NOTE: CITY OF CHICAGO V. ENVIRONMENTAL DEFENSE FUND: JUSTICE SCALIA'S EVOLUTION OF THE PLAIN MEANING APPROACH AS APPLIED TO RCRA'S HOUSEHOLD EXEMPTION

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Text

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"Statutes are the federal courts' daily bread. The way in which courts go about reading those statutes in the federal system is therefore of particular importance to our jurisprudence." [1]

"The task of statutory interpretation is complicated, and so are the regulations imposed by RCRA. Communities . . . who labor under these provisions every day, deserve to know exactly what the law requires." [2]

I. INTRODUCTION

"This country faces a solid waste disposal crisis of national proportions." [3] In 1988, the year in which the Environmental Defense Fund (EDF) initiated action against the city of Chicago, the United States generated approximately 180 million tons of municipal solid waste. [4] That number is expected to grow to 216 million tons by the year 2000. [5] "This growing volume of waste is coupled with a steadily decreasing availability of disposal capaci **[*116]** ty." [6] Most of this solid waste is disposed of in already overcrowded landfills. [7]

"Alternatives to existing methods of land disposal must be developed since many of the cities of the United States" are running out of disposal sites. [8] In recognizing this need for alternatives, Congress considered resource recovery facilities as a feasible solution. [9] Such facilities recover energy and materials from waste in an effort to reduce the amount which must be deposited

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[1] Kenneth W. Starr, Observations About the Use of Legislative History, 1987 Duke L.J. 371 (1987).

[2] Hillary A. Sale, Note, Trash, Ash, and Interpretation of RCRA, 17 Harv. Envtl. L. Rev. 409, 444 (1993).

[3] Brief of the Petitioners at 3, City of Chicago v. Environmental Defense Fund, 114 S. Ct. 1588 (1994) (No. 92-1639).

[4] Solid Waste Facility Criteria, 56 Fed. Reg. 50,978, 50,980 (1991) (to be codified at 40 C.F.R. sections 257, 258).

[5] Id.

[6] Id. In response to the problem, the Environmental Protection Agency (EPA) developed a strategy of "integrated waste management with three national goals: (1) increase source reduction and recycling; (2) increase storage capacity and improve secondary material markets; and, (3) improve the safety of solid waste management facilities." Id.

[7] 42 U.S.C. section 6901(b)(1) (1988 & Supp. V 1993).

[8] Id. section 6901(b)(8).

[9] Id. section 6941a(3) (1988).

in landfills. [10] These facilities, however, have leftover residues, such as ash, that must be discarded within the guidelines of the Resource Conservation and Recovery Act (RCRA) which governs the disposal of solid waste.

In an effort to ease the regulato ry burden on municipalities processing primarily household and residential waste, Congress exempted household waste from the stringent regulations which apply to industrial wastes. [11] In City of Chicago v. Environmental Defense Fund the Supreme Court considered whether ash from municipal resource recovery facilities is exempt under RCRA's "household waste exclusion" provision. [12]

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II. LEGISLATIVE BACKGROUND

A. RCRA

RCRA was enacted to address the problem of solid waste disposal, promote the protection of health and the environment, and conserve valuable material and energy resources. [13] RCRA was to "eliminate the last remaining loophole in environmental law" by creating a "cradle-to-grave" federal program for the management of hazardous waste. [14]

RCRA classifies waste as either "hazardous" under Subtitle C [15] or "nonhazardous" under Subtitle D. [16] The Act does not specify which waste is hazardous. Instead, Subtitle C charged the Environmental Protection Agency (EPA) with formulating a scheme for identifying hazardous waste. [17] The 1976 Act contained no provision excluding household waste from Subtitle C regulation. [18]

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[10] Id.

[11] See 42 U.S.C. section 6921(i) (1988 & Supp. V 1993). The exemption was referred to as section 3001(i) in City of Chicago v. Environmental Defense Fund, 114 S. Ct. 1588 (1994); however, when RCRA was amended the section became known as section 6921(i) and will be referred to throughout this note as section 6921(i).

[12] City of Chicago, 114 S. Ct. at 1591. The household waste exclusion of 42 U.S.C. section 6921(i) (1988) states:

(i) Clarification of household waste exclusion

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if-

(1) such facility -

(A) receives and burns only-

(i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and

(ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and

(B) does not accept hazardous wastes identified or listed under this section, and

(2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

[13] 42 U.S.C. section 6902 (1988).

[14] Brief of the Respondents at 20, City of Chicago (No. 92-1639) (citing H.R. Rep. No. 94-1491, 94th Cong., 2d Sess. 4, 5 (1976); see Chemical Waste Management v. Hunt, 112 S. Ct. 2009, 2011 n.1 (1992)).

[15] 42 U.S.C. sections 6921-6939b (1988 & Supp. V 1993).

[16] Id. sections 6941-6949a (1988).

[17] Id. section 6921(a) (1988 & Supp. V 1993). EPA was to establish standards "as may be necessary to protect human health and the environment." Pub. L. No. 94580, sections 3002-3004, 90 Stat. 2806-2808 (1976).

[18] See S. Rep. No. 988, 94th Cong., 2d Sess. 16 (1976).

B. "Waste Stream" Household Exception of 1980

In 1980 EPA established a set of guidelines identifying those solid wastes that are to be considered hazardous [19] and those that are nonhazardous. [20] In doing so, EPA created a "waste stream" exemption for household waste. [21] "The exclusion had

[*118] the effect of releasing households and municipalities from the burden of complying with the cumbersome requirements of Subtitle C." [22]

The preamble to the "waste stream" exception stated that the "residues remaining after treatment (e.g., incineration, thermal treatment) are not subject to regulation as a hazardous waste." [23] The preamble thus attempted to exempt all household waste residue from the strict regulations of Subtitle C.

C. 1983 Senate Committee Report on Environment and Public Works

In 1983 a Senate committee held hearings in an attempt to clarify the household exclusions EPA had promulgated in 1980. The committee report proposed that "all waste management activities of such a facility, including the generation, transportation, treatment, storage and disposal of waste shall be covered by the exclusion . . . ." [24] Had the committee report been adopted, it would have exempted expressly the "generation" of ash as a hazardous material.

