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Cover Page Footnote

J.D. Candidate, 2007, Fordham University School of Law. I would like to thank Professor Marc Arkin for her guidance and helpful comments.

CLASS ACTIONS AND THE INTERPRETATION OF MONETARY DAMAGES UNDER FEDERAL RULE OF CIVIL PROCEDURE 23(b)(2)

*Natasha Dasani**

INTRODUCTION

What remedies are available to victims of discrimination? Federal Rule of Civil Procedure 23(b)(2) was created, in part, to provide class-wide relief for victims of civil rights discrimination.[1] While the other provisions of Rule 23 enable classes to obtain monetary damages, only subsection (b)(2) enables victims to request injunctive or declaratory relief for the harm they have sustained.[2] Rule 23(b)(2) enables relief for victims of large-scale civil rights discrimination, including race and sex discrimination.[3] Additionally, this provision is often used in cases of discriminatory employment practices.[4] The central controversy surrounding Rule 23(b)(2) class actions

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1. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997) (citing Fed. R. Civ. P. 23 advisory committee's note); Nat'l Consumer Law Ctr., Consumer Class Actions § 9.8.1.3 (5th ed. 2002).

2. Fed. R. Civ. P. 23(b)(2). The text of this provision of the Rule permits certification in cases where "final injunctive relief or corresponding declaratory relief with respect to the class as a whole" is appropriate. *Id.*

3. *See, e.g.*, 2 Alba Conte & Herbert B. Newberg, Newberg on Class Actions, § 4:11 n. 20 (4th ed. 2002) [hereinafter Newberg on Class Actions] (describing a number of civil rights cases based on class-wide discrimination that have been brought under Rule 23(b)(2)).

4. *See id.* § 4:11 n. 19 (describing cases where employment discrimination class actions have been brought under Rule 23(b)(2)). See also *infra* Part I.A.3 for a discussion of the circuit split between the United States Courts of Appeals for the Fifth and Second Circuits involving employment discrimination against African-American employees. Employment discrimination cases are brought under Title VII of the Civil Rights Acts of 1964 and 1991, which prohibits discrimination on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2 (2000). *See generally* Meghan E. Changelo, Note, *Reconciling Class Action Certification with the Civil Rights Act of 1991*, 36 Colum. J.L. & Soc. Probs. 133, 141-58 (2003) (discussing the impact of the Civil Rights Acts on class actions under Rule 23(b)(2)); W. Lyle Stamps, Note, *Getting Title VII Back on Track: Leaving Allison Behind for the Robinson Line*, 17 BYU J. Pub. L. 411, 412-16 (2003). For a discussion of the history of employment discrimination class actions under Title VII and the Civil Rights Act of 1991, see Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 Akron L. Rev. 813, 815-35 (2004). While individuals can bring suits for employment discrimination, courts are more likely to order institutional or organizational changes in class actions, where large groups of employees are alleging discrimination on a company-wide

is whether it is appropriate for courts to permit class certification in cases where classes request monetary damages in addition to injunctive or declaratory relief.[5]

This Note examines the certification requirements of Rule 23(b)(2), which governs class actions in which the plaintiffs are seeking injunctive or declaratory relief.[6] Specifically, it seeks to discuss whether monetary damages are permissible in class actions brought under Rule 23(b)(2). First, this Note determines how the Federal Rules of Civil Procedure should be interpreted. To do so, this Note examines the various approaches to judicial interpretation, attempts to determine the most appropriate approach, and applies this approach to the interpretation of Rule 23(b)(2) class-action lawsuits. Part I discusses the provisions of Rule 23(b)(2) and Rule 23 in general, as well as the historical interpretation of Rule 23(b)(2) by courts. Part I also introduces the two main theories of statutory interpretation—textualism and intentionalism—which can be used to determine the optimal framework to interpret the Federal Rules of Civil Procedure in general, and Rule 23(b)(2) in particular. Part II discusses the arguments for interpreting the Federal Rules of Civil Procedure using the general principles of statutory interpretation discussed in Part I. Part II goes on to examine the arguments concerning the interpretation of the Rules under the two main approaches to statutory interpretation. Finally, Part III attempts to resolve this conflict by concluding that incorporating the Advisory Committee's notes is better than applying the principles of statutory interpretation. Applying this interpretation to Rule 23(b)(2), this Note concludes that the Rule allows certification for classes claiming some monetary damages in addition to injunctive relief.

I. THE CERTIFICATION OF CLASS ACTIONS UNDER RULE 23(b)(2) AND TWO MAIN THEORIES OF STATUTORY INTERPRETATION

Part I.A of this Note addresses the specific provisions and the historical judicial interpretation of Rule 23(b)(2) and the Advisory Committee's note to Rule 23(b)(2). Part I.B introduces two of the main approaches to statutory interpretation: the modern textualist or plain-meaning view, and the purposive or intentional approach. Part I.C examines the U.S. Supreme Court's approach to the interpretation of the Federal Rules of Civil Procedure by examining its interpretation of Rule 11.

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scale rather than simply an individual experience. *See* Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 Fordham L. Rev. 659, 678-79 (2003).

5. *Compare* Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998) (holding that monetary damages are only permissible in Rule 23(b)(2) class actions where the monetary relief is wholly incidental to the injunctive relief requested), *with* Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147 (2d Cir. 2001) (holding that requests for monetary relief are permissible for classes certified under Rule 23(b)(2) as long as the monetary relief does not predominate over the injunctive relief requested).

6. Fed. R. Civ. P. 23(b)(2).

A. *Rule 23(b)(2) Class Actions*

1. Background on Class Actions

In order to maintain a class-action lawsuit, the plaintiff class must satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure, which governs class actions.[7] Class actions are useful litigation tools when class members are "united in interest."[8] "The most common method of litigating claims on behalf of large numbers of individuals,"[9] class actions are governed by Rule 23 of the Federal Rules of Civil Procedure.[10] Rule 23(a) imposes the following four requirements for class certification: numerosity, common questions of law or fact among all members, typicality, and adequate representation by the named plaintiffs.[11] Provided that all of the requirements of Rule 23(a) are met,[12] the class must then be maintained under one of the provisions of Rule 23(b) in order for plaintiffs to be eligible to litigate their claims as a class action.[13]

Rule 23(b)(1) allows certification for classes in which "the prosecution of separate actions by or against individual members of the class would create a risk of" either "inconsistent or varying adjudications" for class members, or "adjudications . . . which would as a practical matter be dispositive of the interests of the other members [not a party to the litigation] or substantially impair or impede their ability to protect their interests."[14] Rule 23(b)(3)

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7. Fed. R. Civ. P. 23.

8. Albert R. Connelly, *Class Actions*, *in* The New Federal Class Action Rule 23, 23 (Robert L. Clare ed., 1968).

9. Linda J. Silberman & Allan R. Stein, Civil Procedure: Theory and Practice 897 (2001).

10. *See* Fed. R. Civ. P. 23.

11. Fed. R. Civ. P. 23(a). The first prerequisite for a class action, "numerosity," refers to the requirement that "the class [be] so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). For example, the numerosity requirement was met in *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 125 S. Ct. 2611 (2005), where approximately ten thousand class members were involved. The second requirement is that "there are questions of law or fact common to the class," since, if the issues of each litigant are unique, each matter is better litigated on an individual basis. Fed. R. Civ. P. 23(a)(2). "Typicality," the third requirement, means that "the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Finally, the fourth requirement is "adequate representation," meaning that the "representative parties [must] fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). For a discussion of the requirements of Rule 23(a), see generally Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147 (1982), and Rachel Tallon Pickens, *Too Many Riches?* Dukes v. Wal-Mart *and the Efficacy of Monolithic Class Actions*, 83 U. Det. Mercy L. Rev. 71, 75-76 (2006).

12. *See Falcon*, 457 U.S. at 161 (holding that a class action can only be certified once all of the prerequisites of Rule 23(a) have been satisfied); Pickens, *supra* note 11, at 75 (stating that, in *Falcon*, the U.S. Supreme Court "mandated strict compliance with Rule 23(a)").

13. *See* Fed. R. Civ. P. 23(b).

14. Fed. R. Civ. P. 23(b)(1). The provisions of 23(b)(1) establish the "limited fund" class, which occurs when "the defendant has insufficient assets to pay potential legal liabilities of all potential plaintiffs," and the "prejudice" class, where resolution of the dispute through individual litigations "would result in a race to the courthouse where the first

permits certification in cases when "the court finds that the questions of law or fact that are common to all members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[15]

2. Provisions of Rule 23(b)(2)

Rule 23(b)(2) specifically provides for injunctive or declaratory relief for class members.[16] According to the Advisory Committee's note, Rule 23(b)(2) was created mainly to allow plaintiffs in civil rights cases to adjudicate their claims, where the primary relief sought is to reverse the effects of the class-based discrimination, a fact well recognized in case law.[17] Additionally, the Advisory Committee's note indicates that Rule 23(b)(2) may be used to certify other types of classes seeking injunctive or declaratory relief, including consumer actions for price discrimination, actions brought by sellers, medical monitoring in toxic tort cases, or even antitrust violations brought by patent holders.[18]

The text of Rule 23(b)(2) is as follows:

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

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case to be decided would effectively decide all other subsequent lawsuits on the same matter." Stamps, *supra* note 4, at 415.

15. Fed. R. Civ. P. 23(b)(3). Also referred to as the "damage" class, classes certified under this provision, in addition to satisfying the requirements of Rule 23(a), must also demonstrate "predominance and superiority" and include "notice and opt-out procedures" that are not necessary for classes certified under (b)(1) or (b)(2). *See* Stamps, *supra* note 4, at 415-16. Additionally, in 23(b)(3) classes, non-common issues must be litigated separately. *Id.* at 416.

16. Fed. R. Civ. P. 23(b)(2). Injunctive relief generally refers to "a broad range of conduct that plaintiffs are trying to restrain or mandate" by the defendant. Nat'l Consumer Law Ctr., *supra* note 1, § 9.8.1.3. Declaratory relief is usually related to or goes along with injunctive relief, but can also just be a request for the court to, for example, "declar[e] that a statute is unconstitutional or that a business practice is unfair . . . [which] would have the effect of 'enjoining' either the enforcement of the statute or the commitment of the offending practice." *Id.* § 9.8.1.4 (citation omitted). For an in-depth discussion of the use of declaratory judgments under Rule 23(b)(2) class actions, see generally Andrew Bradt, *"Much to Gain and Nothing to Lose": Implications of the History of the Declaratory Judgment for the (b)(2) Class Action*, 58 Ark. L. Rev. 767 (2006).

17. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997) (citing Fed. R. Civ. P. 23 advisory committee's note); Nat'l Consumer Law Ctr., *supra* note 1, § 9.8.1.3. The Advisory Committee's note regarding Rule 23(b)(2) indicates that "[i]llustrative [of this subsection] are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." Fed. R. Civ. P. 23 advisory committee's note.

18. Fed. R. Civ. P. 23 advisory committee's note; Nat'l Consumer Law Ctr., *supra* note 1, § 9.8.1.3; *see also* Timothy E. Eble, The Federal Class Action Practice Manual—Internet Edition § 24 (1999), http://www.classactionlitigation.com/fcapmanual/chapter4.html (stating that Rule 23(b)(2) class actions have also been brought for "medical monitoring in toxic tort cases"). *See generally* 2 Newberg on Class Actions, *supra* note 3, § 4:12.

. . . .

> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . .[19]

Rule 23(b)(2) is silent as to whether classes so certified may obtain monetary relief in addition to any injunctive or declaratory relief requested in the suit.[20] At the same time, however, courts have regularly allowed class members to seek some monetary damages in class-action lawsuits certified under Rule 23(b)(2).[21] Even though the Rule fails to address the permissibility of monetary damages, the Advisory Committee's note regarding Rule 23(b)(2) refers to monetary damages.[22] The Advisory Committee's note to Rule 23(b)(2) states that the "'subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages,'"[23] implying that requests for money damages may be permitted if they do not predominate over the injunctive or declaratory relief.

Rule 23(b)(2)'s textual silence as to the permissibility of monetary damages for classes certified under 23(b)(2) has important ramifications in the interpretation of the Rule. On the one hand, if silence is treated as ambiguity, the Court could consider the drafters' intent, which would seemingly allow for limited monetary damages.[24] On the other hand, if the Rule's silence is seen as a deliberate omission on the part of the drafters, no monetary damages would be allowed for class actions certified under 23(b)(2).[25]

3. Circuit Court Split: *Allison v. Citgo Petroleum Corp.* and *Robinson v. Metro-North Commuter Railroad*

While the Supreme Court has decided a number of issues concerning class actions brought under Rule 23(b)(2),[26] it has yet to rule on the permissibility of monetary damages in class actions certified under Rule 23(b)(2). The circuit courts have regularly relied on the Advisory

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19. Fed. R. Civ. P. 23(b)(2).

