

4-1992

## The Costs of Incoherence: A Comment on Plain Meaning, West Virginia University Hospitals, Inc. v. Casey, and Due Process of Statutory Interpretation

T. Alexander Aleinikoff

Theodore M. Shaw

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Constitutional Law Commons](#)

---

### Recommended Citation

T. Alexander Aleinikoff and Theodore M. Shaw, The Costs of Incoherence: A Comment on Plain Meaning, West Virginia University Hospitals, Inc. v. Casey, and Due Process of Statutory Interpretation, 45 *Vanderbilt Law Review* 687 (1992)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol45/iss3/7>

This Symposium is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).

# The Costs of Incoherence: A Comment on Plain Meaning, *West Virginia University Hospitals, Inc. v. Casey*, and Due Process of Statutory Interpretation

*T. Alexander Aleinikoff\**  
*Theodore M. Shaw\*\**

I.	INTRODUCTION .....	687
II.	THE CASE: <i>WEST VIRGINIA UNIVERSITY HOSPITALS, INC. v. CASEY</i> .....	690
	A. <i>The Majority Opinion</i> .....	690
	B. <i>Legal Context, Purpose, and a Critique of the Opinion</i> .....	693
III.	ANTI-ANTI-ANTI PLAIN MEANING AND THE NORM OF DUE PROCESS OF STATUTORY INTERPRETATION .....	698
IV.	THE COSTS OF INCOHERENCE .....	706
V.	EPILOGUE .....	712

## I. INTRODUCTION

Karl Llewellyn's classic article on the canons of statutory construction,<sup>1</sup> which we rightly celebrate in this Symposium, is too clever by half. To the reader untutored in the scholarly literature on statutory interpretation, the "thrust but parry" pairing of the canons is a delightful demonstration of how legal argument is structured in a way guaranteed to maintain discretion in the judiciary and to keep lawyers in business. No case involving a statute is clear cut because the canons can lend support to either side. This means that no lawyer is without an

---

\* Professor of Law, University of Michigan Law School. B.A., 1974 Swarthmore College; J.D., 1977, Yale Law School.

\*\* Assistant Professor of Law, University of Michigan Law School. B.A., 1976, Wesleyan University; J.D., 1979, Columbia Law School.

1. 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).

argument, and a judge is free to do what he or she thinks "situation sense," natural justice, or economic efficiency demands.

But this rendering of the tools of statutory interpretation really misses the point. The canons are not free-floating rules, snatched out of the air or created on the spot in helter-skelter fashion. They are rules of thumb ("generalizations of experience," Felix Frankfurter called them<sup>2</sup>) for approaching legal texts, and as such, canons have at least two attributes: they summarize common-sensical ways of thinking about language and communication, and they follow from a broader normative theory about the proper way to read statutes. For example, if one starts with a theory that an interpreter ought to read a statute as its drafters would have read it at the time of enactment, then certain rules or guidelines for interpretation become sensible based on our assumptions regarding how legal drafters indicate their intent.

From this perspective, the battle of canons identified by Llewellyn is really an inter-system, not an intra-system, dispute. This is easiest to see if one focuses on "plain meaning" and "intentionalist" or "purposive" theories of interpretation. It is immediately apparent that many of the "thrust but parry" pairs simply represent a canon from one model posed against one from the other. Thus:

1. A statute cannot go beyond its text. [plain meaning]

But

To effect its purpose a statute may be implemented beyond its text. [purpose]

. . .

12. If the language is plain and unambiguous it must be given effect. [plain meaning]

But

Not when a literal interpretation would lead to absurd or mischievous consequences or thwart manifest purpose. [purpose]

. . .

18. Words are to be interpreted according to the proper grammatical effect of their arrangement within the statute. [plain meaning]

But

Rules of grammar will be disregarded where strict adherence would defeat purpose. [purpose]

19. Exceptions not made cannot be read. [plain meaning]

But

The letter is only the "bark." Whatever is within the reason of the law is within the law itself. [purpose]<sup>3</sup>

So Llewellyn's article should lead us not to despair or ridicule, but rather to a discussion of the more interesting question of the appropriate normative approach, which, in turn, might well dissolve the very

---

2. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 544 (1947).

3. Llewellyn, 3 Vand. L. Rev. at 401-04 (cited in note 1).

oppositions that have made the piece famous.<sup>4</sup>

In the current legal generation, the Supreme Court and its academic critics have marshalled different canons deriving from radically different underlying normative approaches. As many have noted,<sup>5</sup> the justices appear increasingly drawn to “plain meaning” or textualist readings. In contrast, the scholars have tended to favor purposive or pragmatic approaches, frequently of nonoriginalist varieties.

In this Article, we wish to provide a case study of “plain meaning” by examining a recent decision of the Supreme Court, *West Virginia University Hospitals, Inc. v. Casey*.<sup>6</sup> Casey held that prevailing civil rights litigants could not recover expert witness fees as a part of the “attorney’s fees” awardable under Title 42, Section 1988 of the United States Code.<sup>7</sup> We argue that the Court’s approach did not do justice to the statute or Congress and—most importantly—to the persons the statute attempts to protect. Furthermore, the Court’s reliance on “plain meaning” left it wholly uninterested in the legal context in which the statute must operate. The result, at least in this case, is a Court-imposed incoherence, blind both to the manifest congressional purpose and to the real-world consequences of the literalistic reading. We suggest a norm of “due process of statutory interpretation” that would ask an adjudicator to ensure that the meaning imposed upon a statutory text bears, at a minimum, a plausible connection to some practical purpose that makes sense in our legal system.<sup>8</sup>

---

4. Fixing on a single normative approach would not resolve all disputes about the canons: some of Llewellyn’s pairs mark “intra-approach” disputes. See, for example, pair 8 in which both the “thrust” and the “parry” follow from a purpose approach. *Id.* at 402.

To Llewellyn, the existence of competing canons flowed inexorably from the law’s (false) claim that traditional legal sources and logic yield “one single correct answer” to any legal problem. Because, in fact, statutes and precedents can yield up any number of plausible or permissible readings, a legal system dedicated to a “right answer” must have tools that allow it to believe that the answer is compelled. Competing canons are the natural result. In every case, a judge can appear to deduce the right answer through application of the appropriate iron-clad interpretive rules. In short, the competing canons permit the legal system to maintain the myth of determinacy. *Id.* at 399.

5. See, for example, William N. Eskridge, Jr., *The New Textualism*, 37 *UCLA L. Rev.* 621 (1990); Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 *S. Ct. Rev.* 231; Nicholas S. Zeppos, *Justice Scalia’s Textualism: The “New” New Legal Process*, 12 *Cardozo L. Rev.* 1597 (1991); Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 *Harv. L. Rev.* 892 (1982).

6. 111 S. Ct. 1138 (1991).

7. 42 U.S.C. § 1988 (1988). Part, but by no means all, of the effect of the Court’s ruling was overturned by Congress in § 113 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (providing that, in employment discrimination cases, a court “may include expert fees as part of the attorney’s fee”).

8. We argue that a practical purpose is necessary because Congress enacts legislation to accomplish a given end and that judicial restraint should prevent the Court from elevating its affinity for linguistic simplicity and consistency across the statutory landscape over Congressional

## II. THE CASE: *WEST VIRGINIA UNIVERSITY HOSPITALS, INC. v. CASEY*

### A. *The Majority Opinion*

In *West Virginia University Hospitals, Inc. v. Casey*,<sup>9</sup> the Supreme Court held that the Civil Rights Attorney's Fees Awards Act of 1976<sup>10</sup> (the Fees Act) did not authorize an award of expert witness fees to the prevailing party in a civil rights case. West Virginia University Hospitals, Inc. (WVUH) successfully sued Pennsylvania Governor Robert Casey and others under Title 42, Section 1983 of the United States Code, challenging new Medicaid reimbursement schedules adopted by Pennsylvania and applied to services provided by WVUH to Pennsylvania residents. The hospital sought and was awarded attorney's fees. Included in the fee award was more than \$100,000 for reimbursement of costs attributable to expert services. The district court had found these services "essential" to the litigation.<sup>11</sup>

In his opinion for the majority,<sup>12</sup> Justice Scalia acknowledged that courts could shift expert witness fees under the terms of federal statutes that permitted witness fees to be taxed as costs. But the controlling statutes limited such costs to a \$40 per day "attendance fee"<sup>13</sup>—clearly far below the costs incurred by WVUH in prosecuting its claim. In *Crawford Fitting Co. v. J.T. Gibbons, Inc.*,<sup>14</sup> the Court previously

intent.

9. 111 S. Ct. 1138 (1991).

10. 42 U.S.C. § 1988 (1988). Section 1988 provides in relevant part:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. §§ 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000d et. seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

11. 111 S. Ct. at 1140.

12. Chief Justice Rehnquist and Justices White, O'Connor, Kennedy, and Souter joined Justice Scalia's majority opinion. Justice Marshall wrote a dissenting opinion, as did Justice Stevens, who was joined by Justice Marshall and Justice Blackmun.

13. 28 U.S.C. §§ 1821(b), 1920 (1966 & Supp. 1991).

At the time *Casey* was brought, § 1821 provided that "[a] witness shall be paid an attendance fee of \$30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance . . ." Act of Oct. 27, 1978, Pub. L. No. 95-535, 92 Stat. 2033, cited in *Casey*, 111 S. Ct. at 1140. While *Casey* was pending before the Supreme Court the attendance fee was increased to \$40 per day by the Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 314(a), 104 Stat. 5115, cited in *Casey* 111 S. Ct. at 1140 n.2.