D. 1984 Hazardous and Solid Waste Amendments

Congress did not, however, adopt EPA's 1980 preamble or the wording of the 1983 Senate committee report when it made a "Clarification of the Household Waste Exclusion." [25] Instead, broad statements regarding the "treating, storing, disposing of . . . or managing of hazardous waste" by resource recovery fa **[*119]** cilities were set forth in the statute without ever addressing ash. [26] Thus, the question remained as to whether residue is exempt under the household exclusion.

E. EPA's Interpretation of the 1984 Legislation

EPA's 1985 regulations closely tracked Congress's 1984 clarification. [27] The preamble to the 1985 EPA regulations recognized that toxic ash may be present at the resource recovery facilities regardless of the level of toxicity of incoming wastes. [28] Thus,

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[19] 45 Fed. Reg. 33,084 (1980).

[20] Id. at 33,120 (codified as amended at 40 C.F.R. section 261.4(b)(1) (1992)).

[21] Id. Household waste was defined as "any waste material (including garbage, trash and sanitary wastes in septic tanks) derived from households (including single and multiple residences, hotels and motels)." EPA limited household waste to include only that household waste which has been "collected, transported, stored, treated, disposed, recovered . . . or reused." Id.

[22] Environmental Defense Fund, Inc. v. City of Chicago, 948 F.2d 345, 347 (7th Cir. 1991), vacated sub. nom., City of Chicago v. Environmental Defense Fund, 113 S. Ct. 486 (1992), aff'd on remand, Environmental Defense Fund, Inc. v. City of Chicago, 985 F.2d 303 (7th Cir. 1993), aff'd, City of Chicago v. Environmental Defense Fund, 114 S. Ct. 1588 (1994). "If Chicago were forced to handle the ash from the city's . . . waste-to-energy incinerator as 'hazardous' waste, disposal costs would rise by at least $ 20 million." Barry Shanoff, When is Hazwaste Not Hazwaste?, 36 World Wastes 60 (1993).

[23] 45 Fed. Reg. 33,099 (1980).

[24] S. Rep. No. 284, 98th Cong., 2d Sess. 61 (1983).

[25] See supra note 12.

[26] Id.

[27] See 40 C.F.R. section 261.4(b)(1) (1993) which states:

(b) Solid wastes which are not hazardous wastes. The following solid wastes are not hazardous wastes:

[*120] according to EPA, the 1984 amendments did not "exempt the regulation of incinerator ash from the burning of non-hazardous waste in resource recovery facilities if the ash routinely exhibits a characteristic of hazardous waste." [29] This interpretation of the 1984 amendments reversed the policy of the "waste stream" exclusions promulgated in 1980. EPA announced that it had no plans to further regulate the resource recovery facilities until "serious questions arise about the residues." [30]

In 1987 and 1988 EPA presented two conflicting interpretations of the exclusion in congressional testimony. In December 1987, J. Winston Porter, assistant administrator of EPA's Solid Waste and Emergency Response unit, testified before the Senate Subcommittee on Hazardous Waste and Toxic Substances. [31] After reexamining the legislative history of section 6921(i), he testified that EPA's 1985 interpretation was incorrect and that the ash was meant to be exempt under Subtitle C. [32]

In May, 1988, however, Sylvia K. Lowrance, director of the Office of Solid Waste, testified before the Subcommittee on Transportation and Hazardous Waste Materials. [33] Standing behind EPA's 1985 interpretation, she testified that she supported House Bill 2162 "which would provide clear authority to the EPA to regulate municipal combustor ash . . . ." [34]

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(1) Household waste, including household waste that has been collected, transported, stored, treated, disposed, recovered (e.g., refuse-derived fuel) or reused. "Household waste" means any material (including garbage, trash and sanitary wastes in septic tanks) derived from households (including single and multiple residences, hotels and motels, bunkhouses, ranger stations, crew quarters, campgrounds, picnic grounds and day-use recreation areas). A resource recovery facility managing municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subtitle, if such facility:

(i) Receives and burns only

(A) Household waste (from single and multiple dwellings, hotels, motels, and other residential sources) and

(B) Solid waste from commercial or industrial sources that does not contain hazardous waste; and

(ii) Such facility does not accept hazardous wastes and the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

Id.

[28] See 50 Fed. Reg. 28,725-26 (1985). The preamble states:

The statute is silent as to whether hazardous residues from burning combined household and non-household, non-hazardous waste are hazardous waste. These residues would be hazardous wastes under present EPA regulations if they exhibited a characteristic. The legislative history does not directly address this question although the Senate report can be read as enunciating the general policy of non-regulation of those resource recovery facilities if they carefully scrutinize their incoming wastes. On the other hand, residues from burning could, in theory, exhibit a characteristic of hazardous waste even if no hazardous wastes are burned, for example, if toxic metal became concentrated in the ash. Thus, the requirement of scrutiny of incoming wastes could not assure non-hazardousness of the residue. EPA believes that the principal purpose of section 3001(g) was to prevent resource recovery facilities that may inadvertently burn hazardous waste, despite good faith efforts to avoid such a result from becoming subject to the Subtitle C regulations. EPA does not see in this provision an intent to exempt regulation of incinerator ash from the burning of non-hazardous waste in resource recovery facilities if the ash routinely exhibits a characteristic of hazardous waste.

Id. "An ash can be hazardous, even though the product from which it is generated is not, because in the new medium the contaminants are more concentrated and more readily leachable . . . ." City of Chicago v. Environmental Defense Fund, 114 S. Ct. 1588, 1591 (1994) (citing 40 C.F.R. sections 261.3, 261.24, and pt. 261, App. II (1993)).

[29] 50 Fed. Reg. 28,726 (1985).

[30] Id.

[31] Resource Conservation and Recovery Act: Oversight, Part 2: Continuation of Hearings on H.R. 2162 Before the Subcomm. on Hazardous Wastes and Toxic Substances, 101st Cong., 1st Sess. (1989) (statement of J. Winston Porter, Asst. Administrator, Office of Solid Waste and Emergency Response, EPA).

[32] Id.