20. *See id.*

21. *See* Changelo, *supra* note 4, at 143 (stating that "[m]any circuit courts have taken the position that monetary relief may be obtained in a [Rule 23](b)(2) class action so long as the predominant relief sought is injunctive or declaratory"); *see also* Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 162-63 (2d Cir. 2001).

22. Fed. R. Civ. P. 23 advisory committee's note.

23. Parker v. Time Warner Entm't Co., 331 F.3d 13, 18 (2d Cir. 2003) (quoting Fed. R. Civ. P. 23 advisory committee's note (1966)).

24. See *infra* notes 135-38 and accompanying text for a discussion of the interpretation of legislative silence as ambiguity.

25. See *infra* notes 139-46 and accompanying text for an illustration of the Supreme Court's interpretation of legislative silence as a deliberate omission by Congress.

26. *See* Nat'l Consumer Law Ctr., *supra* note 1, app. U (summarizing Supreme Court cases that have interpreted Federal Rule of Civil Procedure 23(b)(2)).

Committee's note to Rule 23, and assume that some monetary damages are permissible.[27] A circuit split exists, however, with regard to the standard for determining whether the requested injunctive relief predominates over any monetary relief requested by class members.[28]

As Rule 23(b)(2) is silent regarding monetary damages, courts have regularly relied on the Advisory Committee's note to the Rule, which indicates only that Rule 23(b)(2) class actions "'do[] not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages.'"[29] Other than seeming to provide for the existence of some monetary damages in class actions certified under 23(b)(2), the Advisory Committee's note fails to provide further guidance to courts to determine whether monetary damages "predominate" in a suit.[30] One of the reasons that this issue has plagued numerous courts is that it is a complicated task for courts to value any injunctive or declaratory relief being requested against monetary damages in order to determine which type of relief predominates.[31] Additionally, while the Supreme Court has not yet decided on the issue of monetary damages, the Court has also not yet decided on the proper interpretation of the term "predominate" with regards to class actions under 23(b)(2).[32]

While not authoritative, the Court seems to be leaning towards a narrower definition of "predominate" in 23(b)(2) class actions, a definition where class actions seeking any monetary damages may only be certified under Rule 23(b)(3).[33] The Court, in *Ticor Title Insurance Co. v. Brown*, indicated that there was a substantial possibility that classes seeking monetary damages could only be certified under 23(b)(3).[34] At the same time, however, the Court chose not to address this issue, as it had already been litigated and therefore, under the principle of res judicata, the Court

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27. *See infra* notes 43, 66 and accompanying text.

28. *See infra* Part I.A.3.

29. Parker v. Time Warner Entm't Co., 331 F.3d 13, 18 (2d Cir. 2003) (quoting Fed. R. Civ. P. 23 advisory committee's note (1966)).

30. *See supra* notes 22-23 and accompanying text.

31. *See, e.g.*, Allison v. Citgo Petroleum Corp., 151 F.3d 402, 416 (5th Cir. 1998) (stating that courts cannot always make a make precise determination as to whether monetary or injunctive damages predominate).

32. Changelo, *supra* note 4, at 147-48.

33. *See* Ticor Title Ins. Co. v. Brown, 511 U.S. 117 (1994) (per curiam). *Ticor* casts "doubt on the proposition that class actions seeking money damages can be certified under Rule 23(b)(2), noting existence of 'at least a substantial possibility' that actions seeking money damages are certifiable only under Rule 23(b)(3)." Changelo, *supra* note 4, at 148 (quoting *Ticor*, 511 U.S. at 121); *see also* Jeffrey H. Dasteel & Ronda McKaig, *What's Money Got to Do with It?: How Subjective, Ad Hoc Standards for Permitting Money Damages in Rule 23(b)(2) Injunctive Relief Classes Undermine Rule 23's Analytical Framework*, 80 Tul. L. Rev. 1881, 1882 (2006). See *infra* notes 44-46 and accompanying text for an explanation of the narrow definition of "predominate" adopted by the Fifth Circuit in *Allison*.

34. *Ticor*, 511 U.S. at 121.

was barred from determining the issue.[35] Additionally, the Court indicated that "lower courts have consistently held that the presence of monetary damages claims does not preclude class certification under . . . [Rule 23](b)(2)," and that, "[u]nless and until a contrary rule is adopted, courts will continue to certify classes under . . . [Rule 23](b)(2) notwithstanding the presence of damages claims."[36] Therefore, while suggesting that monetary damages may be inappropriate for classes certified under Rule 23(b)(2), the Court in *Ticor* nonetheless recognized and refrained from altering the long-standing practice for lower courts to allow certification under 23(b)(2), even when monetary damages are present.[37]

a. Allison *and the Incidental Damages Test*

In 1998, in *Allison v. Citgo Petroleum Corp.*, the U.S. Court of Appeals for the Fifth Circuit was the first appellate court to decide whether plaintiffs seeking to adjudicate a Title VII class action claim under Rule 23(b)(2) were able to seek compensatory or punitive damages in addition to injunctive or declaratory relief.[38]

The class-action lawsuit in *Allison* was brought by over 130 African-American employees and job applicants of Citgo Petroleum Corporation on behalf of over one thousand class members who had been employed by Citgo or applied for employment with Citgo from April 1979 up until the time of the litigation.[39] The plaintiffs alleged race-based employment discrimination in a number of company practices, including hiring and promotions.[40] The class-action litigants sought certification under Rule 23(b)(2), seeking both injunctive relief and the maximum amount of compensatory and punitive damages permitted by law.[41]

The Fifth Circuit applied a narrow reading of the permissibility of monetary relief (either compensatory or punitive) for classes certified under Rule 23(b)(2).[42] It held that, since injunctive or declaratory relief must be exclusive or predominate according to the Advisory Committee's note to Rule 23(b)(2), 23(b)(2) certification was only available when the monetary

35. *Id.* The Court failed to decide this issue conclusively, as it declined to address this issue on the grounds of res judicata once the lower court allowed certification under Rule 23(b)(2), even though monetary damages were also being requested. The Court also stated that "even though [the class certification under 23(b)(2)] determination may have been wrong, it is conclusive upon these parties," implying that certification may not have been appropriate under those provisions in this case. *Id.* at 120-21. It must be noted, however, that the primary issue in *Ticor* involved opt-out rights for class members under these provisions, rather than the availability of monetary damages under Rule 23(b)(2). *Id.*

36. *Id.* at 124 (O'Connor, J., dissenting) (summarizing the majority's opinion).

37. *See id.* (stating that the issue of monetary damages under Rule 23(b)(2) was "an issue [the court] need not, and indeed should not, decide [in *Ticor*]").

38. Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998).

39. *Id.* at 407.

40. *Id.*

41. *Id.* at 407-08.

42. *Id.* at 425.

relief sought was wholly incidental to the injunctive or declaratory relief.[43] The court held that "monetary relief predominates in [Rule 23](b)(2) class actions unless it is incidental to requested injunctive or declaratory relief."[44] In addition to assuming the predominance of monetary damages over any injunctive or declaratory relief requested, the court also defined "incidental" to refer to "damages that flow directly from liability to the class *as a whole*."[45] Therefore, the court in *Allison*, while formally allowing for the possibility of monetary damages in class actions certified under Rule 23(b)(2), largely limited recovery to instances in which the monetary damages served as a group remedy and did not involve complex individual determination of damages.[46]

The standard for monetary damages in class actions certified under Rule 23(b)(2) set by the Fifth Circuit in *Allison* has been characterized as a bright-line rule where "any claim for monetary relief will automatically bar certification under Rule 23(b)(2)."[47] A number of other circuits, including the Seventh Circuit in *Jefferson v. Ingersoll International Inc.*,[48] the Eleventh Circuit in *Murray v. Auslander*[49] and *Cooper v. Southern Co.*,[50] and the Sixth Circuit in *Coleman v. General Motors Acceptance Corp.*[51] and *Reeb v. Ohio Department of Rehabilitation & Correction*,[52] have adopted either the "incidental test" or the narrow interpretation of "predominance" as set forth by the Fifth Circuit in *Allison*,[53] thereby limiting the ability of class members seeking both injunctive and monetary relief to certify a class action under Rule 23(b)(2).

The circuit split was created in 2001, when the Second Circuit, in *Robinson v. Metro-North Railroad*, disagreed with the *Allison* interpretation of monetary damages for classes certified under Rule 23(b)(2).[54]

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43. *Id.*
44. *Id.* at 415.
45. *Id.*
46. *Id.*
47. Changelo, *supra* note 4, at 158.
48. 195 F.3d 894 (7th Cir. 1999).
49. 244 F.3d 807 (11th Cir. 2001).
50. 390 F.3d 695 (11th Cir. 2004); *see also* Allan G. King & Kimberly R. Miers, FindLaw, 11th Circuit Reins in Class Action Certification Under Federal Rule of Civil Procedure 23(b)(2), http://library.findlaw.com/2005/Jan/6/133675.html (last visited Aug. 31, 2006) (noting that the Eleventh Circuit in *Cooper v. Southern Co.* adopted a narrow interpretation of Rule 23(b)(2), and that this was a "victory" for employers); Adele Nicholas, *Circuit Split Deepens on Discrimination Class Actions*, InsideCounsel.com, Feb. 2005, http://www.insidecounsel.com/issues/insidecounsel/15_159/litigation/180-1.html (stating that *Cooper* "adopt[ed] the conservative standard set forth by the 5th Circuit in *Allison v. Citgo Petroleum Corp.*").
51. 296 F.3d 443 (6th Cir. 2002).
52. 435 F.3d 639 (6th Cir. 2006); *see also* Circuit Review Staff, *First Impressions*, 2 Seton Hall Cir. Rev. 459, 481 (2006) (stating that the Sixth Circuit in *Reeb v. Ohio Department of Rehabilitation & Correction* followed the Fifth Circuit in *Allison*, by determining that compensatory and punitive damages were "very particularized inquiries" and that they were not incidental to the injunctive or declaratory relief sought).
53. *See* Changelo, *supra* note 4, at 147.
54. Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 164 (2d Cir. 2001).

b. Robinson *and the Ad Hoc Balancing Approach*

The class-action lawsuit in *Robinson* was brought by present and former African-American employees of Metro-North Commuter Railroad.[55] The suit was brought on behalf of the approximately 1300 African-American employees of Metro-North during the period from 1985 through 1996.[56] Similar to *Allison*, the plaintiffs in this suit also alleged employment discrimination in violation of Title VII of the Civil Rights Act of 1964.[57] The suit alleged that the company's policy of delegating discretion to department supervisors with regard to discipline and promotion was exercised in a discriminatory manner towards African-American employees based on their race.[58] The plaintiffs sought both injunctive and equitable relief for the class as a whole, and also compensatory damages for class members who alleged individual acts of discrimination.[59]

In *Robinson*, the Second Circuit extensively discussed the Fifth Circuit's holding in *Allison* and declined to adopt *Allison*'s "incidental damages" test.[60] The court made a number of arguments against the "incidental damages" test and in favor of a more ad hoc approach.[61] One reason that the *Robinson* court declined to adopt the Fifth Circuit's approach was because it found that the *Allison* test eliminated judicial discretion in deciding whether a class met the certification requirements of Rule 23.[62] The court also found that an ad hoc approach, as opposed to the "incidental damages" test, would better ensure due process for absent class members and also achieve judicial efficiency by allowing district court judges to determine whether a claim was in the interest of judicial economy.[63]

Instead of following the Fifth Circuit, the Second Circuit adopted a much broader rule, which actually called for an ad hoc evaluation for each class

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55. *Id.* at 155.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 164-65.
61. *See id.* at 163-66.
62. *Id.* at 164-65 (stating that, historically, district courts have had the authority to determine whether "in their informed discretion" and "based on the particulars of the case," a particular class has satisfied the prerequisites of certification).
63. *Id.* at 165.

> With respect to the [second] concern, [judicial economy,] permitting district courts to assess issues of judicial economy and class manageability on a case-by-case basis is superior to the one-size-fits-all approach of the incidental damages standard. As for the [first] concern, [due process,] options other than the adoption of the incidental damages approach exist to eradicate the due process risks posed by (b)(2) class certification of claims for damages.