14. 482 U.S. 437 (1987). *Crawford* held that 28 U.S.C. § 1920 and § 1821(b) define the full extent of a federal court's power to shift litigation costs absent some other explicit statutory authorization. 28 U.S.C. § 1920 provides that:

A judge or clerk of any court of the United States may tax as costs the following:

- (1) Fees of the clerk and marshal;
- (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;

had determined that these statutes define the full extent of a district court's authority to shift costs, absent other express statutory authorization. The question in *Casey*, therefore, was whether Section 1988, which permits the shifting of "a reasonable attorney's fee," constituted express authority to shift expert fees.

Justice Scalia's majority opinion examined statutory usage and concluded that attorney's fees and expert fees are distinct items for purposes of defining litigation expenses. He rested his judgment on the fact that some statutes refer only to attorney's fees, while others explicitly refer to expert witness fees in addition to attorney's fees.<sup>15</sup> Scalia rejected arguments that the judicial usage of the phrase "attorney's fees" before 1976, the date of Section 1988's enactment, included expert witness fees. His analysis, however, focused not on civil rights cases, but rather consisted of a survey of fee-shifting in litigation ranging from securities<sup>16</sup> and antitrust cases<sup>17</sup> to contracts and tort claims<sup>18</sup> and state law diversity actions.<sup>19</sup> Furthermore, in the absence of statutory authority to do otherwise, Justice Scalia refused to distinguish between testimonial and nontestimonial expert services and applied the \$40 per day witness fee limit to both.<sup>20</sup>

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses and costs of special interpretation services under Section 1828 of this title.

15. Justice Scalia noted that "[a]t least 34 statutes in 10 different titles of the U.S. Code explicitly shift attorney's fees and expert witness fees." *Casey*, 111 S. Ct. at 1142.

16. *Id.* at 1144 (citing *Fey v. Walston & Co.*, 493 F.2d 1036 (7th Cir. 1974)).

17. *Id.* at 1145 (citing *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1961)).

18. *Id.* at 1144 (citing *Kiefel v. Las Vegas Hacienda, Inc.*, 404 F.2d 1163 (7th Cir. 1968); *Coughenour v. Campbell Barge Line, Inc.*, 388 F. Supp. 501 (W.D. Pa. 1974)).

19. *Id.* (citing *Burgess v. Williamson*, 506 F.2d 870 (5th Cir. 1975); *Henning v. Lake Charles Harbor and Terminal Dist.*, 387 F.2d 264 (5th Cir. 1968)).

20. *Id.* at 1143-46.

As Judge Posner has observed:

Experts are not only hired to testify; sometimes they are hired, also or instead, to educate counsel in a technical matter germane to the suit. The time so spent by the expert is a substitute for lawyer time, just as paralegal time is, for if prohibited (or deterred by the cost) from hiring an expert the lawyer would attempt to educate himself about the expert's area of expertise.

*Friedrich v. City of Chicago*, 888 F.2d 511, 514 (7th Cir. 1989).

Justice Scalia did not, and indeed could not, refute the logic of Judge Posner's analysis. Instead, he pointed to pre-1976 statutes explicitly authorizing fees for nontestimonial services and concluded that such statutes established a usage prior to 1976 similar to the one that continued after 1976. *Casey*, 111 S. Ct. at 1142-43, citing 18 U.S.C. § 3006A(e) (1988). That provision directed reimbursement to court-appointed counsel for expert fees necessary to the defense of indigent criminal defendants. The same Act's immediately preceding provision, in contrast, directed that appointed counsel be reimbursed a designated hourly rate plus "expenses reasonably incurred" 18 U.S.C. § 3006A(d)(1). Justice Scalia also cited 28 U.S.C. § 2412(d)(2)(A), which shifted fees and

The *Casey* majority also rejected the argument that Section 1988 was an attempt to repudiate *Alyeska Pipeline Service Co. v. Wilderness Society*<sup>21</sup> in all respects and to restore the pre-*Alyeska* regime, which allowed equitable fee-shifting in some civil rights cases. In *Alyeska* the Court held that, in the absence of any statute explicitly authorizing fee-shifting, the American rule required each side to bear its own attorney's fees.<sup>22</sup> Justice Scalia acknowledged that the chronology of Section 1988 and the House and Senate reports supported the contention that the statute was a response to *Alyeska*. He concluded, however, that the statute could not have been meant to return precisely to the pre-*Alyeska* regime because it authorized fees only for suits brought pursuant to certain enumerated civil rights statutes and did not extend to litigation brought under the environmental statutes at issue in *Alyeska*. Accordingly, the objective of achieving a return to the pre-*Alyeska* world could not justify a departure "from the normal import of the text."<sup>23</sup>

In ruling that expert fees could not be recovered as an aspect of attorney's fees, Justice Scalia had to distinguish *Missouri v. Jenkins*,<sup>24</sup> in which the Court held that paralegal and law clerk's fees are recoverable under Section 1988. In Justice Scalia's view, "[i]t was not remotely

other expenses including those for nontestimonial expert witness services. The Justice observed that "[i]f the reasonable cost of a 'study' or 'analysis'—which is but another way of describing nontestimonial expert services—is by common usage already included in the 'attorney's fees,' again a significant and highly detailed part of the statute becomes redundant." *Casey*, 111 S. Ct. at 1143.

Thus, rather than addressing the logical coherence of § 1988 in an attempt to effectuate its purpose, Justice Scalia was concerned with reconciling statutory usage in a way that imposed code uniformity. He eliminated redundancy at the expense of statutory purpose. Even more inconsistently Justice Scalia posits no persuasive argument for including nontestimonial expert services within the reach of 28 U.S.C. § 1821. Yet the plain language of the statute refers to "a witness." See note 13. A nontestifying expert is, by definition, not a witness.

21. 421 U.S. 240 (1975).

22. *Id.* at 247.

23. *Casey*, 111 S. Ct. at 1146. We think another conclusion may follow from the fact that § 1988 is limited. Congress in enacting § 1988 was attempting to restore the pre-*Alyeska* regime with respect to civil rights enforcement. That regime assumed that prevailing plaintiffs could recover expert witness fees. Because the *Alyeska* decision did not apply to civil rights statutes that included fees provisions, these statutes were not included in the Fees Act. If Congress had explicitly authorized expert witness fees recovery in § 1988 it would not simply have been restoring the pre-*Alyeska* regime; rather it would seem to be treating civil rights plaintiffs differently with respect to expert witness fees recovery based upon the nature of the discrimination they suffered. That is, plaintiffs suing under the statutes enumerated in § 1988 would be able to recover expert witness fees, but plaintiffs bringing other civil rights claims—housing discrimination or voting rights claims, for example—would not. We know of no evidence supporting such a distinction. Indeed, the Senate Report accompanying the Fees Act states: "The purpose of this Amendment is to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in [*Alyeska*] and to achieve consistency in our civil rights laws." Civil Rights Attorney's Fees Awards Act, S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976).

24. 491 U.S. 274 (1989).

plain in *Jenkins* that the phrase ‘attorney’s fee’ did not include charges for law-clerk and paralegal services. Such services, like the services of ‘secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product,’ . . . had traditionally been included in calculation of the lawyer’s hourly rates.”<sup>25</sup> Justice Scalia further relied on the fact that “[t]here was also no record in *Jenkins*—as there is a lengthy record here—of statutory usage that recognizes a distinction between the charges at issue and attorney’s fees.”<sup>26</sup> Finally, the *Casey* majority refused to read a provision for expert witness fees recovery into Section 1988 on the theory that Congress simply overlooked or forgot about the issue:

Where what is at issue is not a contradictory disposition within the same enactment, but merely a difference between the more parsimonious policy of an earlier enactment and the more generous policy of a later one, there is no more basis for saying that the earlier Congress forgot than for saying that the earlier Congress felt differently. In such circumstances, the attribution of forgetfulness rests in reality upon the judge’s assessment that the later statute contains the better disposition. But that is not for judges to prescribe.<sup>27</sup>

### B. *Legal Context, Purpose, and a Critique of the Opinion*

Justice Scalia’s majority opinion in *Casey* states that any “inconsistency of policy” regarding the shifting of expert witness fees is Congress’s fault and that it is not the function of the Court “to treat alike subjects that different Congresses have chosen to treat differently.”<sup>28</sup> But this attribution of responsibility grossly mischaracterizes Congress’s long-standing policy that successful civil rights plaintiffs be able to recover the costs of vindicating their rights. Indeed, it has been the

---

25. *Casey*, 111 S. Ct. at 1147 (quoting *Jenkins*, 491 U.S. at 285). Fidelity to plain meaning, however, would seem to dictate that paralegals are not lawyers and that nontestimonial experts are not witnesses.

26. *Id.* at 1147. Justice Scalia noted: “We do not know of a single statute that shifts clerk or paralegal fees separately.” *Id.* This reasoning strongly illustrates the Court’s elevation of consistency of statutory usage over effectuation of congressional intent.

27. *Id.* at 1148. We argue that Justice Scalia’s attribution to Congress of inconsistent policies of generosity and parsimony is no less a form of activism than the attribution of forgetfulness he so forcefully rejects. Given the choice between the conclusion that the earlier Congress either forgot to include an expert fees provision or did not deem the inclusion of such a provision necessary (a choice that permits the statute to work in a sensible manner) and the conclusion that the earlier Congress felt differently (a choice that is unsupported by the legislative history and that frustrates the purpose of the statute), we see no reason to choose the latter. Indeed, Scalia’s observation that “there is no more basis for saying that the earlier Congress felt differently” does not provide a basis for saying that the earlier Congress felt differently. The “plain meaning” doctrine, which Scalia invokes to reach the “felt differently” result, is a judicial construct that purports to ask “what did Congress say?” but really asks “what rule of statutory interpretation will work most efficiently for the Court within the framework of separation of powers?” Scalia, of course, completely spurns the question “what did Congress mean?”

