they thought about the question at all—would have regarded the prevailing state judicial practice as ipso facto transferable to the new federal judiciary.”). *See also* Philip B. Kurland, *The Rise and Fall of the ‘Doctrine’ of Separation of Powers*, 85 MICH. L. REV. 592, 594 (1986) (explaining that separation of governmental powers as written into the U.S. Constitution would be irrelevant in England where the constitution was unwritten and consisted of customary procedures that could be altered by parliament).

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.

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.¹⁸⁵ A judge exercising this corrective power is being a faithful agent of Congress, even though the power is inconsistent with the textualist view of statutory interpretation.¹⁸⁶

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.¹⁸⁷ 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."¹⁸⁸ Or consider again that most faithful of agents, the computer. When your computer 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.

185. See Scalia, *supra* note 5, at 20; Siegel, *supra* note 11, at 325–32 (discussing "scrivener's errors" as an exception to Justice Scalia's strict adherence to textualism).

186. See Siegel, *supra* note 11, at 333–35.

187. *Id.* at 348.

188. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 625 (1949). (Fuller is speaking here through his invented character, Judge Foster.)

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 discussed in subpart IV(B). Purely linguistic analysis in that case would have strongly suggested that the phrase "trade or commerce" had the same meaning in §§ 1 and 3 of the Sherman Act, where it appears in exactly parallel constructions.¹⁸⁹ 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.¹⁹⁰ In light of this purpose, the Court determined that it was appropriate to construe §§ 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.¹⁹¹ 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

189. 15 U.S.C. §§ 1, 3 (2000).

190. *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 434–35 (1932) (explaining that Congress's passage of § 3 under its plenary power to legislate for the District of Columbia, coupled with the legislative debate surrounding the passage of the Sherman Act, suggests that Congress intended § 3 to deal comprehensively with the problems resulting from restraints on trade).

191. *Id.*

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 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.¹⁹² 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 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."¹⁹³ 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

192. 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); Stephen F. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation*, 87 GEO. L.J. 195, 218–20 (1998).

193. *Clark v. Martinez*, 125 S. Ct. 716, 724 (2005).

it,¹⁹⁴ and choose one meaning for them all. That is still a choice. The strong unitary principle yields one high-stakes judicial choice instead of 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 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.¹⁹⁵

Justice Scalia and some scholarly commentators believe that even where the law applicable to a case leaves a court with a choice to make, the court should, to the extent possible, adopt a clear, general rule that will circumscribe its discretion in future cases.¹⁹⁶ By doing so, Justice Scalia argues, courts make the law more predictable; they make it easier for parties to understand that they are receiving equal treatment; and they embolden themselves to apply rules evenhandedly in difficult, controversial cases. 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 he and other commentators have observed that looser legal tests that leave more up to case-by-case application are susceptible to judicial manipulation for ideological ends.¹⁹⁷

There is something to Justice Scalia's point. Certainly one must credit him for sticking to 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*, yet voted for it all the same.¹⁹⁸ But there are two

194. *Id.* (“[W]hen 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.”).

195. As the next section shows, this was certainly true in *Martinez*. See *infra* section IV(C)(4).

196. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179–80, 1187 (1989); see also Robert J. Pushaw, Jr., *Does Congress Have the Constitutional Power to Prohibit Partial-Birth Abortion?*, 42 HARV. J. ON LEGIS. 319, 337–38, 343–44 (2005) (making this point and applying it to suggest that courts should neutrally determine that abortion services are part of “commerce” for Commerce Clause purposes).

197. See Scalia, *supra* note 196, at 1179–80, 1187 (arguing that “totality of the circumstances” and other balancing tests create the potential for “judicial arbitrariness,” among other flaws).