Id. The court goes on to discuss the due process issue and determines that in cases where "non-incidental monetary relief, such as compensatory damages, is involved," due process for absent class members would be preserved through notice and opt-out rights. *Id.* at 165-66.

action.[64] The *Robinson* approach called for the court to determine whether "'the positive weight or value . . . of the injunctive or declaratory relief sought is predominant even though compensatory or punitive damages are also claimed.'"[65] The *Robinson* court looked to the Advisory Committee's note for guidance in interpreting Rule 23(b)(2), thereby assuming the relevance of the note, and concluded that the drafters' intent was to permit class members to seek some monetary damages in addition to "predominant" injunctive or declaratory relief.[66] The standard adopted by the *Robinson* court to determine whether monetary damages are permissible is as follows:

> [W]hen presented with a motion for (b)(2) class certification of a claim seeking both injunctive relief and non-incidental monetary damages, a district court must "consider[] the evidence presented at a class certification hearing and the arguments of counsel," and then assess whether (b)(2) certification is appropriate in light of "the relative importance of the remedies sought, given all of the facts and circumstances of the case." The district court may allow (b)(2) certification if it finds in its "informed, sound judicial discretion" that (1) "the positive weight or value [to the plaintiffs] of the injunctive or declaratory relief sought is predominant even though compensatory or punitive damages are also claimed," and (2) class treatment would be efficient and manageable, thereby achieving an appreciable measure of judicial economy.[67]

Therefore, in the Second Circuit, district courts faced with 23(b)(2) class certification motions must examine the merits of the claim and ensure that, (1) even without the possibility of recovering monetary damages, reasonable plaintiffs would still bring the suit in order to obtain the injunctive or declaratory relief being sought, and (2) the injunctive or declaratory relief would be reasonably necessary as well as appropriate if the plaintiffs claims were to succeed on the merits.[68] Ultimately, the

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64. *Id.* at 164.

65. *Id.* (quoting Allison v. Citgo Petroleum Corp., 151 F.3d 402, 430 (5th Cir. 1998) (Dennis, J., dissenting)).

66. *See id.* at 162.

67. *Id.* (quoting Hoffman v. Honda of Am. Mfg., Inc., 191 F.R.D. 530 (S.D. Ohio 1999) (criticizing the Fifth Circuit's decision in *Allison*, stating that "[b]y limiting (b)(2) certification to claims involving no more than incidental damages, the standard utilized by the district court forecloses (b)(2) class certification of all claims that include compensatory damages (or punitive damages) even if the class-wide injunctive relief is the "form of relief in which the plaintiffs are primarily interested") and *Allison*, 151 F.3d at 430 (Dennis, J., dissenting)).

68. *Id.* Therefore, while not all classes will be certified under Rule 23(b)(2) in the Second Circuit, the certification request cannot be denied without some investigation into the factual circumstances of the suit, while in the Fifth Circuit virtually all "hybrid" claims will immediately be denied certification under Rule 23(b)(2). *See* Changelo, *supra* note 4, at 148-49, 158. A "hybrid" class action refers to a class action requesting both equitable and monetary relief. *See* Robert M. Brava-Partain, *Due Process, Rule 23, and Hybrid Classes: A Practical Solution*, 53 Hastings L.J. 1359 (2002) (examining the class certification problems facing courts today when confronted with hybrid class actions). A "hybrid" class action has

Robinson test involves certification of a class under Rule 23(b)(2) to address the common issues involving the injunctive relief sought, and then treats the damages stage as if it were certified under Rule 23(b)(3), thereby requiring notice and opt-out rights for all class members.[69]

Although the Fifth Circuit's incidental damages test has been followed by a number of other circuits, the Second Circuit's approach has also been followed.[70] In *Molski v. Gleich*,[71] the Ninth Circuit "refuse[d] to adopt the [incidental damages] approach set forth in *Allison*,"[72] and held in favor of the ad hoc balancing test that was developed in *Robinson*.[73] The court in *Molski* adopted the *Robinson* test over the *Allison* test largely because the *Robinson* approach preserves judicial discretion in the district courts, and the "bright-line rule" from *Allison* "holds troubling implications for the viability of future civil rights actions."[74]

While both the Fifth Circuit and the Second Circuit turned to the Advisory Committee's note to Rule 23 for guidance in determining whether monetary relief was permissible for classes certified under Rule 23(b)(2),[75] the two circuits interpreted the issue differently. The Fifth Circuit adopted a "bright-line rule"[76] that virtually eliminates the ability for classes seeking certification under Rule 23(b)(2) to request monetary relief in addition to injunctive or declaratory relief.[77] The Second Circuit, on the other hand, adopted a more flexible "ad hoc balancing test"[78] that examines the merits of the request for monetary damages in order to determine whether the

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also been referred to as a class action where "the initial liability stage . . . is certified under Rule 23(b)(2), while the second stage of the litigation, concerning monetary relief, is certified under Rule 23(b)(3)." Changelo, *supra* note 4, at 152.

69. Jon Romberg, *The Hybrid Class Action as Judicial Spork: Managing Individual Rights in a Stew of Common Wrong*, 39 J. Marshall L. Rev. 231, 232 (2006). Therefore, in a class action where both monetary and injunctive or declaratory relief is requested, the *Robinson* approach does not require classes to specifically satisfy the requirements of Rule 23(b)(3) in addition to Rule 23(b)(2). *Id.* However, under this approach, courts do try the damages portion of the relief incorporating the same safeguards of notice and opt-out as regular classes certified under Rule 23(b)(3). *Id.*

70. *See* Nat'l Consumer Law Ctr., *supra* note 1, § 9.8.2.2 (5th ed. Supp. 2005) (citing Molski v. Gleich, 318 F.3d 937 (9th Cir. 2003)).

71. *Molski*, 318 F.3d 937.

72. *Id.* at 949.

73. *Id.* at 950 n.15. "Rather than adopting a particular bright-line rule, we have examined the specific facts and circumstances of each case. . . . In order to determine predominance, we have focused on the language of Rule 23(b)(2) and the intent of the plaintiffs in bringing the suit." *Id.* at 950.

74. *Id.* at 950.

75. *See* Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 162-63 (2d Cir. 2001); Allison v. Citgo Petroleum Corp., 151 F.3d 402, 411 (5th Cir. 1998). Both courts specifically referred to the Advisory Committee's note in their determination that monetary damages cannot predominate. *Robinson*, 267 F.3d at 162-63; *Allison*, 151 F.3d at 411.

76. Changelo, *supra* note 4, at 158. Changelo and the Second Circuit in *Robinson* both label the *Allison* test as a "bright-line" rule. *Robinson*, 267 F.3d at 163-64; Changelo, *supra* note 4, at 158.

77. *See* Changelo, *supra* note 4, at 158.

78. *Id.* at 161.

monetary relief or the injunctive relief predominates. While the approach of the Second Circuit does not allow for classes certified under Rule 23(b)(2) to seek unlimited monetary damages, it more readily enables classes seeking both monetary and injunctive relief to litigate their claims through class-action lawsuits, by preserving judicial discretion in determining whether the combined relief requested by a class of litigants satisfies the certification requirements of Rule 23(b)(2).[79]

B. *Interpretation of Statutes*

There is a long-standing debate in the Supreme Court concerning statutory interpretation. On one side of this debate are those justices, including Justice Antonin Scalia, who endorse a textualist or plain-meaning approach to interpretation.[80] On the other side are justices, including Justices John Paul Stevens and Stephen Breyer, who support a more flexible approach that utilizes extrinsic sources to determine the purpose of a statute.[81] The traditional approach to statutory construction is for the Court to interpret a statute in accordance with "the original intent and purpose of the enacting Congress."[82] In recent decades, however, the Supreme Court has been moving towards a stronger plain-meaning approach, which Professor William Eskridge has termed "the new textualism."[83]

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79. *Robinson*, 267 F.3d at 164-65 (stating that Rule 23 has historically been interpreted to provide district courts with the discretion to determine whether the certification requirements were met by a specific class, and that the *Allison* rule served to "nullify the district court's . . . discretion") (quoting *Allison*, 151 F.3d at 430 (Dennis, J., dissenting)); *see also* Stamps, *supra* note 4, at 411 (arguing that "the *Robinson* test preserves judicial discretion to certify Rule 23(b)(2) classes" by "[e]nabl[ing] [courts] to objectively valuate the requested relief").

80. Christian E. Mammen, Using Legislative History in American Statutory Interpretation 153 (2002) (describing Justice Scalia as "the Court's leading opponent of legislative history" and who "has argued at length" that "legislative history should be banished from statutory interpretation"); Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 Hastings L.J. 1039, 1074 (1993) (explaining that the current focus on the plain-meaning approach is "most commonly attributed to Justice Scalia").

81. *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct. 2611, 2628-31 (2005) (Stevens, J., dissenting) (supporting a broad interpretation of ambiguity, which then allows courts to consult legislative history); Mammen, *supra* note 80, at 153 (stating that Justice Breyer, of all the current Justices, has been the most articulate in favoring the use of legislative history).

82. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621, 626 (1990). Under this traditional approach, what Eskridge calls the "soft plain meaning rule," "legislative history is usually relevant, either to supply meaning for an ambiguous statute or to confirm or rebut the plain meaning of a clear statute." *Id.* For an illustration of this traditional approach, see INS v. Cardoza-Fonseca, 480 U.S. 421, 431-33, 433 n.12 (1987), where the Court examined the legislative history of the statute at issue to determine whether there was a "clearly expressed legislative intention" that contradicted the statutory language.

83. Eskridge, *supra* note 82, at 623-24. Eskridge attributes the new textualism, in large part, to Justice Scalia, and describes this approach as "posit[ing] that once the Court has ascertained a statute's plain meaning, consideration of legislative history becomes irrelevant." *Id.* at 623; *see also* Moore, *supra* note 80, at 1073 (stating that recently the

1. Background on Statutory Interpretation

a. *The Plain-Meaning Approach*

The modern plain-meaning or textualist approach views the goal of statutory interpretation as discerning the text's "plain" meaning.[84] As a result, this view focuses primarily on the text of the statute in question.[85] Under the plain-meaning approach, absent ambiguity, a court will interpret a statute based on the text of the statute alone.[86] Courts applying a plain-meaning approach will also look to the statute as a whole to determine the context of the phrase or subject in question to provide guidance for interpretation.[87] Therefore, if a statute is unambiguous, the modern plain-meaning approach would allow courts to "consider[] . . . dictionaries[88] and

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Supreme Court has "increasingly relied on a 'plain meaning' analysis to dispose of difficult questions involving the interpretation and application of various Federal Rules").

84. *See* William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, Legislation and Statutory Interpretation 231 (2d ed. 2006). "For a meaning to be 'plain,' . . . it must be only the most plausible meaning and need not be free from any semblance of doubt." Office of Legal Policy, Using and Misusing Legislative History: A Re-Evaluation of the Status of Legislative History in Statutory Interpretation 71 (1989).

85. Michael Sinclair, Guide to Statutory Interpretation 107 (2000) ("'It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed . . . .'" (quoting Justice William Day in *Caminetti v. United States*, 242 U.S. 470, 485-86 (1917))).

86. *See id.* (discussing Chief Justice John Marshall in *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202 (1819), and Justice Henry Brown in *Hamilton v. Rathbone*, 175 U.S. 414, 421 (1899)). According to Sinclair, the plain-meaning rule advanced by Justice Marshall would permit "access to legislative history if the statute is ambiguous" or if "the statute applie[d] to the facts generates 'absurdity or injustice,'" while Justice Brown would only allow access to the legislative history in instances where the language of the statute is ambiguous. *Id.* For purposes of this Note, Justice Marshall's interpretation will generally be considered the plain-meaning rule.

87. Eskridge, *supra* note 82, at 669 (stating that Justice Scalia, a "new textualist," will consider the language of the entire statute to provide context and give meaning to the "bare language of statutes").

88. The dictionary would indicate the common meaning of a term at the time the statute was enacted, which may shed light on Congress' intended meaning of a term. *See* Mammen, *supra* note 80, at 15-16. "Generally, the Supreme Court uses dictionaries to provide 'plain meaning' translations for key terms in a statutory provision." *Id.* at 15; *see, e.g.*, Mississippi v. Louisiana, 506 U.S. 73, 77-78 (1992) (consulting *Webster's New International Dictionary* to determine the plain meaning of the term "exclusive" in a statute). Additionally, to deal with the fact that the meaning of words often changes over time, the Supreme Court has "expressed a preference for the definition in operation at the time the statute was enacted." Mammen, *supra* note 80, at 16 (citing Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries, 512 U.S. 267, 272 (1994)). For a recent example of a case in which the Supreme Court looks to the dictionary to aid in statutory interpretation, see Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2801 (2006) (Kennedy, J., concurring) (looking to the 1961 edition of *Webster's Third New International Dictionary* for guidance as to the meaning of the term "practicable" at the time a statute was enacted, in order to best determine Congress's intent), and *id.* at 2852 (Alito, J., dissenting) (defining the terms "regular" and "special" by examining the definitions in the 1913 edition of *Webster's Third New International Dictionary*).

grammar books, the whole statute, analogous provisions in other statutes,[89] canons of construction,[90] and the common sense God gave us."[91] In the context of Supreme Court statutory interpretation, ambiguity arises when the text of a statute is open to at least two or more ways of interpretation.[92] If there is ambiguity in a statute, then this approach would suggest looking to extrinsic sources, including the legislative history, to effectuate the drafters' intent behind the statute.[93] Absent ambiguity, this approach deliberately avoids extrinsic sources, in part because extrinsic sources, especially legislative history, tend to be murky and complicated, and they often provide little insight into the purpose of the statute.[94]

The current Supreme Court usually interprets statutes using a plain-meaning or textualist approach.[95] According to one scholar, those who follow the plain-meaning approach rarely find a statute to be ambiguous, and therefore rarely find the need to investigate the legislative intent.[96] Due in part to Justice Scalia's criticism of the liberal use of extrinsic sources, in recent years "the Court has been much more willing to ignore legislative history, has been slightly more reluctant to deviate from the apparent meaning of the statutory text, and has relied more heavily than before on structural arguments and canons of statutory interpretation."[97]

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89. Analogous provisions in other statutes may provide a contrast with regards to the word choice, and therefore the intent, of a particular statute. *See* Mammen, *supra* note 80, at 15-16.