[33] Regulation of Municipal Solid Waste Incinerators: Hearings on H.R. 2162 Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce, 101st Cong., 1st Sess. (1989) (statement of Sylvia K. Lowrance, Director, Office of Solid Waste and Emergency Response, EPA).

These views exemplify EPA's confusion in enforcing the 1984 clarification. At this point, the EDF sought to enjoin the city of

[*121] Chicago from disposing of ash as if it were nonhazardous under Subtitle D. [35]

III. FACTS AND PROCEDURE BELOW

In 1988 the EDF initiated this action to prohibit Chicago from violating Subtitle C of RCRA and implementing regulations issued by EPA. [36] Since 1971 Chicago has owned and operated a municipal incinerator, the Northwest Waste-to-Energy Facility, where it has burned solid waste and generated electricity. [37] The facility burns approximately 350,000 tons of solid waste per year which is reduced to 110,000 to 140,000 tons of municipal waste combustion ash. [38] Although tests performed on ash at the facility indicated that thirty-two of thirty-five samples exhibited sufficient characteristics to qualify the ash as hazardous under Subtitle C, [39] it was conceded that the city did not manage the ash as if it were hazardous waste. [40]

In 1989 the district court ruled in favor of Chicago, holding that the "ash remaining after the incineration of household waste and non-hazardous commercial waste is exempt from regulation if the resource recovery facility satisfies the criteria of [section 6921(i)]." [41] However, the court denied both parties' motions for summary judgment and granted the EDF leave for additional discovery to determine whether the "defendants . . . have complied with the conditions needed to exempt resource recovery facilities from hazardous waste regulation when burning household and commercial waste." [42]

On appeal, after the EDF decided not to "contest the adequacy of the Northwest Facility's procedures for excluding hazardous

[*122] waste," the Seventh Circuit Court of Appeals reversed the lower court decision in 1991. [43] Giving no weight to the legislative history of the household waste exclusion, the court held "that the ash generated from the incinerators of municipal resource recovery facilities is subject to regulation as a hazardous waste under Subtitle C of RCRA." [44]

In early 1992 Chicago petitioned for a writ of certiorari. An earlier Second Circuit opinion held such ash to be exempt under the household waste exclusions of RCRA. [45] In light of this Second Circuit decision, the EDF "acknowledged the square

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[34] Id. at 33.

[35] City of Chicago v. Environmental Defense Fund, 114 S. Ct. 1588, 1589 (1994).

[36] Id.

[37] Id.

[38] Id.

[39] Brief of the Respondents at 2, City of Chicago (No. 92-1639).

[40] City of Chicago, 114 S. Ct. at 1589. As of 1988, the facility disposed of the ash at a sanitary landfill in Michigan that was not permitted to accept hazardous wastes. See Brief of the Petitioners at 7, City of Chicago (No. 92-1639).

[41] Environmental Defense Fund, Inc. v. City of Chicago, 727 F. Supp. 419, 424 (N.D. Ill. 1989), rev'd, 948 F.2d 345 (7th Cir. 1991), vacated sub. nom., City of Chicago v. Environmental Defense Fund, 113 S. Ct. 486 (1992), aff'd on remand, Environmental Defense Fund, Inc. v. City of Chicago, 985 F.2d 303 (7th Cir. 1993), aff'd, City of Chicago v. Environmental Defense Fund, 114 S. Ct. 1588 (1994).

[42] Id. at 425.

[43] Environmental D efense Fund, Inc. v. City of Chicago, 948 F.2d 345, 346 (7th Cir. 1991), vacated sub. nom., City of Chicago v. Environmental Defense Fund, 113 S. Ct. 486 (1992), aff'd on remand, Environmental Defense Fund, Inc. v. City of Chicago, 985 F.2d 303 (7th Cir. 1993), aff'd, City of Chicago v. Environmental Defense Fund, 114 S. Ct. 1588 (1994).

[44] Id. at 352.

[45] Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc., 725 F. Supp. 758 (S.D.N.Y. 1989), aff'd, 931 F.2d 211 (2d Cir.), cert. denied, 112 S. Ct. 453 (1991). For a comparison of the different statutory interpretation approaches used by the Second and Seventh Circuits in Wheelabrator and City of Chicago, respectively, see Jane E. Warner, Note, The Household Waste Exclusion Clarification; 42 U.S.C. Section 6921(i): Did Congress Intend to Exclude Municipal Solid Waste Ash From Regulation as Hazardous Solid Waste Under

conflict . . . and agreed that the case presented an important question of federal law." [46] The Supreme Court invited the Solicitor General of the United States to present the government's case. [47]

On September 18, 1992, before the Solicitor General was able to respond to the invitation, the EPA Administrator issued a memorandum which set forth EPA's determination that the ash produced at the resource recovery facilities was exempt from Subtitle C regulation. [48] Following the advice of the Solicitor General, the Court granted certiorari, vacated the decision, and remanded the case to the Seventh Circuit "for further consideration in light of the memorandum" of the EPA Administrator. [49]

The Seventh Circuit, on remand, reaffirmed its previous decision, relying on the plain language of the statute, giving no def **[*123]** erence to the EPA memorandum. [50] Again, Chicago appealed to the Supreme Court seeking review of the Seventh Circuit opinion. On May 2, 1994 the Supreme Court upheld the court of appeals' decision and found that municipal incinerator ash is not exempt under the household waste exclusion provision of RCRA. [51]

IV. THE COURT'S REASONING IN CITY OF CHICAGO V. ENVIRONMENTAL DEFENSE FUND

A. Majority Opinion

Justice Scalia addressed the issue of "whether . . . the ash generated by a resource recovery facility's incineration of municipal solid waste is exempt from regulation as a hazardous waste under Subtitle C of RCRA." [52] The majority found that the household waste exclusion provision of RCRA [53] does not apply to the ash generated from a resource recovery facility. [54]

Justice Scalia first considered the legislative history of the household waste exclusion provision. [55] In analyzing the "waste stream" exemption for household wastes created by the 1980 EPA regulations and its preamble, the majority found "the regulation did not . . . exempt MWC [municipal waste combustion] ash from Subtitle C coverage if the incinerator that produced the ash burned anything in addition to household waste . . . ." [56] Because the Northwest Facility burned industrial waste in addition to household waste, the Court held that the Northwest Facility "would qualify as a Subtitle C hazardous waste generator if the MWC ash produced was sufficiently toxic . . . though it would still not qualify as a Subtitle C [treatment, storage, or disposal facility], since all the waste it took in would be characterized as nonhazardous." [57]

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Subtitle C?, 16 W. New Eng. L. Rev. 149, 167-68 (1994) (showing the Second Circuit's "approach used authoritative legislative history" while the Seventh Circuit "used a 'plain meaning' approach").