198. Compare *Zadvydas v. Davis*, 533 U.S. 678, 702–05 (2001) (Scalia, J., dissenting) (dissenting from *Zadvydas*'s holding that removable aliens could be detained only for a “reasonable period” before the INS must release them), with *Martinez*, 125 S. Ct. at 720–27 (writing for the

rejoinders. First, in taking away a judge's power to manipulate results ideologically, Justice Scalia would also deprive the judge of the power to follow what might be the best understanding of Congress's instructions. A judge who makes an exception to a previously adopted rule or interpretation by, for example, applying the polymorphic principle, may not be doing so for an unprincipled or ideological reason, but may be quite sincerely attempting to reach the correct result under the applicable statute. The polymorphic principle recognizes that an undesirable result that would follow from applying the unitary principle may be an indicator that the best interpretation of a statutory term is different in different cases. Thus, by ostensibly reducing the opportunities for judicial choice, Justice Scalia may, in the end, only increase the number of occasions on which, for judicially chosen reasons, courts depart from the best understanding of their congressional instructions.¹⁹⁹

Second, while it is true that judges who decide on a case-by-case basis whether to apply the polymorphic principle could make their decisions for unworthy, ideological reasons, the same could be equally true of judges who make an initial interpretation and then apply the strong unitary principle. Judges could simply apply ideology at an earlier stage in the interpretive process. 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 for the initial choice.²⁰⁰ Judicial choice is required either way.

So the strong unitary principle fails to deliver on its promise of reducing the role of judicial choice in statutory interpretation. It may limit the number of times a court must exercise judicial choice, but it proportionately raises the stakes when a court does decide to do so.

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

majority in *Martinez* and applying *Zadvydas*'s holding to order the release of inadmissible aliens who had been held beyond a "reasonable period").

199. The next section also emphasizes this point in the particular context of cases in which the court's initial interpretation involves departure from the congressional instructions for reasons related to rules that are of judicial origin. See *infra* section IV(C)(4).

200. One might note, similarly, that courts could cut down on judicial choice and perhaps prevent ideological manipulation by always giving dispositive weight to the interpretive canon that a single statutory term used multiple times within a statute should have a single, consistent meaning. Nonetheless, because such a rule would be too inflexible and would prevent courts from giving some statutes their best interpretation, courts give the canon only presumptive weight. See *supra* subpart IV(B). We trust judges to make a principled choice as to when to apply this canon, and there is no clear reason not to grant similar trust with regard to choosing between the unitary and polymorphic principles.

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 willfulness at the expense of what the legislature has prescribed, and compels its application even more broadly than might otherwise be required.

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.²⁰¹ 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.²⁰²

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.²⁰³ 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.²⁰⁴ 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

201. 125 S. Ct. at 732–33 (Thomas, J., dissenting).

202. *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* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1949 (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, and it has its roots in cases as early as *Mossman v. Higginson*, 4 U.S. 12 (1800). *See, e.g., Martinez*, 125 S. Ct. at 732 (Thomas, J., dissenting); Vermeule, *supra*, at 1958–59. 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). As early as 1830, however, 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).

203. Vermeule, *supra* note 202, at 1963.

204. *See id.* (arguing that, in contrast to the doctrine of constitutional avoidance, the doctrine of severability in statutory construction rests on the “opposing norm of legislative supremacy: duly enacted statutes take effect to the full extent that the Constitution allows”).

construction, they fail to give effect to what might well have been a constitutional exercise of legislative power.

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.²⁰⁵ This attribution of congressional desire is, however, implausible.²⁰⁶ 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 it 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”²⁰⁷ constructions and will not “press statutory construction to the point of disingenuous evasion even to avoid a constitutional question.”²⁰⁸ 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,”²⁰⁹ implicitly *limits* the Attorney General’s authority to detain removable aliens.²¹⁰ The Supreme Court exercised judicial choice in this case, as is evidenced by the 5-4 split among the

205. See *Martinez*, 125 S. Ct. at 724 (explaining that the avoidance canon rests “on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts”); *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.”).

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

207. *Zadvydas v. Davis*, 533 U.S. 678, 689 (2005) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

208. *Salinas v. United States*, 522 U.S. 52, 60 (1997) (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 57 n.9 (1996)).

209. 8 U.S.C. § 1231(a)(6) (2000).

210. *Zadvydas*, 533 U.S. at 682. Similarly, although the Court employed the avoidance doctrine in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 506–07 (1979), to hold that the National Labor Relations Act does not cover the relationship between religious schools and their teachers, Justice Brennan rightly concluded that the Court’s construction of the statute was not “fairly possible.” *Id.* at 511 (Brennan, J., dissenting). Actual practice under the avoidance doctrine supports Judge Posner’s conclusion that “[c]ourts often do interpretive handstands” to avoid a constitutional question. *United States v. Marshall*, 908 F.2d 1312, 1335 (7th Cir. 1990) (Posner, J., dissenting).