90. The canons of construction are rules that courts may invoke to help interpret statutes and have been used to determine whether a statute is ambiguous. See *id.* at 25-26 for a discussion of the use of canons of construction in statutory interpretation.

91. Eskridge, *supra* note 82, at 669. "The only context not normally considered is legislative history, and most of the new textualists will consider legislative history if the other aids still leave the statutory meaning truly unclear." *Id.* While it may seem that some of these sources, including dictionaries, analogous provisions in other statutes, and the canons of construction are extrinsic to the text, they are consulted to supplement the text and are considered to be part of the context of the statute rather than as extrinsic sources. *Id.* (stating that "[t]he new textualism considers [these sources] as context").

92. Mammen, *supra* note 80, at 33 (stating that "[i]n essence, in Supreme Court practice, a statute is ambiguous whenever a majority of Justices determines that, as applied to the facts of the case, the statutory text may *reasonably* be given two or more interpretations").

93. Sinclair, *supra* note 85, at 107 (stating that, when the meaning is susceptible to multiple constructions, "the court may look into [among other factors,] prior and contemporaneous acts [and] "the reasons which induced the act" (quoting Hamilton v. Rathbone, 175 U.S. 414, 419 (1899))).

94. *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct. 2611, 2626 (2005); *see also infra* Part II.A.

95. *See* Sinclair, *supra* note 85, at 109. While the plain-meaning approach was prevalent in the Supreme Court at the time of *Caminetti* in 1917, from that time until the 1980s, when Justice Scalia joined the Court, the Supreme Court "seemed to have completely abandoned the [plain-meaning rule]." *Id.* Since Justice Scalia's appointment to the Court, however, the Court has once again largely adopted a plain-meaning approach to statutory interpretation. *Id.*

96. *See* Moore, *supra* note 80, at 1074-75.

97. Eskridge, *supra* note 82, at 625 (describing the shift in the approach to statutory interpretation that occurred during Justice Scalia's first two years on the Supreme Court).

1. The Current Situation: *Exxon Mobil v. Allapattah*

Allapattah,[98] decided in June 2005, is a case interpreting 28 U.S.C. § 1367, the statute authorizing supplemental jurisdiction for the federal courts. *Allapattah* represents the most recent decision by the Supreme Court that sets out the Court's standards for statutory interpretation and the use of extrinsic sources in interpretation.[99] Justice Anthony Kennedy delivered the opinion of the Court, which was a five-to-four decision.[100] *Allapattah* was a class-action lawsuit filed in 1991 on behalf of approximately ten thousand Exxon Mobile dealers against the Exxon Corporation.[101] The suit was filed in federal court, invoking diversity jurisdiction, and alleged an intentional and systematic scheme by Exxon to overcharge the plaintiffs for fuel.[102] As not all of the named plaintiffs met the minimum amount in controversy required for federal diversity jurisdiction, the issue was whether the district court had "properly exercised § 1367 supplemental jurisdiction over the claims of class members who did not meet the jurisdictional minimum amount in controversy."[103] The Eleventh Circuit had affirmed the district court's holding and permitted supplementary jurisdiction over the plaintiff class members who did not satisfy the amount-in-controversy requirement.[104] The Supreme Court held that where are least one plaintiff satisfied the amount-in-controversy requirement, and the other elements of jurisdiction were satisfied, § 1367 allowed federal jurisdiction for the claims of class members who did not meet the amount-in-controversy requirement.[105]

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98. 125 S. Ct. at 2611.

99. *See generally id.* at 2626-28. In the months since *Allapattah*, the Supreme Court has also decided *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), which also involved the application of a primarily plain-meaning approach. In the opinion, written by Justice Stevens, the Court interpreted § 1005 of the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, 119 Stat. 2739 (to be codified in scattered sections of 10, 28, and 42 U.S.C.). The statute governs the treatment of detainees and applies to pending cases; however, the statute is silent as to whether it applies to pending applications for a writ of habeas corpus, which was at issue in that case. *Hamdan*, 126 S. Ct. at 2762-65.

100. *Allapattah*, 125 S. Ct. at 2614.

101. *Id.* at 2615.

102. *Id.* The Exxon dealers alleged that Exxon breached an agreement to provide discounts to dealers for customers using credit cards to purchase gasoline by failing to provide the discount for the dealers between March 1983 and August 1994, thereby overcharging the dealers for the fuel. *See* Allapattah Servs., Inc. v. Exxon Corp., 333 F.3d 1248, 1252 (11th Cir. 2003).

103. *Allapattah*, 125 S. Ct. at 2615. According to 28 U.S.C. § 1332(a) (2000), the minimum amount in controversy required is currently $75,000 for federal diversity jurisdiction cases. *Id.* at 2617.

104. *Allapattah*, 333 F.3d at 1253-54. The Court interpreted the language of 28 U.S.C. § 1367 to "allow[] a district court entertaining a diversity class action to exercise supplemental jurisdiction over class members whose claims do not meet the jurisdictional minimum amount in controversy requirement." *Id.* at 1254.

105. *Allapattah*, 125 S. Ct. at 2625. The Court specifically held that, in a case of diversity jurisdiction, "where . . . at least one named plaintiff in the action satisfies the amount-in-controversy requirement, § 1367 does authorize supplemental jurisdiction over the claims of other plaintiffs . . . even if those claims are for less than the jurisdictional

While *Allapattah*'s specific holding pertains to supplemental jurisdiction under § 1367, the Court extensively discussed the issue of statutory interpretation.[106] The Court based its holding on a textualist or plain-meaning approach to statutory interpretation.

> As [the Supreme Court] ha[s] repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms.[107]

The majority of the Court in *Allapattah* found the text of the statute to be unambiguous and thus limited its inquiry to the text.[108] In short, the Supreme Court's holding in *Allapattah* represents the "textualist" or "plain-meaning" view of statutory interpretation, where extrinsic sources of the drafters' intent are only relevant when there is ambiguity in the text of the statute.[109]

b. *The Purposive or Intentional Approach*

Another view of statutory interpretation, which has been termed "purposivism"[110] or "intentionalism,"[111] views the goal or objective of statutory interpretation as enforcing legislative intent.[112] As a result, this view allows courts to look to extrinsic sources for the drafters' intent in

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amount specified in the statute setting forth the requirements for diversity jurisdiction." *Id.* at 2615.

106. *Id.* at 2625-27 (discussing statutory interpretation in general, and the interpretation of § 1367 in particular).

107. *Id.* at 2626 (supporting a plain-meaning approach to statutory interpretation where extrinsic sources are only appropriate when the terms of the statute are ambiguous).

108. *Id.* at 2625. The Court indicated that the majority's interpretation of the statute was in accordance with the text, other statutory provisions, and the "established jurisprudence" of the Court. *Id.* While limiting the inquiry to these sources, Justice Kennedy also stated that,"[e]ven if we were to stipulate, however, that the reading these proponents urge upon us is textually plausible, the legislative history cited to support it would not alter our view as to the best interpretation of § 1367." *Id.*

109. *See* Jacobs v. Bremner, 378 F. Supp. 2d 861, 866 (N.D. Ill. 2005) (interpreting *Allapattah* to signify that "it is impermissible to consult legislative history when the statutory language is unambiguous").

110. Michael Livingston, *Practical Reason, "Purposivism," and the Interpretation of Tax Statutes*, 51 Tax L. Rev. 677, 680-81 (1996) (referring to the theory developed by Professors Henry Hart and Albert Sacks, where "a court interpreting a statute first should attribute a purpose to the statute (or its subordinate provision), and then '[i]nterpret the words of the statute . . . so as to carry out the purpose as best it can'" (quoting Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1374 (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958))).

111. *See* Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. Pa. L. Rev. 1099, 1152 (2002); *see also* Richard J. Pierce, Jr., *Justice Breyer: Intentionalist, Pragmatist, and Empiricist*, 8 Admin. L.J. Am. U. 747, 747 (1995) (defining "intentionalism" as "interpreting a statute based on a judicial determination of the intent of the legislature").

112. *See* Eskridge, Frickey & Garrett, *supra* note 84, at 219.

adopting a statute, even when the text is not obviously ambiguous.[113] The core of this approach is that, when construing a statute, judges should consider a number of factors, including the legislative history and the purpose of the statute, in addition to the text.[114] This view, which Professor Daniel Farber has called "practical reason," does not presume that relying solely on the text of a statute is necessarily the appropriate way of interpreting the statute.[115] This approach seeks to remain faithful to the purpose and intent of the statute, as opposed to specific language that the drafters ultimately chose to put into the statute.[116]

While the Supreme Court has been moving towards a plain-meaning approach to statutory interpretation in recent decades, courts have traditionally applied the purposive approach to statutory interpretation, where the purpose of the statute or the intent of the drafters guided the interpretation of the statute.[117] In interpreting a statute, courts would initially examine the text of the statute to determine if there was a plain meaning to the text.[118] Generally, however, "[u]nder this approach, if a

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113. According to Professor Eskridge, one type of plain-meaning rule, which he refers to as the "soft plain meaning rule," is closely related to a purposive interpretation. *See* Eskridge, *supra* note 82, at 626-27. Under the "soft" approach, a plain meaning can be overcome by compelling evidence of a contrary legislative intent, and thus the interpreter must always check plain meaning against legislative background. *See* Eskridge, Frickey & Garrett, *supra* note 84, at 231-33. This approach, much like a purposive approach, would require courts always to consult the legislative history, not solely to determine legislative intent, but rather to determine whether there is compelling evidence of legislative intent that contradicts the plain language of the statute. *See id.*; Sinclair, *supra* note 85, at 109. Using the "soft" plain-meaning approach in *Griffin v. Oceanic Contractors, Inc.*, the Court carved out an exception to the plain-meaning rule "in rare cases [where] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters"—in such cases, "those intentions must be controlling." 458 U.S. 564, 571 (1982). Additionally, according to Eskridge, "[i]n almost all of the leading plain-meaning cases of the Warren and Burger Courts, the Court checked the legislative history to be certain that its confidence in the clear text did not misread the legislature's intent." Eskridge, *supra* note 82, at 627.

114. *See* Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 Vand. L. Rev. 533, 537 (1992).

115. *Id.* at 535-37.

116. *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct. 2611, 2629 (2005) (Stevens, J., dissenting) (criticizing the majority for treating statutory interpretation as a "pedantic exercise," rather than a "serious attempt at ascertaining congressional intent").

117. Eskridge, *supra* note 82, at 626 (discussing the "soft" plain-meaning rule in which courts usually consult legislative history to ensure that their "plain meaning" interpretation is supported by the legislative intent). According to Professor Eskridge, there exists a "long line of Supreme Court decisions stating or suggesting that the only task of the Court in statutory interpretation is to determine congressional intent or purpose." *Id.* One example of such a case is *Commissioner v. Engle*, 464 U.S. 206, 214 (1984), which described the Court's sole task as determining whether Congress intended a specific tax allowance in the Tax Reduction Act of 1975.