[46] Brief of the Petitioners at 9, City of Chicago v. Environmental Defense Fund, 114 S. Ct. 1588 (1994) (No. 92-1639).

[47] City of Chicago, 114 S. Ct. at 1590.

[48] Id.

[49] Id.

[50] Id.

[51] Id. at 1593-94.

[52] Id. at 1589. Justice Scalia wrote for the majority, in which opinion Justices Rehnquist, Blackmun, Kennedy, Souter, Thomas, and Ginsburg concurred.

[53] Id. at 1591; see supra note 12.

[54] City of Chicago, 114 S. Ct. at 1591.

[55] Id. at 1590.

[56] Id. at 1591.

[57] Id.

Second, the majority analyzed the Hazardous and Solid Waste Amendments of 1984 which added the "Clarification of Household Waste Exclusion" to RCRA. [58] In interpreting the clarification, Justice Scalia adopted the "plain meaning approach" and found that "the provision quite clearly does not contain any exclusion for the ash itself." [59] The Court found that there was "no express support for petitioner's claim of a waste stream exemption." [60] Justice Scalia then presented and subsequently dispelled each of the petitioners' claims.

1. "The practical effect of the statutory language is to exempt the ash by virtue of exempting the facility." [61]

The petitioners' first argument was that if "the facility is not deemed to be treating, storing, or disposing of hazardous waste, then the ash that it treats, stores, or disposes of must itself be considered nonhazardous." [62] Justice Scalia pointed out two problems with this argument. First, Justice Scalia noted that it is the facility that is exempt, not the ash. [63] Second, relying on the court of appeals' observation, he observed that the facility is "not even exempt . . . in its capacity as a generator of hazardous waste" under section 6921(i). [64] After discussing the definitions of "treating," [65] "storing," [66] "disposal of," [67] and "managing of," [68] Justice Scalia interpreted the "carefully constructed text" of section 3001(i) and the absence of the word "generation" to mean that the generation of toxic ash is not exempt from Subtitle C regulations. [69]

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2. "The legislative history of [section 6921(i)] supports excluding the ash produced at a resource recovery facility from regulation as a hazardous waste." [70]

Acknowledging the petitioners' reliance on the Senate committee report of 1983 [71] which included the word "generation," the Court declared that "it is the statute, and not the Committee Report, which is the authoritative expression of law, and the statute prominently omits reference to generation." [72] Justice Scalia then compared other statutory exemptions in RCRA, the Superfund Amendments and the Reauthorization Act of 1986. [73] In the Superfund section Congress provided an exemption to

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[58] Id.

[59] Id.

[60] Id.

[61] Id. at 1592. For an explanation of petitioners' argument that the ash is exempt by virtue of facility being exempt, see Brief of the Petitioners at 14-17, City of Chicago (No. 92-1639).

[62] City of Chicago, 114 S. Ct. at 1592.

[63] Id.

[64] Id.

[65] See 42 U.S.C. section 6903(34) (1988 & Supp. V 1993).

[66] See id. section 6903(33).

[67] See id. section 6903(3).

[68] See id. section 6903(7).

[69] City of Chicago v. Environmental Defense Fund, 114 S. Ct. 1588, 1592 (1994).

[70] Brief of the Petitioners at 23, City of Chicago (No. 92-1639). See City of Chicago, 114 S. Ct. at 1593.

[71] See supra text accompanying note 24.

[72] City of Chicago, 114 S. Ct. at 1593.

[73] Id. See Pub. L. No. 99-499, section 124(b), 100 Stat. 1689 (amending 42 U.S.C. section 6921 (1988 & Supp. V 1993)).

those generating hazardous waste under Subtitle C. The majority contrasted this provision with section 6921(i) and held "that this provision shows that Congress knew how to draft a waste stream exemption in RCRA when it wanted to." [74]

3. "If [section 6921(i)] did not extend the waste-stream exemption to the product of such a combined household/nonhazardousindustrial treatment facility . . . it did nothing at all." [75]

Justice Scalia noted that Congress's codification of a prior agency policy, except for the exclusion of "generation," militated against Congress's having excluded "generation" in the 1984 clarification. [76] The Court also addressed the petitioners' subargument that the majority's interpretation would subject the facilities "to the potentially enormous expense of managing ash residue as a hazardous waste." [77] Justice Scalia, noting that those who "manage" hazardous waste are exempt under section

[*126] 6921(i), explained that "generators" are not subject to the high costs associated with those who "manage" hazardous waste. [78]

4. "If the language of [section 6921(i)] is ambiguous, this Court should defer to the EPA's interpretation that the ash produced at a resource recovery facility is exempt from hazardous waste regulations." [79]

The majority declined to give any deference under the Chevron doctrine [80] to the EPA interpretation, holding that "the EPA's interpretation . . . goes beyond the scope of whatever ambiguity [section 6921(i)] contains." [81] Adopting the plain language approach and affirming the court of appeals, Justice Scalia stated that "the most reliable guide . . . is the enacted text." [82]

B. Dissenting Opinion

Justice Stevens [83] began the dissent by analyzing the history of EPA's classification of hazardous and nonhazardous waste. [84] He maintained that under the EPA regulations a waste is classified as either hazardous or nonhazardous at the point that it is discarded and retains that characterization "during and after its treatment and disposal." [85] Therefore, regardless of whether the treatment of household waste produces a toxic residue, the waste's classification remains nonhazardous. [86]

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[74] City of Chicago, 114 S. Ct. at 1593 (citing Brief of the Respondents at 18, City of Chicago (No. 92-1692)).