28. *Id.*



Court's interventions in fee award cases that have imposed incoherence on clear congressional policies.<sup>29</sup>

The Supreme Court's first intrusion came in *Alyeska*,<sup>30</sup> which represented a fundamental departure from then-existing practices regarding fee-shifting in civil rights cases. An examination of the pre-*Alyeska* fee-recovery landscape in civil rights cases reveals a patchwork of statutory fee-recovery provisions augmented by judicial exercise of equitable power in nonstatutory fee-shifting cases that produced a rough uniformity of result: prevailing civil rights plaintiffs successfully recovered fees and costs.

The very first federal attorney's fees statute arose in the civil rights area. The 1870 Enforcement Act provided protection for voting rights and included three provisions for fees recovery.<sup>31</sup> When *Alyeska* was decided, however, the civil rights statutes of comparable vintage—the post-Civil War statutes<sup>32</sup>—did not include fee-shifting provisions. More recent civil rights statutes did provide explicitly for fee-shifting,<sup>33</sup> although they did not address expert witness fees.<sup>34</sup> Nonetheless, the widespread pre-*Alyeska* assumption was that prevailing plaintiffs in civil rights cases could recover expert witness fees, either as part of costs or as part of attorney's fees. Courts often were not precise, but many thought it clear that fee-shifting practices in civil rights cases were intended to reimburse prevailing plaintiffs in a "make-whole"

---

29. See generally Jeffrey S. Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 Tex. L. Rev. 291 (1990).

30. 421 U.S. 240 (1975).

31. Act of May 31, 1870, 16 Stat. 140 (§§ 2, 3, and 12), repealed by Act of Feb. 8, 1894, 28 Stat. 36.

32. 42 U.S.C. §§ 1981-83, 1985-86.

33. Civil Rights Act of 1964, tit. II, § 204, Pub. L. No. 88-352, 78 Stat. 244, codified at 42 U.S.C. § 2000 a-3(b) (1988) (prohibiting discrimination in public accommodations); Id. tit. VII, § 701, codified at 42 U.S.C. § 2000 e-5(k) (prohibiting discrimination in employment); Civil Rights Act of 1968 tit. VIII, § 812, Pub. L. No. 90-284, 82 Stat. 88, current version codified at 42 U.S.C. § 3612 (prohibiting discrimination in housing).

34. The absence of specific fee-shifting provisions for expert services would not surprise anyone familiar with the development of civil rights litigation. Although the use of expert witnesses is not a new phenomenon, see, for example, *Brown v. Board of Education of Topeka*, 347 U.S. 483, 494 n. 11, experts were once less integral to the successful presentation of a civil rights case. In de jure school desegregation cases, voting rights cases in which crude practices were employed to deprive racial minorities of the right to vote, and employment discrimination cases in which applicants were overtly excluded from the work force, establishing liability did not involve sophisticated statistical analyses. As Judge Sobeloff of the Fourth Circuit once observed: "Overt bias, when prohibited, has often times been supplanted by more cunning devices designed to impart the appearance of neutrality, but to operate with the same invidious effect as before." *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1238 (4th Cir. 1970) (Sobeloff concurring in part and dissenting in part). In recent years, as overt discrimination has become less common, and especially as the courts have demanded higher standards of proof in civil rights cases, expert witness testimony has become more crucial.

manner.<sup>35</sup> Typically a court might award fees in the amount of \$X and costs in the amount of \$Y. Alternatively a court might award \$X in costs and fees or \$X in attorney's fees, \$Y in costs, and \$Z in expert witness fees. Neither Congress nor the lower courts (or for that matter, the pre-*Alyeska* Supreme Court) found these formulations to be fatally deficient.

As Justice Scalia acknowledged in *Casey*, "prior to [*Alyeska*] many courts awarded expert fees and attorney's fees in certain circumstances pursuant to their equitable discretion."<sup>36</sup> Although the *Casey* decision minimized the significance of that prior practice, the Court, in fact, was not unfamiliar with it. In *Bradley v. School Board of Richmond*<sup>37</sup> the district court had awarded "\$43,355 for services rendered . . . and expenses of \$13,064.65."<sup>38</sup> Noting "the absence at that time of any explicit statutory authorization for an award of fees in school desegregation actions," the Supreme Court upheld the award, relying on its general equity powers and citing numerous precedents in school desegregation cases.<sup>39</sup> Pre-*Alyeska* courts also exercised this equitable discretion within the context of other fee-shifting provisions; although such statutes contained no explicit reference to expert witness fees, the practice was to allow their recovery.<sup>40</sup>

*Alyeska*, of course, was quickly followed by the enactment of Section 1988. Fully in line with the plain congressional design, the lower courts interpreted the statute as restoring the status quo ante for successful civil rights litigants. Thus, prevailing plaintiffs continued to recover expert witness fees as they had before *Alyeska*. In *Jenkins v.*

---

35. "Under the Civil Rights Act [42 U.S.C. § 1983] courts are required fully to remedy an established wrong . . . and the payment of fees and expenses in class actions like this one is a necessary ingredient of such a remedy." *Bradley v. School Bd. of City of Richmond, Va.*, 53 F.R.D. 28, 42 (E.D. Va. 1971) (citation omitted). "Fees for expert witnesses' testimony likewise will be allowed as an expense of suit. It is difficult to imagine a more necessary item of proof (and source of assistance to the Court) than the considered opinion of an educational expert." *Id.* at 44.

36. *Casey*, 111 S. Ct. at 1146. See also *Bradley*, 53 F.R.D. at 42.

37. 416 U.S. 696 (1974).

38. *Id.* at 705-06.

39. *Id.* at 706 n.9, citing *Brewer v. School Bd. of City of Norfolk*, 456 F.2d 943, 951-52 (4th Cir.) (1972); *Nesbit v. Statesville City Bd. of Education*, 418 F.2d 1040, 1043 (4th Cir. 1969); *Williams v. Kimbrough*, 415 F.2d 874, 875 (5th Cir. 1969); *Rolfe v. County Bd. of Education of Lincoln County*, 391 F.2d 77, 81 (6th Cir. 1968); *Clark v. Board of Education of Little Rock*, 369 F.2d 661, 670-71 (8th Cir. 1966); *Griffin v. County School Bd. of Prince Edward County*, 363 F.2d 206 (4th Cir.) (1966); *Bell v. School Bd. of Powhatan County*, 321 F.2d 494, 500 (4th Cir. 1963).

40. See, for example, the Education Amendments of 1972, tit. VII, § 718, Pub. L. No. 92-318, 86 Stat. 369, repealed by the Education Amendments of 1978, tit. VI, § 601(b)(2), Pub. L. No. 95-561, 92 Stat. 2268. In *Swann v. Charlotte-Mecklenburg Bd. of Education*, 66 F.R.D. 483, 486 (W.D.N.C. 1975), the district court awarded \$175,000 to plaintiffs, including \$29,072.33 in expenses, which in turn (although not specified by the court) included expert witness fees.

*Missouri*,<sup>41</sup> in which the Court held that paralegal and law clerk expenses could be recovered as part of attorney's fees under Section 1988, the court of appeals had affirmed the district court's award of \$4,053,015.66 in "fees and expenses." This amount included not only the expenses at issue before the Court, but also expert witness fees.<sup>42</sup>

In voting rights cases as well, the pre-*Casey* assumption was that expert witness fees were fully recoverable by prevailing plaintiffs. The assumption was so ingrained that some defendants did not even contest motions for reimbursement of expert witness fees and expenses. Thus, in a 1988 unreported order on plaintiffs' motion for attorney's fees and expenses in *Major v. Treen*,<sup>43</sup> a Louisiana reapportionment case, the district court noted that the State of Louisiana did not initially dispute \$27,581.49 the plaintiffs had requested for expert and professional services; the State in fact had stipulated to at least \$18,256.49 of that amount.<sup>44</sup>

In *Casey* Justice Scalia denied the significance of the prior practice of awarding expert fees and, instead, adopted the formalistic methodology of simply comparing the language of Section 1988 with that of other fee-shifting statutes. The fact that some of these statutes explicitly referred to expert fees, while Section 1988 did not, was sufficient to carry the day under a "plain meaning" approach. But we believe that a more thoughtful analysis would understand the linguistic variations in a different manner.

Justice Scalia failed to offer any reason why Congress would treat civil rights plaintiffs differently from other successful litigants with respect to expert witness fees recovery. Perhaps, this failure is best explained by the difficulty of coming up with a convincing—or even plausible—basis for such a distinction. Congress has specifically provided civil rights plaintiffs with the ability to recover attorney's fees to vindicate rights that have special societal importance. Why, then, would it single out civil rights plaintiffs and deny them expert witness fee recovery while allowing such recovery by plaintiffs in antitrust, securities, and other categories of cases? Given courts' pre-*Alyeska* practice of awarding attorney's fees and not treating expert witness fees separately, it was logical for Congress to enact ameliorative legislation that left un-

---

41. 491 U.S. 437 (1987).

42. *Jenkins by Agyei v. State of Missouri*, 838 F.2d 260, 266 (8th Cir. 1988) (rejecting Missouri's objection to reimbursement for expert witness fees).