118. Eskridge, *supra* note 82, at 624. Generally, "plain meaning" essentially refers to interpretation in light of the "ordinary and obvious meaning" of the words in the statute. *See id.* at 626-27. The Supreme Court specifically uses the term "plain meaning" (as well as "ordinary meaning") "to refer to meanings of a statutory text that are apparent from the text alone (at least to members of the Court), without references to external sources or interpretive aids." Mammen, *supra* note 80, at 12.

statute is ambiguous, legislative history often will be decisive, and even an apparently plain meaning can be rebutted by legislative history."[119] As a result of this relatively liberal approach to legislative history, courts regularly consulted extrinsic sources "including committee reports, floor debates,[120] hearings, rejected proposals, and even legislative silence" to determine the purpose or intent of a statute.[121] Other examples of extrinsic sources that courts may consult include other statutes, judicial opinions, administrative materials, secondary sources, dictionaries, and canons of construction.[122]

A recent example of this approach to statutory interpretation is the dissent in *Allapattah*, written by Justice Stevens and joined by Justice Breyer.[123] While the purposive approach does not require looking to extrinsic sources for guidance, especially when there seems to be a "plain meaning" to the statute,[124] courts would generally consult extrinsic sources when there is ambiguity in the statute. In his dissent, Justice Stevens, unlike Justice Kennedy and the majority, found the text of the statute to be ambiguous, and therefore turned to the legislative history for guidance.[125] Justice Stevens, agreeing with Justice Ruth Bader Ginsburg's dissent, found the legislative history to provide support for an alternate interpretation of § 1367, in which § 1367 requires each litigant to satisfy the amount in controversy requirement.[126]

According to Justice Stevens, "'ambiguity' is a term that may have different meanings for different judges"[127] and is "apparently in the eye of the beholder."[128] Justice Stevens criticized the majority's opinion because it decided that the statute at issue was unambiguous and that its reading of the statute was the only possible correct interpretation.[129] Because some

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119. Eskridge, *supra* note 82, at 624.

120. *See, e.g.*, Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2767 n.10 (2006). In *Hamdan*, Justice Stevens consulted floor statements by a number of senators for guidance in determining Congress's intent with respect to the DTA. *Id.*

121. Eskridge, *supra* note 82, at 624. Compare this list with the sources listed in *supra* notes 88-91 and accompanying text. The scope of the materials consulted under the purposive approach is broader than those consulted under the plain-meaning or new textualist approach.

122. Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 Stan. L. Rev. 1, 11-12 (1998) (discussing some of the "extrinsic" sources used by the Supreme Court in statutory interpretation during the 1996 Term).

123. *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct. 2611, 2628-31 (2005) (Stevens, J., dissenting).

124. *See* Eskridge, *supra* note 82, at 624.

125. *See Allapattah*, 125 S. Ct. at 2628-29 (Stevens, J., dissenting) (indicating that the statutory text may have been ambiguous and suggesting that legislative history should still be consulted when a statute is deemed unambiguous).

126. *See id.* at 2629-31; *see also id.* at 2631-41 (Ginsburg, J., dissenting) (arguing that there is a more plausible reading of the statute than that of the majority's opinion, thereby implying that the language of the statute is ambiguous).

127. *Id.* at 2628 (Stevens, J., dissenting).

128. *Id.*

129. *See id.*

courts may find a statute ambiguous, while others may find that same provision to be unambiguous, Justice Stevens encouraged a broader approach to the use of legislative history and the definition of ambiguity.[130] Instead of the majority's approach, he suggested that "it is unwise to treat the ambiguity *vel non* of a statute as determinative of whether legislative history is consulted."[131] Therefore, Justice Stevens advocated a broad approach to ambiguity, which would then allow courts to interpret a statute in accordance with "*all* reliable evidence of legislative intent"[132] and more accurately interpret statutes in accordance with their purpose.

c. *Legislative Silence: Ambiguity or a Deliberate Omission?*

While courts can interpret the text of a statute using a plain-meaning or a purposive approach, the text may be silent as to whether particular conduct is within the scope of a statute. This creates a new problem for courts—how to interpret statutory silence. If a statute is silent as to a certain subject, this silence can be interpreted in one of two ways: It can be seen to represent ambiguity in the statute, or it can be viewed as a deliberate omission by Congress of the subject in question from the statute.[133] The Supreme Court has interpreted silence in both of these ways, which has led to confusion as to the appropriate way to interpret silence.[134]

One interpretation is that silence, in a text, represents ambiguity.[135] With respect to federal statutes, the Supreme Court has indicated that "the silence of Congress is ambiguous."[136] Additionally, the Court has indicated that statutory silence generally creates ambiguity, instead of resolving it.[137] If silence is construed as ambiguity, courts would be required to look to extrinsic sources for guidance in interpreting a text when the statute is silent

130. *See id.*

131. *Id.*

132. *Id.*; *see also* Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 65 (2004) (Stevens, J., concurring) ("In recent years the Court has suggested that we should only look at legislative history for the purpose of resolving textual ambiguities or to avoid absurdities. It would be wiser to acknowledge that it is always appropriate to consider all available evidence of Congress' true intent when interpreting its work product.").

133. *See* Daniel L. Rotenberg, *Congressional Silence in the Supreme Court*, 47 U. Miami L. Rev. 375, 375-76 (1992); *see also* Abner J. Mikva & Eric Lane, An Introduction to Statutory Interpretation and the Legislative Process 37-39 (1997) (discussing how legislative silence can also be used by courts to confirm prior statutory interpretations if the legislature fails to address the issue).

134. *See generally* Rotenberg, *supra* note 133 (discussing a number of different ways that congressional silence has been interpreted by the Supreme Court).

135. *See id.* at 375 (stating that ambiguity is a result of silence because "silence does not define itself").

136. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 388 (2000); *see also* Carlisle v. United States, 517 U.S. 416, 449 (1996) (referring to "ambiguous silence").

137. Barnhart v. Walton, 535 U.S. 212, 218 (2002).

on a particular issue,[138] regardless of whether a court is a proponent of the plain-meaning or purposive approach to interpretation.

The other approach taken by the Supreme Court is to interpret statutory silence as a deliberate omission by Congress.[139] *Youngstown Sheet & Tube Co. v. Sawyer* illustrates this approach.[140] In *Youngstown*, President Harry Truman seized the country's steel mills, whose workers were on strike, in order to provide materials needed to support the Korean War.[141] While President Truman claimed he had authority to seize the steel mills, the Supreme Court disagreed.[142] The Court was unable to find any specific provision either in any statute or in the Constitution which authorized President Truman's seizure of the steel mills.[143] The Court held that while the Constitution gives the President the power to execute the laws, Congress was the only branch of the federal government with the constitutional authority to make laws.[144] Here, Congress failed to provide the President with the explicit authority to engage in the act of seizing the steel mills.[145] Therefore, the Court found Congress's silence about the presidential authority to seize the steel mills to be a lack of approval, an indication that the President lacked the power to take this action.[146]

Youngstown is one of the most prominent decisions where legislative silence was interpreted as a deliberate omission in a statute, and the Supreme Court continues to apply this interpretation to statutory silence. More recently, the Court, in *Hamdan v. Rumsfeld*,[147] treated legislative

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138. *See* Sinclair, *supra* note 85, at 107 (indicating that courts will look to extrinsic sources, including legislative history, for guidance if a statute is found to be ambiguous); *see also supra* note 85 and accompanying text.

139. INS v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987) (stating that, with regards to different provisions of a single statute, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion"); *see also* Eskridge, *supra* note 82, at 640 (indicating that legislative silence often represents ambiguity, but it can also "be supporting evidence of legislative intent," implying that silence may be interpreted as a deliberate omission by Congress).

140. 343 U.S. 579 (1952) (holding that Congress's failure to expressly grant authority to the President indicated that the President lacked such authority).

141. *See id.* at 582-83.

142. *See id.* at 589; *see also* Rotenberg, *supra* note 133, at 376-77 (discussing the *Youngstown* case and arguing that this interpretation of silence is "unwise").

143. *Youngstown*, 343 U.S. at 585, 587-88. "There is no statute that expressly authorizes the President to take possession of property . . . [n]or is there any act of Congress . . . from which such a power can fairly be implied." *Id.* at 585.

144. *Id.* at 588.

145. *Id.* at 586 ("[T]he plan Congress adopted in [the Taft-Hartley Act] did not provide for seizure under any circumstances.").

146. *Id.* at 585 (holding that "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself"). The Court stated, "There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied." *Id.*

147. 126 S. Ct. 2749 (2006).

silence in the Detainee Treatment Act of 2005 (DTA) as a deliberate omission by Congress.[148]

C. *How the Supreme Court Has Interpreted Federal Rules of Civil Procedure*

1. Interpretation of Rule 11 by the Supreme Court

Although the Supreme Court has not promulgated a standard by which to interpret the Federal Rules of Civil Procedure, "the Court routinely uses principles of statutory interpretation in construing the rules."[149] As a result, the Court has been leaning towards a plain-meaning view of interpreting the Federal Rules, especially Rule 11, throughout the past few decades.[150] The Supreme Court's interpretation of Rule 11 can serve to illustrate the approach that the Court has taken towards interpreting the Federal Rules of Civil Procedure, even though the Court has yet to address directly how they should be interpreted. Generally, the plain-meaning interpretation looks to the text of a rule as a whole, in addition to the language at issue, to determine the interpretation of the rule, much in the same way that the plain-meaning approach is used to interpret statutes.[151]

Federal Rule of Civil Procedure 11 provides for sanctions to be placed upon attorneys in federal courts.[152] In one important case, *Pavelic & LeFlore v. Marvel Entertainment Group*,[153] the Court examined the phrase "person who signed" in Rule 11.[154] At the time, Rule 11 called for sanctioning the "person who signed" any offending document.[155] The issue facing the Court was whether sanctions could be imposed on an attorney's law firm in addition to the attorney who signed the document.[156] Following a plain-meaning approach and examining the phrase in the context of the rest of the Rule, the Court, in an opinion by Justice Scalia, held that the sanctions extended only to the attorney who signed the document and not to

148. *Id.* at 2766.

149. Schacter, *supra* note 122, at 11 (citing Moore, *supra* note 80).

150. *See* Moore, *supra* note 80, at 1076 (discussing the jurisprudence of the Supreme Court with regards to Rule 11 between 1989 and 1991).

151. *Id.* at 1076-78.

152. *See* Fed. R. Civ. P. 11. For a thorough discussion of Rule 11 and its interpretation by courts, see Georgene M. Vairo, Rule 11 Sanctions: Case Law, Perspectives and Preventive Measures (3d ed. 2004).

153. 493 U.S. 120 (1989).

154. The Court in *Pavelic* relied on the text of Rule 11 prior to 1993, which stated that "[i]f a pleading, motion, or other paper is signed in violation of this rule, the court . . . shall impose upon the person who signed it . . . an appropriate sanction . . . ." Fed. R. Civ. P. 11 (1983) (amended 1993).

155. The phrase "person who signed" was present in the text of Rule 11 until the Rule was amended in 1993, when the text was altered such that sanctions could be imposed upon "the attorneys, law firms, or parties" that violate the Rule's provisions. Fed. R. Civ. P. 11(c).

156. *Pavelic*, 493 U.S. at 121.

the attorney's law firm.[157] Applying the plain-meaning standard, the majority found the phrase to be unambiguous when examined in the context of the rest of the provisions of Rule 11.[158] The Court stated that sanctions were to be limited to the individual signer of the offending document because the paragraph referenced only the individual signer and found it "strange to think that the phrase 'person who signed' in the last sentence [of the paragraph] refers to the partnership represented by the signing attorney . . . ."[159] Therefore, in applying the plain-meaning approach, the Court examined the context of the Rule as a whole and determined that sanctions could only be imposed upon the individual attorney who signed a document in violation of Rule 11, and not the law firm with which the attorney was associated.[160]

Justice Thurgood Marshall was the sole dissenter in *Pavelic*.[161] Relying on the Advisory Committee's note for guidance, he called for giving trial judges greater flexibility than the majority's view and allowing judges to impose sanctions on the individual attorney, the attorney's law firm, or both, at the judge's discretion.[162] According to Justice Marshall, his interpretation of Rule 11 was in line with Rule 11's broad purpose, which "is to strengthen the hand of the trial judge in his efforts to police abusive litigation practices and to provide him sufficient flexibility to craft penalties appropriate to each case."[163] As a result, Justice Marshall found the majority's opinion to be overly restrictive by providing immunity for law firms from any sanctions placed on their attorneys' misconduct.[164] By interpreting Rule 11 to fit with the purpose of the Rule, as evidenced by the Advisory Committee's note, Justice Marshall applied the purposive approach. In contrast, the majority's opinion, which limits sanctions to the actual person who signed an offending document, is an example of the plain-meaning approach being applied to Rule 11.