[75] Id. See Brief of the Petitioners at 23, City of Chicago (No. 92-1639).

[76] City of Chicago, 114 S. Ct. at 1593.

[77] Id. (quoting Brief of the Petitioners at 20, City of Chicago (No. 92-1639)).

[78] Id.

[79] Brief of the Petitioners at 29, City of Chicago (No. 92-1639). See City of Chicago, 114 S. Ct. at 1594.

[80] The Chevron doctrine requires a court to pay deference to an agency interpretation if the statutory text is ambiguous. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[81] City of Chicago, 114 S. Ct. at 1594.

[82] Id.

[83] Justice Stevens wrote for the dissent, in which opinion Justice O'Connor concurred.

[84] City of Chicago, 114 S. Ct. at 1594 (Stevens, J., dissenting).

[85] Id.

[86] Id. at 1595.

Accordingly, Justice Stevens emphasized the comment to the 1980 regulations [87] which stated "residues remaining after treatment . . . are not subject to regulation as hazardous waste." [88]

[*127] Reflecting further on the comment, the dissent noted that the 1980 regulation failed to identify what classification results if household waste is mixed with other nonhazardous wastes. [89] Because of this failure, Justice Stevens reasoned that the majority was wrong to assert that the Northwest Facility would have qualified as a Subtitle C generator under the 1980 regulations. [90] Justice Stevens thus concluded that the 1980 regulations were in need of clarification. [91]

The dissent compared the similar provisions of the 1984 clarification and the 1980 regulations and reasoned that the 1984 "title's description of the amendment as a clarification identifies an intent to codify its counterpart in the 1980 regulation." [92]

Turning to the 1983 Senate committee report, which included the word "generation" in types of activities excluded from Subtitle C regulation, Justice Stevens reasoned that "it is quite unrealistic to assume that the omission of the word 'generating' from the particularized description of management activities in the [1984] statute was intended to render the statutory description any less inclusive than either the 1980 regulation or the Committee Report." [93] Justice Stevens further stated that it would be "unrealistic to assume that the legislators voting on the 1984 amendment would have detected" the absence of the word "generating" as it had appeared in the committee report. [94] Placing heavy emphasis on the fact that "the Conference Committee adopted the Senate amendment verbatim," Justice Stevens attacked the majority's failure to consider the Senate committee report. [95]

Next, Justice Stevens attacked the majority's position that the statutory text is ambiguous. [96] According to the dissent, the clarification did not go far enough in resolving the ambiguity as to which types of activity are to be exempted. [97] He concluded that under section 1004(6), the definition of "hazardous waste genera **[*128]** tion" [98] could "encompass the burning of pure household waste that produces some hazardous residue." [99] The 1984 amendment, on the other hand, "provides an exemption for the activity of burning household waste." [100] Yet, the dissent observed that the 1984 amendments failed to distinguish whether the exemption applies to only pure household waste or a mixture of household waste and other nonhazardous waste. [101]

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[87] 45 Fed. Reg. 33,120 (1980).

[88] Id. at 33,099.

[89] City of Chicago, 114 S. Ct. at 1595 (Stevens, J., dissenting).

[90] Id. at n.4.

[91] Id. at 1595.

[92] Id. at 1596.

[93] Id. at 1596-97.

[94] Id. at 1597.

[95] Id. at nn.6-7.

[96] Id. at 1597.

[97] Id.

[98] See also 42 U.S.C. section 6903(6) (1988 & Supp. V 1993) (defining hazardous waste generation as "the act or process of producing hazardous waste"). Id.

[99] City of Chicago, 114 S. Ct. at 1597 (Stevens, J., dissenting).

[100] Id.

[101] Id.

In the eyes of Justice Stevens, the majority stood for the notion that the exemption only applies to pure household waste. The dissent found this reasoning illogical because: (1) the 1980 regulation [102] provided for household waste exclusion; (2) the 1984 amendments [103] were merely a clarification and were not meant to repeal or modify the 1980 regulations; and, (3) municipalities had relied on the 1980 regulations and Congress has not seen fit to invalidate them. [104]

V. ANALYSIS

The congressional will can be expressed with deceptive simplicity [105] or Byzantine intricacy. Where Congress merely articulates simplistic policy goals, courts are effectively left as legislators of last resort to fill in the gaps. [106] The courts' task is no easier when Congress has meticulously drafted a device to meet every contingency. Parsing the devil in the details can lead a court to divine the lawmakers' intent with the legislative history and a Ouija board, or else place childlike faith in the omniscience of an administrative agency and the Chevron doctrine.

The complexity of environmental problems is reflected in the complexity of Congress's statutory remedies. [107] Weighing the

[*129] competing procedures, powers, properties, and prescriptions outlined in these statutes requires the courts in each instance to choose an approach for ascertaining the legislative will. Since Justice Scalia's arrival on the Supreme Court, he has rejected efforts to discover "congressional intent" from any source other than the statutory language itself. [108] While Justice Scalia has been in a decided minority in holding this view, [109] his majority opinion in City of Chicago incorporated this approach and may signal its increasing significance in environmental law cases. [110]

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[102] 45 Fed. Reg. 33,084 (1980).

[103] 42 U.S.C. section 6921(i) (1988).

[104] City of Chicago, 114 S. Ct. at 1598 (Stevens, J., dissenting).

[105] Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933).

[106] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 102-04 (1911) (Harlan, J., dissenting).

[107] See, e.g., PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 114 S. Ct. 1900 (1994) (Clean Water Act); Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597 (1991) (Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)); Hallstrom v. Tillamook County, 493 U.S. 20 (1989) (Resource Conservation and Recovery Act (RCRA)); Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) (Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)); Pennsylvania v. Delaware Valley Council for Clean Air, 483 U.S. 711 (1987) (Clean Air Act).

[108] Justice Scalia has been viewed by one writer as a "contextualist" applying many distinct steps in his approach to statutory interpretation. Bradley C. Karkkainen, "Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction, 17 Harv. J.L. & Pub. Pol'y 401, 471-74 (Spring 1994). These distinct steps are:

(1) Arriving at one or more plausible readings of the statutory text, (2) resolving ambiguities and vagueness in the text, (3) fitting the statute into a broader body of law, (4) understanding the statute in its broader historical, political, and policy context, (5) filling gaps or silences in the statutory text, (6) determining statutory domain, (7) reaching the final 'legal' interpretation of the statute.