43. No. 82-1192, unreported order (E.D. La. Sep. 16, 1988) (on file with the Authors).

44. *Id.* at 45-46. Ultimately the stipulation was withdrawn, and the court denied recovery of expert fees. *Id.* at 46. In denying the recovery, the court relied on the then-recent Fifth Circuit decision in *International Woodworkers of America v. Champion International Corp.*, 790 F.2d 1174 (5th Cir. 1986). *Champion* was the companion case to *Casey*.

touched the existing civil rights statutes with attorney's fees provisions and that was consistent with earlier provisions in not specifically enumerating expert witness fees recovery. Indeed, in drafting Section 1988, Congress mirrored the language of Title VII in an obvious attempt to follow the established tradition with respect to fees recovery. *Alyeska* did not address expert witness fees recovery, and neither did Congress in Section 1988. Had Congress done so, Section 1988 might have been interpreted as a provision for expert fees recovery under only the statutes enumerated in Section 1988 and, thus, as a departure from the pre-*Alyeska* practice of allowing expert witness fees-shifting in other civil rights cases. Why would Congress open up an area in which it saw no problem with the pre-existing statutory interpretation and judicial practice? It seems senseless for the courts to ignore or frustrate a clearly discernable statutory scheme and purpose simply because Congress, for context-specific or idiosyncratic reasons, has adopted varying linguistic formulas in related statutes in other areas of law. The principle of judicial deference surely does not dictate such a result.

In sum, the Court's opinion in *Casey* is subject to both a "vertical" critique (that it ignores the easy-to-read history of Section 1988) and a "horizontal" critique (that it is simply not plausible that Congress would award expert fees in other areas of the law but intentionally deny them in civil rights cases covered by Section 1988). Congress has persistently pursued the policy of ensuring that plaintiffs are able to recover the cost of maintaining successful civil rights actions. The accomplishment of this rather straightforward goal has been made difficult by the Supreme Court, which has thrice created incoherence in the set of legal norms and remedies. *Alyeska* threatened civil rights enforcement by knocking out fee awards in cases brought under the Constitution or federal statutes not expressly providing for fee shifting. Congress quickly acted to restore coherence by enacting Section 1988. Under Section 1988, courts returned to the pre-*Alyeska* practice of awarding both attorney and expert fees in civil rights cases. Then in *Crawford Fitting* the Court limited recovery of expert costs to \$30 per day (now \$40), forcing successful plaintiffs to request expert fees as part of attorney's fee awards authorized under Section 1988. *Casey* put a stop to this practice, for the third time disrupting civil rights enforcement efforts. Again, Congress acted quickly to return to a coherent fee-shifting policy, overturning some of the effects of *Casey* in the Civil Rights Act of 1991.<sup>45</sup> Advocates of "plain meaning" may feel vindicated by Congress's actions: the interpretive strategy lodges law-making

---

45. Civil Rights Act of 1991, § 113, Pub. L. No. 102- 166, 105 Stat. 1071.

power in Congress, not the courts,<sup>46</sup> and any judicial "errors" may be corrected quickly. But there are substantial costs to court-induced incoherence. Legislative "corrections" do not come easily. Indeed, civil rights groups were able to overturn *Casey* only for employment discrimination cases. Moreover, even when legislative action is accomplished, it requires the spending of political capital that otherwise could be invested elsewhere. While the wheels of Congress turn, civil rights enforcement suffers. All this from a theory of interpretation justified on the ground of legislative supremacy!

### III. ANTI-ANTI-ANTI PLAIN MEANING AND THE NORM OF DUE PROCESS OF STATUTORY INTERPRETATION

We will not review here a number of the traditional defenses of a "plain meaning" approach, nor will we address the usual parries of the critics of literalism.<sup>47</sup> The preceding section, however, provides interesting data on one of the strongest modern defenses of "plain meaning" (and one pressed particularly strenuously by Justice Scalia)—that a literal interpretation avoids reliance on manufactured and manipulated legislative history.<sup>48</sup> We believe that we have told a coherent and credible story of the history of Section 1988 that supports awards of expert witness fees to prevailing civil rights plaintiffs. That story can be told *without recourse* to committee hearings or reports or statements made on the floor of the House or Senate. The evidence we have examined—prior statutes and judicial practice under those statutes—is hardly "manipulable" in the sense complained about by Justice Scalia. We believe such instances of positive law may permissibly be consulted in trying to make sense of a legal text that must take its place among the other legal texts that constitute our legal system (and our system of protecting civil rights).

Professor Frederick Schauer recently has offered a defense of "plain meaning" that focuses not on faults in the legislative process but rather on the decisionmaking process of the Court. "The reliance on plain meaning," Schauer suggests, "substitutes a second-best coordinating solution for a theoretically optimizing but likely self-defeating

---

46. See *Casey*, 111 S. Ct. at 1148.

47. Contrast Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533 (1983), Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 Duke L. J. 371, and Quintin Johnstone, *An Evaluation of the Rules of Statutory Interpretation*, 3 U. Kan. L. Rev. 1 (1954), with John M. Kernochan, *Statutory Interpretation: An Outline of Method*, 3 Dalhousie L. J. 333 (1976) and Julius Cohen, *Judicial "Legisputation" and the Dimensions of Legislative Meaning*, 36 Ind. L. J. 414 (1961).

48. Such concern is not simply the province of the "plain meaning" crowd. See, for example, Eskridge, 37 UCLA L. Rev. at 684-88 (cited in note 5).

search for first-best solutions by multiple decisionmakers with different goals and different perspectives.”<sup>49</sup> Why might the justices settle for second-best? Because statutory cases are hard and boring: to get inside a statutory scheme requires a “context-sensitive expertise” that the Court is unlikely to be interested in developing. (“Context,” Schauer remarks, “is not for dabblers.”)<sup>50</sup> Thus,

If we take as a given the relative unwillingness of the Justices to get totally involved in the detailed ramifications of the cases involved, or take as an alternative given the likelihood that were they to do so a great deal of disagreement would result, then the reliance on plain meaning may be a hardly novel suboptimizing second-best solution, a way in which people with potentially divergent views and potentially different understandings of what the context would require may still be able to agree about what the language they all share requires.<sup>51</sup>

Schauer appropriately concedes that this defense of “plain meaning” requires that the justices be seeking agreement on a methodology. He posits that it is at least plausible that the justices are “people who both want to agree in fact and want to be seen as people who agree with some frequency.”<sup>52</sup> But Schauer carefully hedges his analysis. He suggests only that *if* we focus our attention on the question of what an appropriate decision process for a fractured multi-member body might be, “then the admitted limitations of plain meaning need no longer be considered dispositive.”<sup>53</sup> This is hardly ringing support for “plain meaning,” but it does raise a set of issues that opponents of “plain meaning” have largely ignored.

Nevertheless, we find Schauer’s analysis unsatisfying. First, how persuasive is the underlying descriptive claim that appears in Schauer’s essay and much of the recent scholarship—that “plain meaning” is beginning to dominate the Court’s statutory cases? While we have not done a full-blown statistical analysis, casual empiricism supports the claim that “plain meaning” language is showing up more in the Court’s work. But what one should make of this is far from clear. We believe that it means much less than most commentators think it means. That is, only for certain justices will a “plain meaning” approach fully cut off analysis of statutory structure or purpose. In most cases, “plain meaning” is fully consistent with—indeed, indicates acceptance of—a purpose approach. Let us explain this mildly paradoxical assertion.

Schauer is no doubt correct that there is a high degree of certainty about the meaning of most speech acts. We *do* regularly communicate with fair precision. It would be surprising were it otherwise. Human

---

49. Schauer, 1990 S. Ct. Rev. at 232 (cited in note 5).

50. *Id.* at 253.

51. *Id.* at 254.

52. *Id.* at 255.

53. *Id.* at 256.

beings are clever enough to create language systems that allow each of us to let others of us know what is on our minds. We use that metaphor ("on our minds") intentionally here. Language is largely instrumental (and statutory language is decidedly so), and it would be curious if our language was not up to the task of rather clearly expressing what we intend to say.

The import of these rather banal observations is that when Congress wants to accomplish something badly enough to pass a statute about it, Congress quite likely will seek and be able to find words that rather clearly express what it wishes to accomplish. That is, "plain meaning" is more than likely to reflect fairly closely the underlying purposes of the statute. Why would Congress write statutes any other way?<sup>54</sup> This commonsensical claim is reflected in the Court's near-canonical statement: "[W]e assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.'"<sup>55</sup> This statement is sensible but not for the reason assigned to it by "plain meaning" advocates— that such a presumption must be made in order to maintain legislative supremacy and a theory of positive law. It is sensible because rational people interested in ordering others about are likely to choose language that brings with it a high degree of probability that their orders will be understood as intended.

What this means is that a theory of interpretation fully dedicated to carrying out the underlying purposes of a statute would be foolhardy to ignore "plain meaning." But "plain meaning" would yield to a purposive analysis when contrary statutory purposes can be identified. This rendering of a purpose approach, interestingly enough, is exactly what Schauer purports to have discovered in the Court's recent statutory cases: frequent appeal to "plain meaning" and "presumptive" weight attached to such meaning. The real test of whether "plain meaning" has come to dominate the Court, therefore, is not the number of times the phrase appears in the Court's opinions, but rather the number of times "plain meaning" is *dispositive* in the face of identifiable opposing purposes.

From this perspective, the cases upon which Schauer relies may be seen in dramatically different light. For, despite frequent invocations of the "plain meaning" canon, in *none* of these cases does the Court rely

---

54. Of course, Congress sometimes may have reasons for writing less than pellucid prose: ambiguous language may permit opposing interests to claim victory, and hard-to-follow texts may hide private-regarding pay-offs.

55. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)). See also *Caminetti v. United States*, 242 U.S. 470, 490 (1917) (stating that "when words are free from doubt they must be taken as the final expression of the legislative intent").

on plain meaning in the face of statutory purposes that point in an opposite direction. Typically, the “plain meaning” reading is shown to conform to underlying statutory purposes discoverable in the overall statutory structure,<sup>56</sup> legislative history,<sup>57</sup> or broader policies.<sup>58</sup> What is missing from the bulk of the cases is the “opacity” that Schauer purports to find.<sup>59</sup> Statutory language may not be fully “transparent to” underlying purposes and policy concerns in the sense that the text simply serves as a window, noticed only for what it frames; but certainly the cases, carefully read, demonstrate a great deal of translucency—a text illuminated by background purposes and policies. Thus, Schauer’s conclusion that “plain meaning appears now for all of the justices to be a strong factor in their decisionmaking”<sup>60</sup> is only the beginning of the analysis. Indeed, to state, as Schauer does, that “plain meaning” is a “presumptive factor” is implicitly to recognize the role that other factors— here, primarily statutory purpose—continue to play.<sup>61</sup> We are all Hart and Sacksians after all, it seems.<sup>62</sup>

---

56. See, for example, *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 157 (1989) (noting that in interpreting the Freedom of Information Act, the Court has sought a “workable balance between the interests of the public in greater access to information and the needs of the Government to protect certain kinds of information from disclosure”); *Hughey v. United States*, 495 U.S. 411 (1990); *Sullivan v. Strop*, 110 S. Ct. 2499 (1990); *Sullivan v. Zebley*, 493 U.S. 521 (1990).

57. See, for example, *California v. American Stores Co.*, 495 U.S. 271 (1990); *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 110 S. Ct. 1570, 1575 (1990) (holding that, “in light of the plain language and the absence of legislative intent to the contrary,” postjudgment interest runs from the date of entry of the judgment).

58. See, for example, *Venegas v. Mitchell*, 495 U.S. 82 (1990) (a § 1988 case!); *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820 (1990); *Hughey v. United States*, 495 U.S. 411 (1990) (employing the general policy reflected in the rule of lenity); *Guidry v. Sheet Metal Workers Nat’l Pension Fund*, 493 U.S. 365 (1990). Although in *Guidry* the Court rejects an interpretation that seems naturally just, it does so not on the basis simply of plain meaning, but on basis that the provision at issue “reflects a considered congressional policy choice” and other policy considerations. *Id.* at 376.

59. Schauer, 1990 S. Ct. Rev. at 237 (cited in note 5).

60. *Id.* at 249.

61. *Id.* (emphasis added). This is not to say that some true plain meaning cases cannot be found. See, for example, *United States v. Locke*, 471 U.S. 84 (1985). But the universal criticism of *Locke* demonstrates that it is the plain meaning exception that proves the purpose rule. See, for example, Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 Case W. Res. L. Rev. 179, 204-05 (1987).

62. See William N. Eskridge, Jr. and Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 Mich. L. Rev. 707, 726-37 (1991).

The interpretive strategy, found in some of the cases, that comes closest to a pure plain meaning approach focuses on how the bit of text at issue fits with other provisions and phrases in the statute as a whole. This kind of reading, which seeks internal coherence within the statute, may occur with little or no recourse to “purpose” discussion. See, for example, *Department of Treasury, IRS v. Federal Labor Relations Authority*, 494 U.S. 922 (1990). Of course, what is happening in these cases is that the Court can find no reason in the structure of the statute to disregard the statute’s “plain meaning”—again, an implicit recognition that “plain meaning” is simply the first step, and not the goal, of statutory interpretation.



Now, as to Schauer's normative musings. As an initial matter, there is something quite curious about a theory of interpretation prescriptively grounded in the desire to avoid work.<sup>63</sup> And given the number of clerks and briefs available to the Court, it seems that a Justice can rather quickly "get up to speed" on a difficult statute. There is also no reason why individual justices might not specialize in particular areas of the law and be delegated the responsibility for writing the opinions of the Court in cases arising in such areas.

Furthermore, it is far from clear to us that the Court either seeks or needs to seek agreement on methodological questions. (What, after all, is a dissent for?) The Court is not a football team that needs to get its signals straight in order to compete effectively, nor is it a set of negotiators who all must agree on a result before a deal can be consummated. Even if the Court did seek agreement—in the context of complex or boring cases—it might just as well say to the Justice unlucky enough to be assigned a statutory opinion: "Go discover the purposes and do the best you can. We'll sign on. (And, besides, if we get it wrong there are always the law reviews, not to mention Congress, standing ready to correct us.)"<sup>64</sup>

It is also apparent that the "boring and hard" justification for a "plain meaning" approach to statutes is wildly over-inclusive. Many of the statutory cases decided by the Court fall well within its areas of expertise.<sup>65</sup> Interestingly enough, *Pavelic & LeFlore v. Marvel Entertainment Group*<sup>66</sup> (Schauer's show case) concerned interpretation of

---

63. Compare this theory with Justice Scalia's comments in *Pauley v. BethEnergy Mines, Inc.*, 111 S. Ct. 2524 (1991) (Scalia dissenting), discussing the deference owed to an agency's interpretation of a statute under *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984):

Deference is appropriate where the relevant language, carefully considered, can yield more than one reasonable interpretation, not where discerning the only possible interpretation requires a taxing inquiry. *Chevron* is a recognition that the ambiguities in statutes are to be resolved by the agencies charged with implementing them, not a declaration that, when statutory construction becomes difficult, we will throw up our hands and let regulatory agencies do it for us.

111 S. Ct. at 2539.

64. If there is agreement on a "plain meaning" methodology, it may be based on motivations different from those identified by Schauer. Thus, "liberal" Justices may seek to maintain the dominant position of (a Democratic) Congress (as against "conservative" courts); "conservative" Justices may seek to limit judicial activism and discipline Congress. On the whole, however, we agree with Schauer that the choice for a theory of interpretation probably is not linked in any strong way with these kinds of political considerations.

65. For example, cases involving interpretations of rules of procedure certainly fall within the Court's expertise as do several of the cases cited by Schauer. See, for example, *Bonjorno*, 110 S. Ct. 1570 (involving calculation of postjudgment interest); *Venegas*, 495 U.S. 82 (interpreting 42 U.S.C. § 1988); *Hughey*, 495 U.S. 411 (determining restitution under the Victim and Witness Protection Act).

66. 493 U.S. 120 (1989).

Rule 11 of the Federal Rules of Civil Procedure. So too, the issue in *Casey*—what kind of fees and costs should be awarded to prevailing parties—traditionally has been a judicial question, turning on court-created rules of equity. Furthermore, the Court frequently has found itself excited about statutory cases. The Civil Rights Act of 1991<sup>67</sup> was a direct response to a number of Supreme Court cases interpreting anti-discrimination statutes to which the Court appeared to have devoted an enormous amount of energy and thought.<sup>68</sup> Interestingly, these cases involved issues in which the courts have substantial expertise,<sup>69</sup> and in only one was the “plain meaning” of the statutory language given much weight.<sup>70</sup>

Thus, as a *descriptive* matter, it may be that the Court applies “plain meaning” in complex, unfamiliar statutory realms (although our review of the cases above suggests that even this claim is harder to sustain than one might suppose). But the *normative* defense suggested by Schauer is hardly strong enough to sustain any such practice across the board in statutory cases.

Finally, we are deeply troubled by a defense of a theory of statutory interpretation that pays so little attention to the way in which statutes function, and ought to function, in our legal system. Statutes are purposive, instrumental acts, crafted (usually<sup>71</sup>) to have an impact on the real world. To be sure, not all the intended effects of legislation may be “wealth maximizing.” Power, greed, ignorance, and mistake may produce “bad” legislation, and theories of interpretation sensibly may seek to appeal to other purposes of statutes.<sup>72</sup> But to say this is hardly to deny that interpreters (or more appropriately: appliers) of a statute ought to be unconcerned with the legislation’s real-world effects.

---

67. Pub. L. No. 102-166, 105 Stat. 1071 (1991).

68. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion).

69. For example, *Wards Cove*, 490 U.S. 642 (determining the appropriate standard and burden of proof in Title VII cases); *Martin*, 490 U.S. 755 (setting the standards for re-opening court-sanctioned settlements of civil rights actions); *Lorance*, 490 U.S. 900 (interpreting Title VII’s statute of limitations).

70. *Patterson*, interpreting 42 U.S.C. § 1981, was the only case in which the Court purported to adopt the plain meaning of the statutory language. It seems clear, however, that statutory policies—particularly the relationship of § 1981 to Title VII of the 1964 Civil Rights Act—played an important role in the decision of the Court. 491 U.S., at 180-82.

71. Arguably some statutes are intended simply to have a “symbolic” effect. See, for example, Murray J. Edelman, *The Symbolic Uses of Politics* (U. Ill., 1964); Kitty Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime*, 24 Law & Soc. Rev. 1041 (1990).

72. See, for example, Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest-Group Model*, 86 Colum. L. Rev. 223 (1986); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 Stan. L. Rev. 29 (1985).

Certainly the Congress that drafted the statute was intensely concerned about such issues. Why should those who actually bring the statute to bear on society not be similarly concerned?

For us, two considerations follow. First, we propose a meta-canon of construction that requires courts to identify some plausible purpose (or purposes) consistent with their reading of the statutory language. We call this constraint "due process of statutory interpretation." Second, we believe that an evaluation of consequences ought to carry interpretive weight. We will discuss each in turn.