Two other cases where the Supreme Court interpreted other aspects of Rule 11 are *Cooter & Gell v. Hartmarx Corp.*[165] and *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*[166] In *Cooter & Gell*, a law firm was sanctioned under Rule 11 by a district court, even after the firm filed for a voluntary dismissal of a suit for unfair competition.[167] The Court considered whether Rule 11 allows sanctioning a plaintiff who has

157. *Id.* at 126-27.
158. *Id.* at 123.
159. *Id.* at 124.
160. *See id.* at 126-27.
161. *Id.* at 127-31 (Marshall, J., dissenting).
162. Moore, *supra* note 80, at 1078-79. According to Professor Moore, Justice Marshall's approach demonstrated that the Court's plain-meaning approach was "not the only reasonable interpretation consistent with the text of the Rule," thereby implying that the text was ambiguous and extrinsic sources should have been consulted. *Id.*
163. *Pavelic*, 493 U.S. at 127.
164. *Id.*
165. 496 U.S. 384 (1990).
166. 498 U.S. 533 (1991).
167. *Cooter & Gell*, 496 U.S. at 389.

voluntarily dismissed his or her suit and whether courts can award attorneys' fees on appeal as part of a sanction.[168] The majority, represented by Justice Sandra Day O'Connor, indicated that it was interpreting Rule 11 in light of its plain meaning.[169] The Court based its analysis on the text of Rule 11 as of the 1983 Amendments to the Rule.[170] At the time, the Rule indicated that "[a]n attorney who signs the paper without such a substantiated belief 'shall' be penalized by 'an appropriate sanction.'"[171] As a result, and in accordance with the text of the Rule, the Court upheld the sanctions the lower court had imposed upon the petitioners despite the fact that the petitioners had voluntarily dismissed the suit shortly after the request for sanctions.[172] In this case, however, the Court also found its interpretation of Rule 11 to satisfy the intent of the Rule, which is to "deter baseless filings" and to streamline federal procedure.[173] Therefore, in *Cooter & Gell*, "the Court appeared to be much more sensitive to allowing policy and other considerations to inform its analysis" than in its previous interpretations of the Rule.[174]

Like *Cooter & Gell*, *Business Guides*[175] also involved a plain-meaning interpretation of Rule 11. The Court in *Business Guides* chose to interpret the Federal Rules of Civil Procedure, like statutes, by their plain meaning and to limit its inquiry to the text of the Rules if the text is "clear and unambiguous."[176] In *Business Guides*, the Court was faced with interpretation of the same version of Rule 11 as the Court in *Cooter & Gell*, where the text of the Rule indicated that "[i]f a pleading, motion, or other paper is signed in violation of this rule, the court shall impose upon the person who signed it an appropriate sanction."[177] The Court held that the plain meaning of the Rule was that any party who signed a pleading or other court document would be sanctioned if the signing was done before a reasonable inquiry was conducted.[178] Based on the text, Rule 11 sanctions were found to apply to represented parties, in addition to counsel and unrepresented parties, even when the signature of a represented party is

168. *Id.* at 388.
169. *Id.* at 391.
170. *Id.* at 393.
171. *Id.* The rule in *Cooter & Gell* has since been partially superseded by the 1993 Amendments to Rule 11, which provide for a "safe harbor" in which a party has 21 days to voluntarily dismiss a suit after a request for sanctions has been made before being sanctioned. *See* De La Fuente v. DCI Telecomms., Inc., 259 F. Supp. 2d 250, 257 n.4 (S.D.N.Y. 2003); Fed. R. Civ. P. 11(c)(1)(A). Under the current text of Rule 11, the petitioners in *Cooter & Gell* would not have been sanctioned. *See De La Fuente*, 259 F. Supp. 2d at 257 n.4.
172. *Cooter & Gell*, 496 U.S. at 394-95.
173. *Id.* at 393.
174. Moore, *supra* note 80, at 1079. For further discussion of *Cooter & Gell*, see *id.* at 1079-80.
175. 498 U.S. 533 (1991).
176. *Id.* at 540-41.
177. *Id.* at 541.
178. *See id.*

present, but not required for the document.[179] As a result, the Court interpreted Rule 11 to allow for "[p]arties, as well as counsel, [to] be sanctioned if they sign papers without first undertaking a reasonable inquiry into their factual and legal basis."[180] As in *Cooter & Gell*, the majority indicated that it was interpreting the Rule in light of its purpose, which was "to bring home to the individual signer his personal, nondelegable responsibility."[181] While in these decisions the Court seemed to apply a more flexible interpretation of Rule 11, the Court still chose to apply the plain-meaning standard to the interpretation of the Rule and found support for the plain-meaning interpretation in the general purpose of the Rule.[182]

D. *The Creation of the Federal Rules: What Sets Them Apart from the Statutory Process?*

1. The Process Behind the Creation of Federal Rules

The Federal Rules of Civil Procedure undergo a multi-step process prior to their enactment.[183] The Rules were first promulgated under the Rules Enabling Act, which was originally passed in 1934.[184] The Rules Enabling Act of 1934 gave the Supreme Court the "authority to make and publish rules in actions at law."[185] The Act gave the Supreme Court the power to make general rules governing motions, pleadings, writs, and other proceedings and procedure in civil actions, provided that "[s]aid rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."[186] As a result of the Rules Enabling Act of 1934, Congress thus delegated the authority to create the Federal Rules of Civil Procedure to the Supreme Court.[187] Since the Supreme Court oversees the creation of the Federal Rules, unlike the passage of statutes, it would be logical to assume that the Court, and the judicial branch in general, would not be overstepping its authority when taking an active role in interpreting Federal Rules.

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179. *Id.* at 542-43.

180. Moore, *supra* note 80, at 1081. *Compare Business Guides*, 498 U.S. at 543-48, *with* Pavelic & LeFlore v. Marvel Entm't Group, 493 U.S. 120, 124-25 (1989) (demonstrating the increasingly flexible plain-meaning approach used by the Supreme Court with regards to the interpretation and application of Rule 11).

181. *Business Guides*, 498 U.S. at 547 (quoting *Pavelic*, 493 U.S. at 126).

182. See Moore, *supra* note 80, at 1079-85 for a discussion of the three Rule 11 cases.

183. For a complete discussion of the rulemaking process, see Moore, *supra* note 80, at 1041-73 and Struve, *supra* note 111, at 1103-19.

184. Rules Enabling Act of 1934, ch. 651, Pub. L. No. 73-415, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2000)).

185. *Id.*

186. Sibbach v. Wilson & Co., 312 U.S. 1, 7-8 (1941) (citing the Rules Enabling Act).

187. Moore, *supra* note 80, at 1041-42 (describing the modern formulation of the Rules Enabling Act as indicating that "Congress delegated to the court the power to promulgate the Federal Rules of Civil Procedure"); *see also* Struve, *supra* note 111, at 1105 (explaining that the Rules Enabling Act of 1934 involved the delegation of the majority of the rulemaking power to the Supreme Court, while preserving the power to prevent the proposed Rules from going into effect for Congress).

While the Court itself has the power to draft the Federal Rules of Civil Procedure, it has relied on the Advisory Committee to draft proposed rules.[188] Currently, proposed rules go through a series of seven formal stages prior to approval and are reviewed by at least five institutions: the Advisory Committee on Civil Rules, the Standing Committee on Rules of Practice and Procedure, the Judicial Conference of the United States, the Supreme Court, and Congress.[189] After a proposed rule is drafted by the Advisory Committee, the next step involves proposed changes, where anyone (including judges, practitioners and even members of the public) can recommend changes to the proposed rule, which are considered by the Advisory Committee.[190] If the Committee accepts any of the suggestions, the text of the proposed rule and an accompanying explanatory note are redrafted.[191] Next, the Advisory Committee seeks approval from the Standing Committee to publish the proposal, and, if approved by the Standing Committee, the proposal is circulated for public comment.[192] The proposal is then reconsidered by the Advisory Committee in light of the public comments, and the final draft of the rule, along with the note, are submitted to the Standing Committee for approval.[193] Upon approval by the Standing Committee, the rule and note are sent to the Judicial Conference and then to the Supreme Court for approval.[194] Generally, if the Standing Committee makes substantial revisions to the proposal, the Standing Committee sends the proposal back to the Advisory Committee for further revision and approval; however, the Standing Committee has been known to make substantial revisions to proposals and then forward them onto the Judicial Conference directly.[195] Finally, if the rule and note are approved by the Supreme Court, they are forwarded to Congress by May 1st.[196] If Congress fails to take action contrary to the proposed rule, it

188. Moore, *supra* note 80, at 1061 (explaining that the Court has "always relied upon a series of Advisory Committees to draft proposed Rules" rather than attempt to independently draft Federal Rules).

189. Struve, *supra* note 111, at 1103-04 (providing an overview of the current rulemaking process).

190. *See id.* at 1103-04. The proposed changes to a rule or amendment to an existing rule are first collected and analyzed by the Advisory Committee Reporter. *See id.* at 1103. These suggestions are then submitted to the Advisory Committee along with a recommendation for disposition from the Reporter. *Id.*

191. *Id.* at 1104. The suggestions are considered at a biannual meeting of the Committee, and suggestions that have been accepted by the Committee are given to the Reporter, who prepares a proposed draft amendment and an explanatory note. *Id.* at 1103-04.

192. *Id.* at 1104. Upon approval by the Standing Committee, both the proposed draft of the rule and the explanatory note are "circulated for public comment." *Id.*

193. *Id.* If the Advisory Committee makes extensive changes to the draft as a result of the public comments, the rule and note may again be submitted for public comment, prior to being submitted to the Standing Committee for approval. *See id.* at 1104 n.7.

194. *Id.* at 1104. "Proposals forwarded by the Standing Committee are considered by the Judicial Conference once a year. . . ." If the Conference approves the proposed rule and note, then the Conference forwards it to the Supreme Court. *Id.*

195. *See id.* at 1104 n.7.

196. *Id.* at 1115. Upon approval by the Supreme Court, the proposed rule and note are forwarded to Congress by the Chief Justice prior to May 1st of "the year in which the

becomes effective as of December 1st.[197] As evidenced by this multi-step process involving five different committees and the public, the Federal Rules are promulgated in a manner that is significantly different from statutes.[198] While the Supreme Court does not take an active role in the proposed drafting of each rule, the Court is involved in the ultimate approval of the text and accompanying Advisory Committee's note.[199] As a result, it may be appropriate for the judicial branch to take an active role in the interpretation of Federal Rules and also to consult regularly and defer often to the Advisory Committee's notes to the Federal Rules.[200]

2. The Advisory Committee's Notes

While the nature of the Advisory Committee's notes to the Federal Rules of Civil Procedure has changed a great deal since the inception of the Federal Rules, today the notes are integral to the rulemaking process, as they accompany a rule through every stage of approval.[201] Since 1988, the Advisory Committee has been using the notes to "indicate an amendment's purpose, guide future interpretations, discuss the amendment's relation to surrounding law, and provide practice tips for lawyers and judges,"[202] and thus "inform the rulemaking process itself."[203] This shift in the nature of the notes is, in part, a result of the 1988 amendments to the Rules Enabling Act, which now requires an "explanatory note" from the Advisory Committee to accompany any proposed amendments to the Federal Rules.[204]

The Advisory Committee's notes are distinct from other extrinsic sources, including legislative history. While legislative history has been criticized for being "murky, ambiguous, and contradictory,"[205] this criticism does not apply to the Advisory Committee's notes.[206] Not only are the Advisory Committee's notes a single source as opposed to various committee reports, debates, hearings, and other materials that comprise legislative history, but they are also intended to serve as a guide for

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amendment is to take effect," giving Congress more than seven months to review the proposal. *Id* at 1104. Professor Struve refers to this step as the "Report-and-Wait Requirement." *See id.* at 1115-19 (describing the "Report-and-Wait Requirement" in detail).

197. *Id.* at 1104.

198. *Compare supra* note 196 and accompanying text, *with* U.S. Const. art. I, § 7, cl. 2.

199. *See supra* notes 194-96 and accompanying text.

200. *See*, Struve, *supra* note 111, at 1169. The author compares the interpretation of the Federal Rules of Civil Procedure with the interpretation of the commentary to the Federal Sentencing Guidelines as well as agency interpretations and concludes that the Advisory Committee's notes should always be consulted and given binding effect unless directly at odds with the text of the rule. *Id.* at 1167-69.

201. *Id.* at 1112-14.

202. *Id.* at 1112-13.

203. *Id.* at 1113.

204. *Id.* at 1113-14.

205. Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct. 2611, 2626 (2005).

206. *See* Struve, *supra* note 111, at 1158-61 (analyzing the Advisory Committee's notes in light of the problems associated with legislative history).

interpreting the Federal Rules.[207] Additionally, the Advisory Committee's notes can be considered a great deal more official than legislative history documents.[208] The Advisory Committee's notes accompany a proposed rule through every stage of the approval process, beginning with the first draft of the rule and continuing through when the rule is sent to Congress prior to enactment.[209] This further supports the argument in favor of courts regularly using the Advisory Committee's notes as a guide when interpreting the Federal Rules of Civil Procedure.

II. HOW TO INTERPRET FEDERAL RULE OF CIVIL PROCEDURE 23(b)(2)

Part II.A of this Note discusses the advantages of applying the modern textualist approach to the statutory interpretation of the Federal Rules of Civil Procedure. Part II.B addresses the advantages of applying the purposive approach and of using the Advisory Committee's notes in the interpretation of the Federal Rules of Civil Procedure.