Id.

[109] See id. at 401, in which the writer observed:

Only Justices Anthony Kennedy and Clarence Thomas can be called adherents of Justice Scalia's plain meaning approach. Chief Justice Rehnquist and Justice O'Connor frequently join Justice Scalia's opinions, but seldom rely on his own approach in their own opinions. Justice Souter appears to have decisively rejected Justice Scalia's approach, and . . . Justice Stevens frequently opposes Justice Scalia on questions of statutory interpretation. While it remains to be seen how . . . Justice Ginsburg, will address these questions, her opinions as a federal appellate judge . . . indicate that she has not been an advocate of Justice Scalia's plain meaning approach.

Id. (footnotes omitted). As for Justice Stephen Breyer, the newest member of the bench, he is a cautious proponent of using legislative history as was shown when he wrote: "The 'problem' of legislative history is its 'abuse,' not its 'use.' Care, not drastic change, is all that is warranted." Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. Cal. L. Rev. 845, 874 (1992). See also Jeff Bucholtz, Breyer Likely to Take on Scalia, HLS Profs. Say, Harv. L. Record, Sept. 16, 1994, at 4. Justice Breyer is "extremely interested in

[*130] Scalia declines to follow the slender threads of legislative history or the Chevron doctrine from the legislative maze. [111] He fixes instead on textualism as a surer guide. [112]

A. Statutory Interpretation

Justice Scalia's strict, plain meaning approach has it roots in English law. [113] "Under English law . . . judges do not consult the legislative debates or proceedings to ascertain what a Parliamentary Act means; the words of the statute are the sole determinant." [114] The use of legislative history in statutory interpretation began in the early 1900s. "The plain meaning rule emerged early as an American modification of the British practice against use of legislative history." [115] The rule provides that "where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion." [116] "Resort to legislative history is only justified where the face of the statute is . . . ambiguous." [117]

[*131]

Following the avalanche of legislation enacted during the New Deal, the courts used legislative history to such an extreme that it caused Canadians "to gibe that . . . whenever the legislative history is ambiguous, it is permissible to refer to the statute." [118] By the early 1980s, Patricia M. Wald, a federal judge and critic of the plain meaning approach, wrote, "the language of the 'plain meaning' approach lingers on in Court opinions, but its spirit is gone." [119] Upon further reflection and, in particular, Justice Scalia's "aggressive assault . . . on the use of legislative history," Judge Wald acknowledged that her "funeral ceremony . . . for the Plain Meaning rule was premature." [120]

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and articulate on questions of statutory interpretation. Breyer has a legal process approach which is paradigmatic of HLS, in contrast to Scalia's plain meaning approach." Id. (quoting Prof. Christine Desan). Compare United States v. Gendron, 18 F.3d 955 (1st Cir. 1994) (Breyer, C.J.) with United States v. X-Citement Video, Inc., 115 S. Ct. 464, 473 (1994) (Scalia, J., dissenting).

[110] Chief Justice Rehnquist and Justices Blackmun, Kennedy, Souter, Thomas, and Ginsburg joined Justice Scalia's majority opinion. Justices Stevens and O'Connor dissented.

[111] See M. Shawn McMurray, The Perils of Judicial Legislation: The Establishment and Evolution of the Parker v. Brown Exemption to the Sherman Antitrust Act, 444000020000249*000293 20 N. Ky. L. Rev. 249, 293 (1993) ("The intricate and inconsistent opinions presented no standard of conduct, no thread to follow from the labyrinth, but a Gordian Knot of policy for lower courts to unravel.").

[112] Professor William N. Eskridge, Jr. describes Justice Scalia's approach as "new textualism." William N. Eskridge, Jr., The New Textualism, 37 U.C.L.A. L. Rev. 621 (1990). Justice Scalia's approach is called "new" due to its "intellectual inspiration." Id. at 623 n.11.

[113] See Starr, supra note 1, at 374 (distinguishing between the English rule, which does not allow the use of legislative history, and the American rule, which does allow such use).

[114] Patricia M. Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 Iowa L. Rev. 195, 196 (1983) (citing R. Dickerson, The Interpretation and Application of Statutes 161-62 (1975)).

[115] Id. at 197.

[116] Caminetti v. United States, 242 U.S. 470, 485 (1917) (citing Hamilton v. Rathbone, 175 U.S. 414, 421 (1899)).

[117] Garcia v. United States, 469 U.S. 70, 76 n.3 (1984) (quoting Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395 (1951) (Jackson, J., concurring)). "A statute is ambiguous only when it is capable of being understood by reasonably well-informed persons in either of two or more senses." 2a Norman Singer, Sutherland on Statutes and Statutory Construction section 45.02 (5th ed. 1991).

[118] R. Dickerson, The Interpretation and Application of Statutes 164 (1975).

[119] Wald, supra note 114, at 197-98.

[120] Patricia M. Wald, The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-1989 Term of the United States Supreme Court, 39 Am. U. L. Rev. 277, 281 (1990).

Recently, the Court has not relied on a finding of statutory ambiguity to invoke the use of legislative history. [121] Instead, the Court has predominantly used the legislative history to "confirm" its interpretation of the text. [122] Justice Scalia believes this practice "serves to maintain the illusion that legislative history is an important factor in the Court's deciding of cases, as opposed to an omnipresent make-weight for decisions arrived at on other grounds." [123]

City of Chicago was the optimal case for Justice Scalia to apply his strict, plain meaning approach. "The language of this provision could not be any clearer." [124] Justice Scalia had the opportunity to emerge from behind the curtains of his numerous

[*132] concurrences [125] on the issue of statutory interpretation and finally take center stage by writing the majority opinion. [126]

City of Chicago was ideal for Justice Scalia's approach because the text of the Act was not facially ambiguous.

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulatio n under this subchapter . . . [127]

No words in the household exemption provision are broad enough to be read as encompassing the "generation" of ash. Each word in the statute that relates to the exemption is defined. [128] The word "generation" is either in the statute or it is not. It is clear, as it was to the Court, that the word "generation" is absent from the statute.