Just as courts considering the constitutionality of a legislative enactment assure themselves that the act passes a rational basis test, so too courts ought to assure themselves that their statutory interpretation (which itself constitutes law-making) is also supported by a rational basis. A conscientious judge, we believe, would ask him or herself: "Is my tentative reading of the statute consistent with a purpose that makes sense within our legal system?" This is *not* the same as adopting a purpose approach. The inquiry is not, what purpose does this piece of legislation attempt to further, nor is it how one interpretation or another would serve or frustrate those purposes. Rather, the question is whether a plausible purpose can be ascribed to the judge's reading of the statute (whether or not that purpose can be identified as having motivated the statute's enactment).<sup>73</sup>

Plausibility would not be established simply by the fact that an interpreter's reading of a statutory provision makes linguistic sense. Thus, reading "no vehicles in the park" to include baby carriages is not plausible, despite the fact that the reading is "good English." As Llewellyn stated: "If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense."<sup>74</sup> Nonsense does not satisfy the constraints of due process of statutory interpretation. A court would test plausibility by looking outward from the statutory language (just as the due process requirement of a "rational basis" requires a showing that a statutory classification can be explained by reference to a permissible purpose beyond the classification itself<sup>75</sup>). Some connection must be

---

73. To give an example, take the recent criminal prosecutions for "delivery of drugs" by pregnant women to fetuses. No one claims that the purpose of the statute was to cover such conduct. Yet one could conclude that finding criminal liability is consistent with a purpose of deterring drug use and protecting fetuses. This, of course, is not to answer the question of statutory meaning; it is simply to say that such a reading would pass our due process test.

74. Llewellyn, 3 Vand. L. Rev. at 400 (cited in note 1). See also Posner, 37 Case W. Res. L. Rev. at 204, 208 (cited in note 61) (rejecting the Court's plain meaning reading of the statute in *United States v. Locke*, 471 U.S. 84 (1985), because no "rational purpose" could be ascribed to a literal interpretation of the statutory language).

75. See *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955).

made between the reading given the statutory language and other legal materials—such as statutory structure, the legal landscape—or the real world.

This is, quite clearly, a rather low level of review.<sup>76</sup> Yet what is so startling about Justice Scalia's opinion in *Casey* is its utter failure even to attempt this exercise in rational justification. Noting that his reading of Section 1988 "prevents . . . accommodation" with the provision and the corpus juris of which it is a part, Justice Scalia seems content to state that "different Congresses have chosen to treat [different fee situations] differently."<sup>77</sup> He may be correct, but the crucial question is *why might this be so?* If an interpreter cannot come up with a plausible explanation for such disparate treatment, then it seems sensible to us that the statute ought to be construed in another manner—in a way that furthers some purpose that plausibly might be ascribed to the overall statutory structure and rationally connected to the world in which it operates.<sup>78</sup>

As we have detailed above, we cannot find a good reason why expert fees should not be awarded in civil rights cases, particularly in light of the many areas in which Congress explicitly has provided for such cost shifting.<sup>79</sup> Furthermore, we have developed a coherent account of why Section 1988 might not have specifically listed witness fees as recoverable. In short, a reading of Section 1988 as permitting the award of expert witness fees (and even the omission of any specific provision from the language of the statute) serves identifiable, plausible purposes. In light of the statute's history and current legal norms the denial of such fees seems irrational.<sup>80</sup>

---

76. Even this low level of review would rule out impermissible purposes such as unconstitutional discrimination or a simple desire to harm another group. See *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973). It would also reject absurd results. See *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166 (1980). Purposes that seem at war with purposes evident elsewhere in the statute or society might also fail a rational basis scrutiny. See *Bob Jones University v. United States*, 461 U.S. 574 (1983).

77. *Casey*, 111 S. Ct. at 1148. "Chosen" here clearly is given a fictive meaning (as, perhaps is "Congress").

78. See Judge Posner's opinion in *Friedrich v. City of Chicago*, 888 F.2d 511 (7th Cir. 1989). In noting that the amendment to § 1988 was not a "compromise" (those seeking all kinds of fees did not bargain with opponents and settle on a deal of attorney's fees but not expert fees), Judge Posner implicitly rejects perhaps the only plausible reason for reading § 1988 as the Court does in *Casey*. *Id.* at 518.

79. Note that the "due process" requirement goes beyond floating a purpose over just the particular statutory provision. Thus, a court *could* conclude, based on the language of the statute alone, that a reading of § 1988 which excludes expert fee awards serves the purpose of giving some incentive to civil rights plaintiffs without overburdening the defendants. But this reading must be rejected if other evidence makes this purpose implausible.

80. Professor Daniel Farber has suggested to us that *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), may provide another example of a violation of "due process of statutory interpre-

The second glaring absence in Scalia's opinion is the lack of any discussion of the consequences of his reading of Section 1988. It is to those consequences that we now turn.

#### IV. THE COSTS OF INCOHERENCE

The development of fee-shifting law accompanied the rise of increasingly complex civil rights litigation. For decades after *Brown v. Board of Education*,<sup>81</sup> plaintiffs' efforts in the school desegregation cases focused on winning meaningful substantive relief that would take *Brown* beyond rhetoric. The federal government, through administrative proceedings brought by the Office of Civil Rights of the Department of Health, Education, and Welfare and through Justice Department lawsuits, relieved private plaintiffs in many jurisdictions from bearing the full burden of litigation. Nevertheless, when private plaintiffs did bring actions, their lawyers often worked without compensation, sometimes for years. The complexity of the desegregation cases necessitated extensive use of expert testimony<sup>82</sup> and accordingly,

---

tation." We agree. *Patterson*, too, was overturned by the 1991 Civil Rights Act.

Our due process norm is related to, but not the same as, the familiar claim that an interpreter ought to adopt a reading of a statute that fits within the prevailing "legal landscape." Llewellyn, writing in a decidedly Hart-and-Sacksian mode, put it this way:

[A] court must strive to make sense *as a whole* out of our law *as a whole*. It must . . . take the music of any statute as written by the legislature; it must take the text of the play as written by the legislature. But there are many ways to play that music, to play that play, and a court's duty is to play it well, and in harmony with the other music of the legal system. . . . If a statute is to be merged into a going system of law, moreover, the court must do the merging, and must in so doing take account of the policy of the statute—or else substitute its own version of such policy. Creative reshaping of the net result is thus inevitable.

Llewellyn, 3 Vand. L. Rev. at 399-40 (cited in note 1).

To some, this is an inappropriate norm because it is, in their view, likely to be impossible to meet, or, in any event, it licenses too much judicial discretion. Both objections flow from a description of our legal system as embodying a plethora of competing and conflicting norms. (This, indeed, is the point behind the "thrust but parry" list.) We agree with Llewellyn's position—so does Justice Scalia! (at least where the words are ambiguous, see *Casey*, 111 S. Ct. at 114)—but we will not make that case here.

81. 347 U.S. 483 (1954).

82. Prior to the Supreme Court's decision in *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1 (1971), experts played a more limited role in school desegregation cases. Most desegregation plans were relatively simplistic and ineffective. They employed "freedom of choice" plans of the kind found to be constitutionally insufficient in *Green v. County School Bd. of New Kent County*, 391 U.S. 430, 437-41 (1968) and its companion cases, *Raney v. Board of Education*, 391 U.S. 433 (1968) and *Monroe v. Board of Comm'rs*, 391 U.S. 450 (1968). None of these cases contained any reference to expert witnesses, nor did any of the major Supreme Court cases decided between *Brown v. Board of Education II*, 349 U.S. 294 (1955), and *Swann*. See *Cooper v. Aaron*, 358 U.S. 1 (1958); *Goss v. Board of Education*, 373 U.S. 683 (1963); *Griffin v. County School Board*, 377 U.S. 218 (1964); *Calhoun v. Latimer*, 377 U.S. 263 (1964); *Bradley v. School Bd. of Richmond*, 382 U.S. 103 (1965); *Alexander v. Holmes County Bd. of Education*, 396 U.S. 19 (1969).

In *Swann* the Supreme Court affirmed a desegregation plan drawn by a court appointed ex-

brought significant financial pressure to bear on plaintiffs and their lawyers. Not surprisingly, fee recovery assumed great urgency.

By no means has the proliferation of expert witnesses in civil rights actions been limited to the school desegregation cases. Expert witnesses have been essential to employment discrimination cases from *Griggs v. Duke Power Co.*<sup>83</sup> through *Wards Cove Packing Co. v. Atonio*.<sup>84</sup> Today, it would be unthinkable for plaintiffs to try a voting rights case without expert witness services. Indeed, the very standards established by the

---

pert. 402 U.S. at 8-11, 25. In post-*Swann* desegregation cases it became a common and often necessary practice for plaintiffs to retain their own experts for both liability and remedial purposes. In recent years school desegregation cases have become a battle between experts. The cases exemplifying this phenomenon are too voluminous to cite, but include *Riddick v. School Bd. of City of Norfolk*, 784 F.2d 521, 526-27 (4th Cir. 1986) (referring to four experts retained by defendants and to an opposing expert); *Little Rock School District v. Pulaski County Special School District*, 778 F.2d 404, 420, 424 (8th Cir. 1985) (first referring to expert testimony regarding the interdistrict effects of boundary-line drawing and later referring to expert testimony regarding school siting decisions and numerous other issues in the case); id. at 422 (referring to the plaintiffs' expert testimony regarding the racial effects of the Educable Mentally Retarded classification); id. at 428, n.16 (referring to the plaintiffs' expert witness testimony regarding interdistrict segregation effects of various discriminatory acts); id. at 432 (referring to plaintiff-intervenors' expert testimony regarding remedy); *Liddell v. State of Missouri*, 731 F.2d 1294, 1303 (8th Cir. 1984) (referring to the testimony of the defendant's expert witness and to the plaintiff's expert witness testimony regarding the remedy); *United States v. Yonkers Bd. of Education*, 624 F. Supp. 1276, 1337, 1347 (S.D.N.Y. 1985) (referring to the defendant City of Yonker's urban planning expert and to the government's urban planning expert); id. at 1347 (referring to the testimony of a HUD economist); id. at 1365 (referring to plaintiffs' housing expert and to a housing and school desegregation expert); id. at 1366 (referring to the city-defendant's urban economic expert); id. at 1393 (referring to defendant Yonkers Board of Education's statistical and sociological expert); *Jenkins by Agyei v. State of Missouri*, 807 F.2d 657, 667 n.14, 674 (8th Cir. 1986) (referring to "plaintiff's expert historian" and to plaintiff's demographic experts); id. at 678 (referring to plaintiff's expert).