A. *A Plain-Meaning Approach to the Interpretation of the Federal Rules of Civil Procedure: Arguments in Favor of Following the Current Plain-Meaning Approach to Statutory Interpretation of the Rules*

The primacy of the text is one of the most compelling arguments in favor of applying a plain-meaning approach to interpretation.[210] The words that comprise a particular statute represent the actual act itself.[211] "Congress legislates by statements, not by force of will."[212] Therefore, the intent or purpose of Congress in passing a law does not have the same importance as the text of the statute. Rather, it is the actual text or statement that is issued by Congress that carries with it the force of law.[213] Thus, while the

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207. *See id.* at 1112-13 (stating that "the Advisory Committee currently uses the Notes to indicate [a Rule's] purpose, guide future interpretations," and "inform the rulemaking process itself"). The Advisory Committee's notes are included with the proposed rule to explain its "purpose and intent." *Id.* at 1113.

208. *See supra* note 201 and accompanying text. Professor Struve further argues that, due to the nature of the Advisory Committee's notes, they should be given "authoritative effect" by courts. Struve, *supra* note 111, at 1152.

209. Struve, *supra* note 111, at 1113-14, 1152 (arguing that, as a result of this process, the "Advisory Committee's Notes possess distinctive claims to authority"). *Compare id.*, *with* Moore, *supra* note 80, at 1094. According to Professor Struve, Professor Moore argues that "the dispositive interpretive consideration should be . . . [the] Court's own understanding of the Rule," not the Advisory Committee's notes. Struve, *supra* note 111, at 1152.

210. *See* Eskridge, *supra* note 82, at 621 (stating that "[t]he statute's text is the most important consideration in statutory interpretation, and a clear text ought to be given effect.").

211. *See* Sinclair, *supra* note 85, at 155-56 (stating that the primary focus of statutory interpretation is the language of the statute, as it is the language of the statute that constitutes the act being legislated by Congress).

212. *Id.* at 155. "Congress speaks only by enacting statutes," and no other words, except the Constitution, have the force of law in the United States. *Id.*

213. *Id.* at 155-56. As only the language of the statute has the force of law, the "[l]egislative history is not law and cannot change the meaning of a statute." *Id.* at 156.

legislative history to a statute might provide persuasive guidance if a statute is unclear, only the text of the statute itself has the force of law behind it.[214] Accordingly, and in line with the plain-meaning approach, "[w]here 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."[215] An equally strong analogous argument can be made with regards to the Federal Rules of Civil Procedure, as the text of the Rules is also of prime importance in interpreting the Rules.[216]

The unreliability of extrinsic sources, especially legislative history, has often been an important justification for the plain-meaning approach to statutory interpretation.[217] Recently, in *Exxon Mobil v. Allapattah Services*, Justice Kennedy discussed some of the major criticisms of relying on legislative history.

> First, legislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become . . . an exercise in looking over a crowd and picking out your friends. Second, judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of [Article I of the U.S. Constitution], may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.[218]

While the Advisory Committee's notes to the Federal Rules would generally not be nearly as "murky" or "ambiguous" as legislative history, the Advisory Committee's notes are still extrinsic sources and may be subject to some of the same criticisms as legislative history.[219] One example of the Advisory Committee's notes being ambiguous and failing to

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214. *Id.* at 155-56. While legislative history and other extrinsic sources do not have the force of law, they can be helpful to a decision maker, especially the judiciary, without compromising the primacy of the text. *Id.* at 156.

215. Caminetti v. United States, 242 U.S. 470, 485 (1917). The Court in *Caminetti* further stated that in the course of interpretation, statutory words are presumed as having the meaning commonly attributed to them. *Id.* at 485-86.

216. *See infra* notes 279-82 and accompanying text.

217. Sinclair, *supra* note 85, at 162 ("[T]he argument is that legislative history is less clear, more vague, more subject to different interpretation, than the statute."). Sinclair refers to this characteristic as a "[l]ack of [u]tility" with regard to legislative history as it is not consistently useful. *Id.* For further discussion, compare Antonin Scalia, A Matter of Interpretation 32 (1997) (arguing that legislative history "is much more likely to produce a false or contrived legislative intent than a genuine one"), with Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 862 (1992) (arguing that while it is not necessarily always helpful, legislative history is sometimes helpful).

218. Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct. 2611, 2626 (2005) (internal quotations omitted).

219. One example of this arises in the situation when the Advisory Committee's notes are irreconcilable with the text of a rule. In such a case, as with all extrinsic sources, the text of the rule will always prevail over any interpretative sources. *See* Struve, *supra* note 111, at 1169.

thoroughly illustrate the purpose of the Federal Rules is the note to Rule 23. Although the note to Rule 23 provide explanations for many aspects of the Rule and therefore aid in its interpretation, the note to subdivision (b)(2) fails to resolve all issues of interpretation.[220] While the note implies that monetary damages are permissible under this provision, the note fails to provide any standard or other guidance for courts to determine whether monetary damages are appropriate in individual suits.[221] As a result, there has been a copious amount of litigation and the current circuit split between the Fifth and Second Circuits regarding the interpretation of this provision.[222]

Another main argument in favor of a modern plain-meaning or textualist approach to statutory interpretation involves the process by which statutes are enacted. The Constitution provides that in order for a bill to become law, it must be passed by both houses of Congress and presented to the President for approval.[223] While statutes are required to endure this process, legislative history, on the other hand, is not. This disparity has led Justice Scalia to criticize courts for relying on legislative history in interpretation.[224] Even though this argument does not directly apply to the Federal Rules of Civil Procedure, as the Federal Rules are enacted in a significantly different manner than statutes,[225] an analogy can be drawn to the Advisory Committee's notes. While the text of a rule undergoes many revisions throughout the rulemaking process, the Advisory Committee's notes accompany the first draft of the rule and do not necessarily undergo

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220. *See supra* Part I.A.3 (discussing the circuit split between the Fifth Circuit and the Second Circuit over the interpretation of the Advisory Committee's note to Rule 23(b)(2)).

221. The Advisory Committee's note simply states that 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." Fed. R. Civ. P. 23 advisory committee's note.

222. *See supra* Part I.A.3.

223. U.S. Const. art. I, § 7, cl. 2. Article I of the Constitution grants exclusive legislative powers to Congress and also sets forth the process whereby statutes are passed, involving approval by both Houses of Congress (bicameralism) and approval by the President (presentment). *Id.* §§ 1, 7, cl. 2; *see also* INS v. Chadha, 462 U.S. 919, 944-51 (1983) (describing the legislative process).

224. Sinclair, *supra* note 85, at 156-57 (referring to Justice Scalia's concurrence in *Blanchard v. Bergeron*, 489 U.S. 87, 98 (1989) (Scalia, J., concurring), in which Justice Scalia "railed" against the majority's reliance on Congressional Committee Reports, which are prepared by staff members (who are not vested with the lawmaking powers provided to Congress by the Constitution), rather than members of Congress); *see also* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2815 (2006) (Scalia, J., dissenting) ("Worst of all is the Court's reliance on the legislative history . . . to buttress its implausible reading of [the statute at issue]. We have repeatedly held that such reliance is impermissible where, as here, the statutory language is unambiguous."); Scalia Dissents: Writings of the Supreme Court's Wittiest, Most Outspoken Justice 24-25 (Kevin A. Ring ed., 2004). Scalia's objections to legislative history are twofold: Legislative history is "not usually ascertainable" as individual "[m]embers of Congress usually have many different reasons (or no reason at all) for voting for a bill," so there is no singular intent that can be attributed to a statute; and intent, even if ascertainable, is an "illegitimate source of meaning." *Id.* at 25.

225. For an explanation of the process behind the creation of the Federal Rules of Civil Procedure, see *supra* notes 183-200 and accompanying text.

significant changes during the course of the process.[226] As a result, it can be argued that they are not as careful and thorough as the text of the rule and therefore, should not be given nearly the same weight as the text.[227] This argument, while not as strong when applied to the Federal Rules of Civil Procedure, does serve to encourage hesitation when courts rely exclusively on the notes to a rule, especially if the notes are not supported by the text of the rule.[228]

B. *A Purposive Approach to the Interpretation of the Federal Rules of Civil Procedure: Arguments in Favor of Using the Advisory Committee's Notes to Interpret the Rules*

Others argue that the Advisory Committee's notes to the Federal Rules are distinct from legislative history and other extrinsic sources in a number of significant ways, and, therefore, that the notes should be used to guide courts in interpreting Federal Rules regardless of the ambiguity of the text.[229] In particular, the process behind the creation of the Federal Rules, the nature of the Advisory Committee's notes, and some other distinctive features of the notes, indicate that the notes should be used more regularly than extrinsic statutory sources.

1. The Creation of the Federal Rules of Civil Procedure

One of the most compelling arguments in favor of disparate treatment for the use of the Advisory Committee's notes in comparison to legislative history is the unique process behind the creation of the Federal Rules.[230] Specifically, due to the rulemaking process, the Federal Rules of Civil Procedure should be interpreted in such a way as to give the judiciary a great deal of discretion. Unlike statutes, which constitutionally must go through both houses of Congress and be presented to the President for approval,[231] the Federal Rules of Civil Procedure are promulgated under the

226. The Advisory Committee's note to a proposed rule, or amendment to a rule, is drafted at the same time as the rule and may undergo changes throughout the rulemaking process. *See* Struve, *supra* note 111, at 1111-12. While the text of the proposed rule undergoes alterations throughout the seven stages, revisions to the note do not seem to be nearly as carefully drafted. *See id.* at 1103-04 (discussing the rulemaking process for the Federal Rules of Civil Procedure).

227. *See* Moore, *supra* note 80, at 1093-94 (stating that while courts "should not be bound by the expressions regarding purpose or policy by the lower bodies, . . . [they] should certainly be informed by those expressions").

228. *See id.*; *see also supra* note 219.

229. *See* Struve, *supra* note 111, at 1169 ("[A] court interpreting a Rule should always consult the Note as well as the text and should attempt to construe the text and Note so that they are consistent. Where the text and Note are irreconcilable, the text should trump the Note; but otherwise, the Note should be given binding effect.").

230. *See generally supra* Part I.D.1.

231. *See supra* note 223 and accompanying text.

supervision of the judicial branch.[232] Since the Federal Rules are crafted under the direct supervision of the judicial branch and are approved by the Supreme Court,[233] the judiciary should be allowed a great deal of discretion in its interpretation of the Rules.

2. The Distinct Nature of the Advisory Committee's Notes

The nature of the Advisory Committee's notes themselves also supports the argument that the notes should be consulted regularly, as opposed to only when the text is found to be ambiguous.[234] While consulting legislative history is difficult and controversial[235] because of the uncertainty of determining legislative intent, the Advisory Committee's notes lack these difficulties. In addition to accompanying the Federal Rules through every stage of development,[236] the notes are drafted by the same committee that drafts the text of the Rules;[237] therefore, consulting the Advisory Committee's notes does not involve nearly as much uncertainty as there is with legislative history. The Advisory Committee intends the notes to serve as a guide for courts attempting to interpret the Rules.[238] As a result, there is a strong argument based on the unique nature of the Advisory Committee's notes, as well as the rulemaking process, that would suggest a purposive or intentionalist view is appropriate for the Federal Rules of Civil Procedure, as the drafters' intent is a great deal more ascertainable than in the context of statutory interpretation.[239]

3. Other Considerations that Encourage the Use of the Purposive Approach for the Federal Rules of Civil Procedure

Some other considerations that should be taken into account when addressing the interpretation of Federal Rules include the issues of separation of powers and drafting errors.[240] Although separation of powers between the legislative and judicial branches of the federal government is an important issue with regards to statutory interpretation,[241] this concern is

232. In 1934, the legislature passed the Rules Enabling Act, which delegated the power to make the Rules to the Supreme Court. *See supra* notes 184-87 and accompanying text.

233. *See supra* notes 194, 196-200 and accompanying text.

234. *See generally supra* Part I.D.2.

235. *See supra* notes 217-18 and accompanying text.

236. *See supra* note 201 and accompanying text.

237. *See supra* note 191 and accompanying text.

238. *See supra* note 207 and accompanying text.

239. *See supra* note 94 and accompanying text.

240. See Sinclair, *supra* note 85, at 157-59, 167-68, for a discussion of the issues of separation of powers and drafting errors in statutory interpretation.