Justices and by the dissent's complaint about the Court's "obvious disregard of congressional intent."²¹¹ 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 the same construction apply to *all* applications of the text, even applications that raise no constitutional doubt, because the "lowest common denominator" must control.²¹² The result is that the strong unitary principle ratchets up the judicial interference with 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.²¹³ Justice Scalia was among those insisting that the Court had "obvious[ly] disregard[ed] . . . congressional intent."²¹⁴ 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.²¹⁵ 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.²¹⁶

211. 533 U.S. at 705 (Kennedy, J., dissenting).

212. *Clark v. Martinez*, 125 S. Ct. 716, 724 (2005).

213. 533 U.S. at 689–90.

214. *Id.* at 705 (Kennedy, J., dissenting).

215. 125 S. Ct. at 722–23. 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*, though 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.

216. For 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. 478 U.S. 310 (1986). The Court's opinion was quite implausible as a matter of statutory construction. Title VII provided for the United States to be liable "the same as a private

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 1) would reduce litigation costs and 2) 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 avoiding the use of legislative history.²¹⁷

The short answer to these arguments is that these benefits, assuming that they 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.²¹⁸ As noted earlier, other

person.” 42 U.S.C. § 2000e-5(k) (2000). This language, if given its normal meaning, would certainly seem to subject the government to the same liability for interest as private parties. See *Shaw*, 478 U.S. at 324–25 (Brennan, J., dissenting). 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 thus have 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. 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 employers. 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 a wrongful action and failure to award interest could significantly degrade the award.

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

218. See *supra* subpart IV(B). As there discussed, the canons of construction are taken only as general guides, not inflexible, mandatory rules. See also Deborah A. Geier, *Commentary: Textualism and Tax Cases*, 66 TEMP. L. REV. 445, 447–49 (1993) (explaining that Justice Scalia’s use of “literalism” as a canon of construction in statutory interpretation comes undesirably close to removing the human factor in judging); William D. Popkin, *An “Internal” Critique of Justice Scalia’s Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1148–49 (1992) (discussing how Justice Scalia’s “super-text” canon of construction with respect to statutory interpretation deters judicial speculation, reduces uncertainty, and could encourage careful congressional legislation, but can be “problematic[ally]” inflexible in many cases); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 428–31 (1989) (claiming that strictly

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,²¹⁹ 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.²²⁰

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.²²¹

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,”²²² 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.²²³ Its achievement requires assuming an unrealistic degree of perfection in the congressional drafting process. So long as we remain human beings, “not gods,”²²⁴ 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.

adhering to textual canons of statutory interpretation and ignoring intent and history will “leave large gaps or produce mistakes” in hard cases).

219. See Scalia, *supra* note 196, at 1176 (exploring the difference between the “general rule of law” and “personal discretion to do justice”).

220. See *supra* subpart IV(B); see also *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253 (1992) (noting that “canons of construction are no more than rules of thumb that help courts determine the meaning of legislation”).

221. See *infra* subpart V(A).

222. See STERN ET AL., *SUPREME COURT PRACTICE* 226–32 (8th ed. 2002) (discussing what makes a conflict a “true” conflict).

223. Siegel, *supra* note 11, at 341–43.

224. See Siegel, *supra* note 5, at 1107 (citing H.L.A. HART, *THE CONCEPT OF LAW* 128 (2d ed. 1994)).

D. Summary

In sum, the strong unitary principle is not only incorrect linguistically and a poor fit with general practices concerning the canons of statutory construction, but it does not logically 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.

V. 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.”²²⁵ It says that statutory language *cannot* have two meanings at the same time.²²⁶ 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* govern.”²²⁷ Thus, the 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

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

226. *Id.* at 723.

227. *Id.* at 724 (emphasis added).

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,”²²⁸ 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.”²²⁹ 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,”²³⁰ or with noting that only a “most extraordinary showing” of intention in legislative history will justify departure from clear statutory text.²³¹ 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.²³²

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.

228. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (citation omitted); *see id.* at 255–56 (Stevens, J., concurring) (explaining that the legislative history supports the statutory text).