The latter two cases exemplify just how complex school desegregation cases have become and the extent to which expert testimony is pivotal. The *Yonkers* opinion is 277 pages in length, a substantial portion of which is devoted to discussing expert testimony. It, like *Jenkins*, encompasses housing discrimination claims that have become crucial elements of school desegregation cases. See also *Dowell v. Oklahoma City Bd. of Ed.*, 396 U.S. 269 (1969). The plaintiffs in *Yonkers* included the government and the NAACP. Although the Justice Department ordinarily cannot recover attorney's fees in civil rights cases, its utilization of experts is instructive insofar as it reveals how essential they are and the extent of the resources necessary to litigate these actions properly.

83. 420 F.2d 1225, 1232 (4th Cir. 1970), rev'd in part, 401 U.S. 424 (1971) (referring to the defendant company's expert witness); id. at 1244 (Sobeloff dissenting in part) (referring to the plaintiff's "testing and selection" expert witness).

84. 490 U.S. 642 (1989). Neither the Supreme Court's decision in *Wards Cove* nor the Ninth Circuit's opinions below made reference to expert witnesses. See id.; 768 F.2d 1120 (9th Cir. 1985), vacated when the court agreed to rehear argument en banc, 787 F.2d 462 (9th Cir. 1985), decided at 810 F.2d 1477 (9th Cir. 1987). Yet the Supreme Court's discussion of the requisite proof in employment discrimination cases leaves no doubt that sophisticated statistical analysis of the kind requiring expert witness services is essential. Plaintiffs' counsel in *Wards Cove* confirmed that he utilized four experts at trial (two testified regarding statistical analyses and two testified regarding job qualifications) and that the defendants engaged in an even more extensive use of experts. Telephone interview with Abraham A. Arditi, attorney for plaintiffs (Jan. 7, 1992).

Supreme Court for such cases mandate that expert services be used, and judicial opinions reflect the crucial role played by expert witnesses.<sup>85</sup> Expert witness testimony (from demographers, sociologists, and economists) is also crucial in complex housing discrimination cases.<sup>86</sup> Although less common, plaintiffs increasingly use experts even in simple housing discrimination cases. Experts on the practice of testing may be helpful in establishing liability, and psychologists sometimes are used to establish the basis for damage awards.<sup>87</sup>

*Casey's* preclusion of expert witness fees recovery will have a sig-

85. See *Thornburg v. Gingles*, 478 U.S. 30, 52-58 (1986) (recounting an analysis by plaintiffs' expert, Dr. Bernard Grofman, and setting forth the standard for legally significant racial bloc voting). The district court opinion in *Gingles* included a detailed elaboration of the kinds of evidence necessary in cases brought under § 2 of the Voting Rights Act, including "historical, social and political factors generally suggested as probative of [vote] dilution." *Gingles v. Edmisten*, 590 F. Supp. 345, 354 (E.D.N.C. 1984). The district court relied upon two methods of statistical analyses that are standard in proving racially polarized voting in § 2 cases: "extreme case" analysis and "ecological regression" analysis, both performed by experts. *Id.* at 367 n.29. See also *Major v. Treen*, 574 F. Supp. 325, 338-339 (E.D. La. 1983) (relying on expert testimony to invalidate a reapportionment plan invalidated under § 2 of Voting Rights Act).

For literature on the kinds of expert analyses necessary in voting rights cases, see Richard L. Engstrom and Michael D. McDonald, *Quantitative Evidence in Vote Dilution Litigation: Political Participation and Polarized Voting*, 17 *Urban Law* 369 (1985); Bernard Grofman, et al., *The "Totality of Circumstances Test" in Section 2 of the 1982 Extension of the Voting Rights Act: A Social Science Perspective*, 7 *L. & Pol.* 199 (1985) (cited in *Gingles*, 478 U.S. at 53, n.20).

For a discussion of the role of expert historians, see Peyton McCrary and J. Gerald Hebert, *Keeping the Courts Honest: The Role of Historians as Expert Witnesses in Southern Voting Rights Cases*, 16 *S. U. L. Rev.* 101 (1989). McCrary and Hebert observed that in the 1980s historians serving as expert witnesses had a significant impact on the outcome of several federal voting rights cases. *Id.* at 101 & n.1 (citing *Bolden v. City of Mobile*, 542 F. Supp. 1050 (S.D. Ala. 1982); *Brown v. Board of School Commissioners of Mobile County*, 542 F. Supp. 1078 (S.D. Ala. 1982), *aff'd* 706 F.2d 1103 (11th Cir.), *aff'd* 464 U.S. 1005 (1983); *County Council of Sumter County v. United States*, 555 F. Supp. 694 (D.D.C. 1983); *Dillard v. Crenshaw County*, 640 F. Supp. 1347 (M.D. Ala. 1986), *aff'd in part, vacated in part, remanded* 831 F.2d 247 (11th Cir. 1987)).

86. See Robert G. Schwemm, *Housing Discrimination Law and Litigation*, § 32.3(6) at 32-13 (Clark Boardman Co., 1990) (citing *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 334-39 (7th Cir. 1974), on remand 706 F.2d 204, 208-11 (7th Cir. 1983)); *Old West End Ass'n v. Buckeye Federal Sav. & Loan*, 675 F. Supp. 1100, 1105-06 (N.D. Ohio 1987); *Huertas v. East River Housing Corp.*, 674 F. Supp. 440, 452-453 (S.D.N.Y. 1987); *In re Malone*, 592 F. Supp. 1135, 1148-52 (E.D. Mo. 1984), *aff'd without opinion*, 794 F.2d 680 (8th Cir. 1986); *United States v. City of Parma, Ohio*, 494 F. Supp. 1049, 1059-65 (N.D. Ohio 1980), *aff'd in pertinent part*, 661 F.2d 562 (6th Cir. 1981); *Zuch v. Hussey*, 394 F. Supp. 1028, 1031-33 (E.D. Mich. 1975), *aff'd without opinion*, 547 F.2d 1168 (6th Cir. 1977)).

87. Schwemm, *Housing Discrimination Law*, § 32.3(6) at 32-14, § 33.2(5) at 33-4 (cited in note 86). See also the deposition testimony of Dr. Gloria Johnson Powell in *Westside Fair Housing Company v. Westchester Investment Co.*, 721 F. Supp. 1165 (C.D. Cal. 1989) (on file in the West Coast Regional Office of the NAACP Legal Defense and Educational Fund, Inc.). "[T]esters' are individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982). In *Havens Realty*, the Supreme Court held that testers given false information about the availability of housing have standing to sue under § 804 of the Fair Housing Act, 42 U.S.C. § 3604 (1988). 455 U.S. at 373-74.

nificant effect on the financial ability of plaintiffs to bring and sustain civil rights cases and has subverted the manifest purpose of the Fees Act. Small firms or solo practitioners cannot contemplate litigation in which, even if successful, they must absorb five- or six-figure sums expended on expert witness testimony necessary for their success. The most well-off public interest law firms may be able to advance tens of thousands of dollars without hope of recovery in one or two cases, but they cannot sustain such losses in several or many cases without compromising their financial integrity or curtailing the number or kind of cases they file.<sup>88</sup> Judges, and certainly justices on the Supreme Court, know this, given their role in devising and implementing the substantive standards governing interpretation of civil rights statutes as well as their familiarity with market conditions gained through deciding fees litigation. *Casey* then is an example of either judicial callousness or intellectual sophistry. It elevates a concern for legislative fastidiousness over the effectuation of the plain purpose of the Fees Act. That purpose is inherent in the very nature of a fee-shifting statute: it *must* be intended to shield specified classes of plaintiffs from bearing the expenses of vindicating certain rights so that it is possible for them to do so.<sup>89</sup>

Since *Casey* that purpose has been frustrated.<sup>90</sup> In *Jeffers v. Clin-*

---

88. Telephone Interview with Steve Ralston of the NAACP Legal Defense and Educational Fund, Inc. (January 10, 1992).

89. We do not rest our analysis on the legislative history of the Fees Act, which Justice Scalia refused to consider in *Casey*. One need not consult the legislative history of the Fees Act to ascertain that its manifest purpose—the facilitation of plaintiffs' ability to vindicate their rights—is subverted by *Casey*.

However, when the legislative history strongly supports the plain purpose (i.e., that purpose without which the statute is rendered nonsensical), it makes no sense to ignore that history. Stated differently, when the statute is rendered meaningless if a given purpose is not ascribed to it, and the legislative history reflects that purpose, nothing should compel a court to ignore that history. The issue of judicial restraint is not raised, as it might be where congressional purpose is murky and the legislative history contains two strongly competing views regarding the matter subject to interpretation.

The Senate Report accompanying the Fees Act reflects unrelated congressional intent that the vindication of civil rights should not depend on the ability of a private citizen to afford a lawyer:

[C]ivil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.

In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

Civil Rights Attorney's Fees Awards Act, S. Rep. No. 94- 1011, 94th Cong., 2d. Sess. 2 (1976).