The household exclusion provision becomes ambiguous only if the legislative history is introduced for consideration. Although it is surprising that he considered the 1983 Senate committee report at all, [129] Justice Scalia acknowledged that the report included the word "generation." However, Justice Scalia's strict approach to statutory interpretation does not allow the Court to leap from the bounds of the text.

Justice Scalia is indifferent to the result or impact of his strict approach. [130] This is evidenced by his cursory treatment of the

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[121] See, e.g., Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597 (1991) (comparing legislative history and statute individually and then together to hold that FIFRA did not preempt local government).

[122] See, e.g., Thunder Basin Coal Co. v. Reich, 114 S. Ct. 771, 777 (1994) (stating that "the legislative history of the Mine Act confirms the interpretation").

[123] Id. at 782 (Scalia, J., concurring in part and concurring in the judgement).

[124] Hallstrom v. Tillamook, 493 U.S. 20, 23 (1989) (deciding whether RCRA's citizen suit 60-day notice provision acts as a statute of limitations).

[125] Justice Scalia has concurred with the majority's decision in numerous cases. However, he has consistently failed to join in their opinions solely because they used legislative history. Karkkainen, supra note 108, at n.153. For an example of his most explicit attack on the use of legislative history, see Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597 (1991).

[126] Justice Scalia did not take full opportunity to assail the previous court decisions which used legislative history as he had in his previous concurrences. See infra text accompanying notes 131-33. His reason for not doing so was probably rooted in the notion of "converting" other members of the Court to his side.

[127] 42 U.S.C. section 6921(i) (1988).

[128] See supra notes 65-68.

[129] See supra part II.C.

[130] This note will not discuss the impact on local municipalities as a result of the majority's ruling. For a discussion of the impact see Sale, supra note 2, at 409. As a result of the ash not being exempt "serious difficulties" would exist: (1) not enough landfill space; (2) cost of disposing the ash as Subtitle C would cost municipalities close to 10 times more than disposing of it as Subtitle D; (3) localities that chemically treat their incinerator ash could be subject to Subtitle C regulation if they attempt to neutralize ash that fails toxicity tests; and, (4) "could extend CERCLA liability to local governments." Id. at 431-33.

[*133] twin goals of RCRA in City of Chicago. RCRA's preamble provides that "the objectives of this chapter are to promote the protection of the health and the environment and to conserve valuable material and energy." [131] In addressing these goals Justice Scalia merely observed that stated goals "sometimes conflict" and that "the most reliable guide for [reconciling the diverse purposes] is the enacted text." [132]

Justice Scalia's approach stems rather from his view of the impact of using legislative history upon lawmaking and federalism. For Justice Scalia the method of judicial decision undergirds the legitimacy of the result, regardless of the specific outcome in a given case. His aversion to the use of legislative history dates back to his service on the United States Court of Appeals for the District of Columbia Circuit where he wrote:

I think it is time for the Court to become concerned about the fact that r outine deference to the detail of committee reports, and the predictable expansion in that detail which routine deference has produced, are converting a system of judicial construction into a system of committee-staff prescription. [133]

Justice Scalia most recently attacked the use of legislative history in Wisconsin Public Intervenor v. Mortier. [134] "We are a Government of laws not of committee reports." [135] As federal Judge Mikva has observed, "Committee reports are too frequently used for political horse-trading and individual ego trips." [136] Justice Scalia would agree that legislative history is not worthy of being used:

As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references . . . were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not pri **[*134]** marily to inform the Members of Congress what the bill meant . . . but rather to influence judicial construction. [137]

Justice Scalia is skeptical of legislative "intent." [138] He does not believe it is the Court's task "to enter the minds of the members of Congress -- who need have nothing in mind in order for their votes to be both lawful and effective -- but rather to give fair and reasonable meaning to the text of the United States Code . . . ." [139] Justice Scalia has written:

The quest for "genuine" legislative intent is probably a wildgoose chase anyway. In the vast majority of cases I expect that Congress neither (1) intended a single result, nor (2) meant to confer discretion upon the agency, but rather (3) didn't think about the matter at all. If I am correct in that, then any rule adopted in this field represen ts merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate. [140]

Justice Scalia's approach is deeply rooted in his perception of the principles of separation of powers. His view of the roles of the three branches is consonant with those articulated by Judge Bork:

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131 42 U.S.C. section 6902(a) (1988).

132 City of Chicago v. Environmental Defense Fund, 114 S. Ct. 1588, 1593 (1994).

133 Hirschey v. Federal Energy Regulation Comm'n, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring).

134 Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597 (1991).

135 Id. at 621.

136 Abner J. Mikva, Reading and Writing Statutes, 48 U. Pitt. L. Rev. 627, 631 (1987).

137 Blanchard v. Blanchard, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring in part and concurring in the judgment).

138 Justice Scalia certainly should not be mistaken for an intentionalist; he does not believe it is always necessary or even possible for courts to determine actual congressional intent before reaching interpretive conclusions about the meaning of a statute." Karkkainen, supra note 108, at 419.

139 Pennsylvania v. Union Gas Co., 491 U.S. 1, 30 (1989) (Scalia, J., concurring in part and dissenting in part).

140 Antonin Scalia, Judicial Deference to Administrative Interpretations of the Law, 1989 Duke L.J. 511, 517 (1989).

1. The functions of courts and legislatures are different, the latter making major political choices. Courts inevitably make policy, but where Congress has written a statute, the policy movements of the courts are ideally molecular rather than molar.

2. An important function of the courts, performed in a variety of ways, is to help keep the legislative process responsible by ensuring, so far as possible, that major policy decisions by the legislature are deliberate and openly made.