229. *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 6 (2000)).

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

231. *Salinas v. United States*, 522 U.S. 52, 57 (1997) (quoting *United States v. Albertini*, 472 U.S. 675, 680 (1985)).

232. *See, e.g., Gen. Dynamics Land Sys., 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. § 623(a)(1) (2004), 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 relatively old”); *see also Conroy v. Aniskoff*, 507 U.S. 511, 514–17, 518 & n.12 (1993) (stating that it is permissible to consult legislative history even where “[t]he statutory command . . . is unambiguous, unequivocal, and unlimited”); *INS 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. Am. Trucking Ass'ns, Inc.*, 310 U.S. 534, 543–44 (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.’”).

In *Harrison v. PPG Industries*,²³³ the Court strongly cautioned against reliance on such “negative” legislative history. The Court said, “In 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.”²³⁴ Yet in the later case of *Chisom v. Roemer*, 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.”²³⁵ For good measure, the Court added, “Congress’[s] silence in this regard can be likened to the dog that did not bark.”²³⁶ The Court thus disregarded its specific—and 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*, the Court referred to a lower court’s reliance on overall purpose as “most impermissibl[e].”²³⁷ 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.”²³⁸ Just a few years later, however, in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, the Court rejected a strong textual

233. 446 U.S. 578 (1980).

234. *Id.* at 592.

235. 501 U.S. 380, 396 (1991).

236. *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 despite the protection of a guard dog. 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.”

“That was the curious incident,” remarked Sherlock Holmes.

ARTHUR CONAN DOYLE, *Silver Blaze*, in *THE COMPLETE SHERLOCK HOLMES* 336, 346–47 (Doubleday 1930) (1894). 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) (exemplifying the use of an accurate but subtle reference to *Silver Blaze* in its title).

237. 480 U.S. 522, 525 (1987) (per curiam) (emphasis added).

238. *Id.* at 525–26.

argument²³⁹ by relying in part on “the broad purpose” of the statute at hand.²⁴⁰ 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.”²⁴¹

The Court sometimes makes flat statements such as “[i]t is beyond our province to rescue Congress from its drafting errors.”²⁴² At other times, however, the Court does exactly that.²⁴³ Even Justice Scalia accepts that courts may correct scrivener’s errors on appropriate, albeit rare, occasions.²⁴⁴

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 is typically 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.²⁴⁵ Yet even he quietly joined the Court’s opinion in *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*, 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.²⁴⁶ Thus, individual Justices, like the Court as a whole, seem to lack truly firm methodological commitments.²⁴⁷

239. 515 U.S. 687, 715–25 (1995) (Scalia, J., dissenting) (arguing that a challenged regulation must fail because it is inconsistent with what the dissent feels is “unmistakably clear” legislation).

240. *Id.* at 698 (holding that, based on the ordinary understanding of the word “harm” and the broad purpose of the Endangered Species Act, Congress intended the word “harm” in the Act to include habitat modification that results in injury or death to members of an endangered species).

241. *Id.* at 726 (Scalia, J., dissenting) (pointing out that “[d]eduction from the ‘broad purpose’ of a statute begs the question . . . by what *means* (and hence to what *length*) Congress pursued that purpose” and arguing that examining a statute’s broad purpose is “the slogan of the enthusiast, not the analytical tool of the arbiter”) (citation omitted).

242. *Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004) (quoting *United States v. Granderson*, 511 U.S. 39, 68 (1994) (Kennedy, J., concurring)).

243. *E.g.*, *United States Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455, 462 (1993) (correcting “a simple scrivener’s error” that caused “punctuation marks [to be] misplaced”).

244. *Holloway v. United States*, 526 U.S. 1, 19 n.2 (1999) (Scalia, J., dissenting); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528–29 (1989) (Scalia, J., concurring in the judgment).

245. *See Chevron U.S.A., Inc. v. Natural Res. Def. 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 (2001) (Scalia, J., dissenting) (“*Chevron* sets forth an across-the-board presumption Ambiguity means Congress intended agency discretion.”); *NLRB v. United Food & 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); *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”).

246. 529 U.S. 120, 159–60 (2000).