90. The losses began to mount even prior to *Casey*. See *Martin v. Mabus*, 734 F. Supp. 1216, 1224-24 (S.D. Miss. 1990) (denying the plaintiffs \$78,395.57 in expert witness fees and limiting them to \$30 per day, totaling \$4,779.27). See also notes 43-44 and accompanying text (regarding *Major v. Treen*).



ton,<sup>91</sup> for example, African-American plaintiffs successfully brought a statewide suit against the Arkansas Board of Apportionment under Section 2 of the Voting Rights Act of 1965.<sup>92</sup> The district court's opinion identified the standard of proof the Supreme Court established in Section 2 cases<sup>93</sup> and explicitly relied on plaintiffs' experts' testimony in determining that the requisite standard of proof was met.<sup>94</sup> In a subsequent decision on the plaintiffs' application for fees and expenses, the district court acknowledged that "[t]his mammoth case could not have been undertaken without the Legal Defense Fund's lawyers and resources,"<sup>95</sup> thus reflecting the difficulty solo or small practitioners have in financing such litigation. Yet, relying on *Casey*, the court denied plaintiffs' request for \$86,820 in expert witness fees and expenses<sup>96</sup> and reimbursed plaintiffs, at the \$40 per day rate prescribed by 28 U.S.C. Section 1821, in the amount of \$2,236.<sup>97</sup> Consequently, to vindicate their clients' civil and constitutional rights successfully, the plaintiffs' attorneys had to expend \$84,584 of their own money without recovery. It is unlikely that antitrust, securities, or commercial litigation lawyers would provide representation under similar circumstances.

---

*Casey's* effects defy precise measurement for two reasons. First, public interest organizations with greater resources may not feel the effects of *Casey* as immediately as a small firm or solo practitioners, who might instantly be driven out of civil rights practice or even into bankruptcy by having to absorb tens of thousands of dollars. The public interest organization may be able to litigate several cases before it changes its litigation docket. Second, it is difficult to quantify accurately the number of cases not filed following the *Casey* decision because of the classic problem of proving a negative—they do not show up. The best one can do is to gather anecdotal accounts of unfiled cases that would have incurred substantial expert witness fees and expenses.

91. 730 F. Supp. 196 (E.D. Ark. 1989), *aff'd* 111 S. Ct. 662 (1991). The district court's opinion is dated December 4, 1989. A first dissenting opinion by Judge Eisele was dated three days later, and a second concurring and dissenting opinion by Judge Eisele was dated January 26, 1990.

92. *Id.* at 217.

93. *Id.* at 205, citing *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). Plaintiffs are required 1) to establish that the minority group challenging the election scheme is sufficiently large and geographically compact enough to constitute a majority in a single member district; 2) to show that the minority group is politically cohesive; and 3) to show that the majority votes sufficiently as a bloc to usually defeat the minority group's preferred candidate. *Id.*

94. *Id.* (finding "that black communities in the areas of the State challenged by plaintiffs are sufficiently large and geographically compact to constitute a majority in single-member districts" and relying heavily on the plaintiffs' expert's testimony); *id.* at 206-07 (reproducing the maps drawn by the expert for alternative House and Senate districts); *id.* at 208-09 (crediting and relying upon the single regression, double regression, and homogeneous-precinct analyses of another expert for the plaintiff).

95. 776 F. Supp. 465, 469 (E.D. Ark. 1991). The court further noted that two other public interest organizations, Eastern Arkansas Legal Services and the Lawyers' Committee for Civil Rights, "refused to handle the case because of its difficulty and broad scope." *Id.* at 473.

96. *Id.* at 474 Appendix A. \$82,882 of the amount denied had been advanced by the NAACP Legal Defense Fund, while \$3,938 was submitted directly to the court by one of the plaintiffs' experts. *Id.* at 475, 476 Appendix A.

97. *Id.* at 474.

Although *Casey* does not affect a civil rights plaintiff's ability to win meaningful substantive relief in a case in which expert witness fees are denied, the decision's impact is felt by the attorneys whose resources have been depleted by the amount of expert witness fees they have had to absorb. That amount is, in effect, subtracted from whatever attorney's fees they can recover pursuant to the Fees Act or other statutory authorization, thus making a civil rights case a more risky and less attractive venture. Similarly, civil rights organizations must absorb the amount expended on expert witnesses through their general budget. Of course whatever amount is spent on expert witnesses is not available to litigate the next case.<sup>98</sup>

There is already troubling evidence that *Casey* has had precisely this effect. In *Garza v. Los Angeles County Board of Supervisors*,<sup>99</sup> the Mexican American Legal Defense Fund (MALDEF) won a major victory under the Voting Rights Act, paving the way for the election of the first Latino supervisor to the Board. The complex case demanded substantial preparatory and testimonial assistance from experts. MALDEF's application for fees detailed \$152,942.45 in out-of-pocket expenses for experts. But *Casey*, decided just a few days after the fees application was filed, made recovery of these expenses impossible. Because MALDEF was forced to absorb the costs for experts in *Garza*, it had fewer funds available for additional litigation and found it necessary to declare a moratorium on the filing of new litigation for the remaining quarter of its 1991-92 fiscal year. According to E. Richard Larson, Deputy Director of MALDEF, "[h]ad we been able to recover our \$152,942.45 in expert fees in *Garza*, we probably would not have imposed the moratorium on new litigation."<sup>100</sup>

One can ascribe one of two motives to the Court's reasoning in *Casey*. The Court may be engaging in a roving exercise to ensure statutory aestheticism in which it turns up its nose at the sausage-making nature of the political process and insists on filet, or it may be acting out, under cloak of "judicial restraint," its hostility to civil rights plain-

---

98. Of its annual \$1.2 million litigation budget, the NAACP Legal Defense Fund spends an average of \$200,000 per year on expert witness services. Its deputy director counsel has stated that "everything we do is expert witness driven" and that "in recent years LDF has lost many cooperating attorneys because they were unable to carry the expenses in civil rights cases, of which expert witness fees are a significant proportion." Telephone Interview with Clyde Murphy, Deputy Director Counsel for the NAACP LDF (Jan. 10, 1992).

99. 756 F. Supp. 1298 (C.D. Cal.), aff'd 918 F.2d 763 (9th Cir. 1990).

100. Letter from E. Richard Larson to Theodore M. Shaw (January 14, 1992) (on file with the Authors). Larson further noted: "We currently have many cases in the pipeline—mostly redistricting cases—in which we have had to expend substantial sums in expert fees. Our inability to recover these expert fees also will have a significantly adverse effect on our ability to pursue new litigation."

tiffs and their lawyers. The former fails to consider and respect the inherent nature of the operative processes by which a coordinate branch of the federal government reaches its decisions; the latter should be beneath the dignity of the Supreme Court. Neither is acceptable.

In the end, it is a question of responsibility. "Plain meaning" allows interpreters to deny responsibility, to deny their inevitable law-making roles, to deny—as Llewellyn put it—their "continuing duty . . . to make sense, under and within the law."<sup>101</sup>

Forty years ago Llewellyn contrasted "Grand" and "Formal" styles of statutory interpretation.<sup>102</sup> In the Grand Style "statutes were construed 'freely' to implement their purpose, the court commonly accepting the legislature's choice of policy and setting to work to implement it."<sup>103</sup> In the Formal Style, however, "statutes tended to be limited or even eviscerated by wooden and literal reading, in a sort of long-drawn battle between a balky, stiff-necked, wrong-headed court and a legislature which had only words with which to drive that court."<sup>104</sup> In 1950 Llewellyn could report that "the courts have regained, in the main, a cheerful acceptance of legislative choice of policy," although adjudicators still were "hampered to some extent" by Formalist doctrine carried forth from earlier days.<sup>105</sup> Oh, what would he think about *Casey*!

## V. EPILOGUE

Section 1988 received further Supreme Court scrutiny in 1991. In *Kay v. Ehrler*,<sup>106</sup> the Court ruled that Section 1988 did not authorize the award of fees to an attorney who had represented himself in a civil rights action that successfully challenged a Kentucky election law. Justice Stevens, writing for a unanimous Court, concluded that permitting an award of attorney's fees to a pro se litigant would "create a disincentive to employ counsel whenever such a plaintiff considered himself competent to litigate on his own behalf."<sup>107</sup> The statute's purpose of facilitating the litigation of meritorious claims, Stevens observed, would be "better served by a rule that creates an incentive to retain counsel in every such case."<sup>108</sup>

---

101. Llewellyn, 3 Vand. L. Rev. at 399 (cited in note 1).

102. *Id.* at 400.

103. *Id.*

104. *Id.*

105. *Id.*

106. 111 S. Ct. 1435 (1991).

107. *Id.* at 1438.

108. *Id.*

Whether or not one agrees with Stevens' reasoning,<sup>109</sup> we salute his inquiry into the policy of the statute. We find remarkable, however, Justice Scalia's silence in the case. Under a "plain meaning" approach, attorney Kay would seem to have a good case under Section 1988. The statute—which Stevens does not quote—provides that a court "may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."<sup>110</sup> Mr. Kay not only *acted* as an attorney; he is in fact a member of the bar. Indeed, as Justice Stevens acknowledged, "Kay competently fulfilled his professional duties in the case."<sup>111</sup> Why, under a literal reading of the statutory text, should he not be compensated for the time he spent successfully lawyering?<sup>112</sup>

What unites Scalia's views in *Kay* and *Casey*, then, cannot be simple fidelity to "plain meaning." Rather, it appears to be a disinclination to award attorney's fees to successful civil rights plaintiffs. Justice Scalia thus has failed to learn the lesson he seeks to teach others—that a primary defense of a "plain meaning" approach is its ability to limit the discretion of judges by keeping them to the solemn words of the text. We can conclude only that for Justice Scalia some texts and some statutory purposes are more sacred than others.

---

109. We have our doubts. Why isn't the requirement of success in the litigation enough of a screen to ensure the bringing only of meritorious cases?

110. 42 U.S.C. § 1988 (1988).

111. *Kay*, 111 S. Ct. at 1437.

112. Arguably, the statute requires an actual fee owed by the litigant to an attorney, just as it awards "costs" to the prevailing party. But surely attorney Kay could bill himself for his services; indeed, he incurred clear opportunity costs by taking his own case.