3. The judicial process itself must be responsible. That requires the decision of cases upon criteria which are judicially administrable, give fair warning to those required to obey the law, permit sufficient predictability so that desirable conduct is not needlessly

[*135] inhibited, and permit rational explanation of the application of the criteria so that judicial performance may be evaluated and controlled. [141]

According to Justice Scalia, if the Court is allowed to use legislative history to interpret statutes, the process creates an unbalanced amending power with no safeguards as to how it is used. [142] He believes legislative history is arbitrarily used. "Committee reports are a forensic rather than an interpretive device, to be invoked when they support the decision and ignored when they do not." [143] Judge Leventhal, a former District of Columbia Circuit Court judge, made the analogy that "citing legislative history is . . . akin to 'looking over a crowd and picking out your friends.'" [144] This lack of consistency disturbs Justice Scalia: "Consistency is the very foundation of the rule of law. . . . The only checks on the arbitrariness of federal judges are the insistence upon consistency and the application of the teachings of the mother of consistency, logic." [145] The use of legislative history is not logical for Justice Scalia.

In Justice Scalia's view, judicial intrusion into the proper spheres of the political branches (for example, using legislative history to justify a broad interpretation of a statute that an agency construes narrowly) not only violates the principle of separation of powers in its own right, but gives voice and effect to unwarranted congressional assertions of power through the enactment of vague statutes with the expectation that gaps can be filled in later through reference to unenacted legislative history. [146]

Justice Scalia "believes that the community good is . . . best served by clear and concise congressional policy making." [147] Justice Scalia's approach mandates that the legislature write

[*136] clearer, more concise statutes. [148] If the statutes are clear, as was the household exemption provision in City of Chicago, then there will be no need to resort to legislative history. "If Congress wants to get a statute past Justice Scalia, it had better be explicit." [149]

B. Deference to EPA

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[141] Robert H. Bork, The Goals of Antitrust Policy, Am. Econ. Rev., May 1967, at 244.

[142] But see Wald, supra note 120, at 306-07, where Judge Wald wrote: "To disregard committee reports as indicators of congressional understanding . . . runs the risk of violating the spirit if not the letter of the separation of powers principle."

[143] Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 621 (1991).

[144] Wald, supra note 114, at 214 (quoting conversation with Harold Leventhal).

[145] Antonin Scalia, Assorted Canards of Contemporary Legal Analysis, 40 Case W. Res. L. Rev. 581, 588 (1989/1990).

[146] Karkkainen, supra note 108, at 428.

[147] Richard J. Brisbin, The Conservatism of Antonin Scalia, 105 Pol. Sci. Q. 1, 13 (1990).

[148] Bork, supra note 141, at 246.

[149] Karkkainen, supra note 108, at 431.

Justice Scalia paid scant heed to the Chevron doctrine when he refused to give deference to EPA's interpretation. [150] The Chevron doctrine provides that:

If the agency interpretation is not in conflict with the plain language of the statute, deference is due. In ascertaining whether the agency's interpretation is a permissible construction of the language, a court must look to the structure and language of the statute as a whole. If the text is ambiguous and so open to interpretation in some respects, a degree of deference is granted to the agency, though a reviewing court need not accept the interpretation which is unreasonable. [151]

In 1989 Justice Scalia prophesied that "repeated changes back and forth may rise (or descend) to the level of 'arbitrary and capricious,' and thus unlawful, agency action." [152] He added, "Whatever else an agency's choice among the various interpretive options may be based upon, it should not be based upon the desire to win a particular lawsuit." [153] Justice Scalia clearly foretold EPA's wavering interpretation of the household exclusion provision during the course of City of Chicago.

In reconciling his strict, plain meaning approach with the Chevron doctrine, Justice Scalia wrote, "One who finds more often (as I do) that the meaning of the statute is apparent from its text and from its relationship with other laws, thereby finds

[*137] less often that the triggering requirement for Chevron deference exists." [154]

VI. CONCLUSION

Justice Scalia has cited Aristotle's prescription of precision in the law:

Rightly constituted laws should be the final sovereign; and personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only on those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement. [155]

In City of Chicago Justice Scalia found a majority to reinforce his message that Congress should make an "exact pronouncement" of the law. Attaining this majority confirms Professor Merrill's contention that there exists a growing consensus in favor of an "exact pronouncement":

In slightly more than a decade the Court has moved from a position in which legislative history was routinely considered in all cases, to a situation in which it is considered by the controlling opinion in only a small minority of decisions. And in most cases, it is not even mentioned at all. [156]

Where Congress attempts to remedy "increasingly complex problems" [157] with "environmental laws that produce complexities aplenty," [158] cities and citizens must "look to the words of the statutes to determine their legal rights and

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[150] City of Chicago v. Environmental Defense Fund, 114 S. Ct. 1588, 1594 n.5 (1994). "In view of our construction of [section 6921(i)], we need not consider whether an agency interpretation expressed in a memorandum like the Administrator's in this case is entitled to . . . deference under Chevron . . . ." Id.

[151] National R.R. Passenger Corp. v. Boston & Maine Corp., 112 S. Ct. 1394, 1401-02 (1992) (citations omitted).

[152] Scalia, supra note 140, at 518.

[153] Id. at 519-20.

[154] Id. at 521. See also Thomas W. Merrill, Textualism and the Future of the Chevron Doctrine, 72 Wash. U.L.Q. 351 (1994) (comparing the "inverse relationship between the rise of textualism and the waning of Chevron"). Id. But see Wald, supra note 120, at 308 (if courts use the textualist approach then "the executive will decide more cases under the Chevron principle").

[155] Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1176 (1989) (quoting Ernest Barker, The Politics of Aristotle (Oxford 1946)).

[156] Merrill, supra note 154, at 356.

[157] Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2922 (1992).

obligations." [159] For Justice Scalia an "exact pronouncement" on the part of Congress would enable those "who labor under these

[*138] provisions every day . . . to know exactly what the law requires:" [160]

> Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law. Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes. . . . As laws have become more numerous, and as people have become increasingly ready to punish their adversaries in the courts, we can less and less afford protracted uncertainty regarding what the law may mean. [161]

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[158] Roll Carter v. Reilly, 932 F.2d 668, 671 (7th Cir. 1991).

[159] Earl M. Maltz, Statutory Inter pretation and Legislative Power: A Case for a Modified Intentionalist Approach, 63 Tul. L. Rev. 1, 22 (1988).

[160] Sale, supra note 2, at 444.

[161] Scalia, supra note 155, at 1179.