247. 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

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."²⁴⁸ 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 applied.²⁴⁹

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*.²⁵⁰ Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, urged the use of express stare decisis polymorphism in *Bossier Parish*.²⁵¹ And Justice O'Connor and Justice Kennedy joined Justice White's opinion applying express subconstitutional polymorphism in *Will v. Michigan Department of State Police*.²⁵² Even former Chief Justice Rehnquist, who dissented in *Clark v. Martinez*, joined the Court in *Illinois*

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.

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

249. 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.

250. *See supra* notes 73–82 and accompanying text.

251. *See supra* notes 132–137 and accompanying text.

252. *See supra* notes 114–119 and accompanying text.

Council,²⁵³ which used express constitutional avoidance polymorphism, and in *Richmond*,²⁵⁴ which used express policy polymorphism.

It therefore seems likely that, of the Justices who joined the majority opinion in *Martinez*, Justice Scalia is the Court's sole firm believer in the strong unitary principle.²⁵⁵ The other Justices approved of the result but are unlikely to consider themselves firmly bound by the case's methodology. The polymorphic principle will probably prevail again.²⁵⁶

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, which should be applied in the absence of a strong reason to do otherwise, 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 presented. First, the principle seems most appropriate when some special rule of statutory interpretation, which deflects

253. See *supra* notes 84–93 and accompanying text.

254. See *supra* notes 123–130 and accompanying text.

255. Justice Thomas, in his dissenting opinion in *Clark v. Martinez*, professes adherence to the unitary principle and attempts to characterize his understanding of the statute at issue as involving “a single and unchanging, if implausible, meaning.” See 125 S. Ct. 716, 730 (2005) (Thomas, J., dissenting). 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,” 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. *Id.*; see *supra* note 103. Effectively, Justice Thomas advocates a polymorphic reading of the statute. In fairness, however, 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.

256. Since this Article was first drafted, Justice O'Connor announced her retirement and Chief Justice Roberts replaced the late Chief Justice Rehnquist. The views of the new Justices regarding the strong unitary principle are not known, but the point remains that *Martinez* is probably not a reliable indicator of the Court's future direction, because Justices seem willing to join statutory opinions when they agree with the interpretation given to the statute at issue, even if they do not fully subscribe to the interpretive methodology used.

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.²⁵⁷ 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 diversity jurisdiction in cases involving four possible party configurations provided the amount in controversy “exceeds the sum or value of \$75,000,”²⁵⁸ 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 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, 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

257. See *supra* sections III(B)(1)–(2).

258. 28 U.S.C. § 1332(a) grants jurisdiction over cases (1) between citizens of different states; (2) between citizens and aliens; (3) between citizens, with aliens as additional parties; and (4) between a plaintiff foreign state and U.S. citizens, all on condition that the amount requirement is satisfied.

(RICO),²⁵⁹ application of the unitary principle seems appropriate. Criminal enforcement is a central theme of RICO.²⁶⁰ 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.²⁶¹ 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.²⁶²

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."²⁶³

Whatever the value of the Court's other arguments, this one is certainly incorrect. Congress has authority to prescribe rules of statutory

259. 18 U.S.C. §§ 1961–1968 (2000).

260. *Id.* § 1963.

261. Solan, *supra* note 6, at 2211.

262. *Id.* at 2218–37.

263. *Clark v. Martinez*, 125 S. Ct. 725, 727 (2005).

interpretation.²⁶⁴ 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,²⁶⁵ but, as I have explained in detail elsewhere, such arguments are implausible and contrary to precedent.²⁶⁶ 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 strong unitary principle as a rule for their construction. Thus, at the very least, if Congress did not care for the polymorphic principle, it 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

264. Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1500–05 (2000). See Rosenkranz, *supra* note 5, at 2102–40.

265. See Siegel, *supra* note 264, at 1500–01 (“Although some authors think it clear that Congress may enact statutes regulating statutory interpretation, others perceive potential constitutional problems with such statutes.”); *id.* at 1501 n.218 (citing REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 270–76 (1975), and Alan R. Romero, *Interpretive Decisions in Statutes*, 31 HARV. J. ON LEGIS. 211, 223–35 (1994)).

266. See Siegel, *supra* note 264, at 1501–03.

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.

VI. 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 of our nation 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.