241. *See* Struve, *supra* note 111, at 1100 (stating that "[d]istinctions between the functions of the legislative and judicial branches are a staple of debates over statutory interpretation," and that, for some, courts should implement a statute's text, regardless of the court's policies, since federal judges play no role in the legislative process); *see also* Sinclair, *supra* note 85, at 156-58. The Constitution establishes "*how* statutes are to be enacted and *who* may enact them," and grants lawmaking power only to the legislative

less implicated with respect to the Federal Rules of Civil Procedure.[242] In the case of statutory interpretation, there is often a clash between the judicial and legislative branches.[243] As a result, courts are often reluctant to use a great amount of discretion when interpreting statutes and try to give deference to the legislative text.[244] While the legislative branch is somewhat involved with the promulgation of the Federal Rules, the Rules are actually crafted under the supervision of the judicial branch,[245] and, therefore, the judiciary plays an active role in their formulation. Thus, there is not as controversial an issue of separation of powers with the Federal Rules.[246] This implies that judges should be given more latitude to interpret Federal Rules of Civil Procedure than they are given with regards to statutory interpretation.[247]

An additional argument in favor of purposive interpretation of the Federal Rules of Civil Procedure involves simple errors that, under the plain-meaning rule, may alter the intended interpretation of a text.[248] While it is unlikely that even the staunchest textualist would be unwilling to look to extrinsic sources in the case of obvious errors in the text,[249] it is also possible that an error would go undiscovered if a court does not examine extrinsic sources.[250] In those cases, a court applying the plain-meaning rule may interpret the Federal Rule of Civil Procedure in a manner that is inconsistent with the intent of the drafters, while a court applying the purposive or intentional approach would provide an interpretation that is in accordance with the drafters' intent.[251]

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branch, not the judiciary. *Id.* at 156. Additionally, free access to extrinsic resources by the judiciary can be viewed as undermining legislative supremacy. *See id.* at 158-59.

242. The separation of powers issue is not nearly as great a concern with regards to the Federal Rules for two main reasons. First, through the Rules Enabling Act, Congress delegated rulemaking power to the Supreme Court. *See supra* notes 184-87 and accompanying text. Also, since the Supreme Court directly oversees the promulgation of the Rules, the Court does not need to be as deferential to its own texts as it is towards the statutes enacted by the legislative branch. *See infra* notes 244-47 and accompanying text.

243. *See supra* note 241 and accompanying text.

244. *See* Moore, *supra* note 80, at 1040, 1085.

245. *See supra* notes 183-87 and accompanying text. Congress, through the "Report-and-Wait Requirement," has the ability to object to a proposed rule, but, if Congress fails to object, the rule is enacted without any specific approval by Congress. Struve, *supra* note 111, at 1115.

246. *See supra* note 242 and accompanying text.

247. *See infra* note 286 and accompanying text.

248. See Sinclair, *supra* note 85, at 167-68. This discussion applies to "drafting errors and other absurdities" such as an accidental omission of the word "not" in a text. *Id.* at 167.

249. Moore, *supra* note 80, at 1074-75 (stating that even Justice Scalia would permit consultation of extrinsic sources when a literal interpretation of a text would "produce an absurd result").

250. *See, e.g.*, Sinclair, *supra* note 85, at 167-68. "Absurdities, oversights, and mistakes are seldom so central and obvious. They are more likely to occur when the statute is applied to an action clearly within its scope but in a way the legislature may not have intended." *Id.* at 168. As a result, these errors may not be noticed until a specific, unanticipated situation arises.

251. *See generally id.* at 167-68 (providing examples of drafting errors and absurdities and the inconsistent interpretations that resulted from these errors).

C. *The Example of the Advisory Committee's Note to Rule 23(b)(2)*

The current circuit split regarding whether monetary damages are permissible in class actions certified under Rule 23(b)(2) serves to illustrate both the advantages and disadvantages of using the Advisory Committee's notes to interpret the Federal Rules of Civil Procedure.

The Fifth and Second Circuits assume the use of the Advisory Committee's notes in the interpretation of Rule 23(b)(2).[252] At the same time, however, the courts disagree as to the standard for determining when monetary damages are permissible.[253] While helpful in some ways, the Advisory Committee's note to Rule 23(b)(2) fails to shed any light on the standard that courts should use in determining the predominance of monetary damages.[254]

1. Advantages of the Use of the Advisory Committee's Note to Rule 23(b)(2)

One advantage of the Advisory Committee's notes to the Federal Rules of Civil Procedure is that, like legislative history, they can provide guidance as to the purpose of a Rule.[255] The note to Rule 23(b)(2) indicates that the subsection was created primarily to enable plaintiffs in civil rights cases to adjudicate their claims.[256] This indication may assist courts in using their judicial discretion in determining whether to certify a specific class under Rule 23(b)(2). Additionally, while the text refers only to equitable relief, the Advisory Committee's note to 23(b)(2) indicates that the subsection "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages."[257] Therefore, the note indicates that the drafters intended that some monetary damages would be permissible for classes certified under Rule 23(b)(2).[258]

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252. See *supra* Part I.A.3 for a discussion of the circuit court split between the Fifth and Second Circuits regarding the interpretation of Rule 23(b)(2).

253. *Compare* Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998) (holding that monetary damages are only permissible when the monetary relief requested is wholly incidental to the injunctive relief requested), *with* Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147 (2d Cir. 2001) (supporting an "ad hoc" approach to determine whether monetary damages predominate in a specific class action).

254. See *supra* note 23 and accompanying text for the text of the Advisory Committee's note to Rule 23(b)(2).

255. See *supra* notes 110-16 and accompanying text for a discussion of the importance of determining the purpose of a text with regards to statutory interpretation.

256. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997) (citing Fed. R. Civ. P. 23 advisory committee's note). This subsection also presumes that civil rights discrimination often occurs on a class-wide basis, rather than only on an individual basis, thereby making class actions appropriate for civil rights cases. *See* Stamps, *supra* note 4, at 415 ("When one individual from a protected class has been discriminated against, similar discrimination against other individuals from that same, or another, protected class frequently occurs.").

257. Fed. R. Civ. P. 23 advisory committee's note.

258. *See* Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 162 (2d Cir. 2001) (holding that "[t]he advisory committee's note to Rule 23 contemplates (b)(2) class

2. Disadvantages of Using the Advisory Committee's Note to 23(b)(2)

At the same time, however, the Advisory Committee's note to Rule 23(b)(2) also demonstrates one of the major disadvantages of reliance on sources extrinsic to the text of the Rule—uncertainty. As Justice Kennedy explained with respect to legislative history, extrinsic sources are often "murky, ambiguous, and contradictory."[259] Here, while the note indicates that some monetary damages are permissible, two problems are created as a result of the text. First, the note can be seen as contradictory to the text of the Rule, which only seems to permit injunctive or declaratory relief.[260] Additionally, the Advisory Committee's note fails to further specify a standard that should be used to determine when monetary damages are permissible, or guide courts as to what is an appropriate balance between monetary and equitable relief.[261] The note's silence resulted in a widespread split among courts, most noticeably between the Fifth Circuit in *Allison* and the Second Circuit in *Robinson*, which have developed distinct standards in determining whether monetary damages predominate in a request for class certification under Rule 23(b)(2).[262]

D. *Application to Rule 23(b)(2) Class Actions*

1. Plain-Meaning Approach

Following the plain-meaning approach, the Supreme Court could well construe Rule 23(b)(2) not to permit monetary damages for classes certified under this provision, as, by its terms, the Rule does not specifically allow for monetary damages in addition to the injunctive or declaratory relief that is requested.[263] If a court considers the Rule's silence to be ambiguous, it

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certification of at least some claims for monetary recovery"); Pettway v. Am. Cast Iron Pipe Co., 494 F.2d 211, 257 (5th Cir. 1974). In *Pettway*, the court stated that "the language [of Rule 23(b)(2)], 'final injunctive relief or corresponding declaratory relief' is 'appropriate,' describes the situation in which a class can be recognized, as one in which this type of relief is appropriate. 494 F.2d at 257 (quoting Fed. R. Civ. P. 23(b)(2)). The *Pettway* court went on to state that "[t]his is not to be read as saying 'thereby making appropriate *only* final injunctive relief or corresponding declaratory relief.' All that need be determined is that conduct of the party opposing the class is such as makes such equitable relief appropriate." *Id.*

259. Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct. 2611, 2626 (2005).

260. Fed. R. Civ. P. 23(b)(2). This argument is strengthened when the text of 23(b)(2) is examined in light of the rest of Rule 23(b)'s provisions, as subsections (1) and (3) both specifically refer to monetary damages as appropriate forms of relief for classes certified under these provisions. *See* Fed. R. Civ. P. 23(b)(1), (3).

261. Striking this balance is especially difficult in this case, as it is very difficult to compare the value of equitable relief to that of monetary damages. *See supra* note 31 and accompanying text.

262. See *supra* Part I.A.3 for a discussion of the circuit split between *Allison* and *Robinson*.

263. See *supra* Part I.A.2 for a discussion of the language of Rule 23(b)(2); *see also* Dasteel & McKraig, *supra* note 33, at 1883 (opining that "any form of money damages as part of a (b)(2) class is inconsistent with Rule 23's analytical framework").

would look to the Advisory Committee's notes for guidance.[264] If so, courts would return to the same discussion of "predominance" exemplified by the circuit split between *Allison* and *Robinson*.[265] However, because the Supreme Court rarely finds statutory text to be ambiguous,[266] Rule 23(b)(2) might well be interpreted in such a way as to preclude any monetary damages in class actions certified under this provision.[267]

Even if the text were held unambiguous, courts could, consistent with the current plain-meaning approach to interpretation, look to the context of the rest of Rule 23 to interpret 23(b)(2).[268] Looking to the context of the Rule could yield another interpretation of Rule 23(b)(2), which would involve severing the monetary relief claims from the injunctive or declaratory relief, and certifying a damages class as well.[269] In examining the text of the Rule as a whole and focusing on the provision of Rule 23(b), both 23(b)(1) and 23(b)(3) provide for monetary relief for class actions, while 23(b)(2) only provides for injunctive or declaratory relief.[270] This might imply that class actions brought under 23(b)(2) are intended to serve a different sort of relief from those brought under other provisions of the Rule, especially as a type of group relief from discrimination suffered by the group as a whole.[271] As monetary damages are not generally considered to be a type of group

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264. There is no standard for when a court will find statutory text ambiguous. However, courts have relied on the canons of construction, a series of "rules, maxims, or homilies" used by courts to "determine whether a statute is ambiguous, and to resolve the ambiguity." Mammen, *supra* note 80, at 25-26 (discussing the use of canons of construction in statutory interpretation).

265. *See supra* Part I.A.3.

266. *See* Moore, *supra* note 80, at 1073-74 (arguing that "[p]lain meaning adherents often find that statutory language is clear, even when others argue that the same statutory language is ambiguous"). As a result of the apparent lack of ambiguity in statutes under the plain-meaning approach, legislative intent or history is rarely explored, except in cases when "blind adherence to the plain meaning" would "produce an absurd result." *Id.* at 1074-75.

267. This interpretation would likely result in a class action being certified under Rule 23(b)(2) only for the claims for equitable relief, with the claims for monetary damages being litigated in a "damages" class action under Rule 23(b)(3) or on an individual basis if a (b)(3) class is inappropriate. *See infra* note 274 and accompanying text. One scholar has also proposed that, for class actions under Rule 23(b)(2) that involve the request for both monetary and equitable relief, a 23(b)(2) class action be certified to settle the question of liability and establish res judicata, while the "remedial stage" where individual damages are determined, be litigated on an individual basis. *See* Changelo, *supra* note 4, at 159.

268. See Eskridge, *supra* note 82, at 669 and Part I.B.1.a for a discussion of the modern plain-meaning approach to statutory interpretation.

269. The severing of the claims into multiple class actions is permissible under Rule 23(c)(4)(A). *See infra* note 274 and accompanying text.

270. *See* Fed. R. Civ. P. 23(b).

271. *See* Pettway v. Am. Cast Iron Pipe Co., 494 F.2d 211, 256-57 (5th Cir. 1974) ("Subdivision (b)(2) is keyed to the effect of the relief sought, and the pragmatic ramifications of adjudication in each situation, rather than any special attributes of the class involved." (internal quotations omitted)). For an analogous situation with regards to statutory interpretation, see *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987), where the Court held that, within a statute, if particular language is included in one section and absent from another, then it is presumed that the exclusion was deliberate and intentional.

relief,[272] then courts may interpret the provision, using the plain-meaning approach, to require only injunctive or declaratory relief for the group, with monetary damages to be litigated separately. The claims for monetary relief can be individually litigated or else the class members can also seek certification under Rule 23(b)(3) to litigate the monetary damages arising from the original claim.[273] Additionally, under the current Rule 23(c)(4), the class can be divided into subclasses, and each subclass treated as a class action in itself, and therefore governed by the other provisions of Rule 23.[274] Under this provision, the relief would likely be split into two separate class actions: one action for injunctive or declaratory relief under 23(b)(2), and, if appropriate, a class action for monetary damages under 23(b)(3).

2. Purposive Approach

Using a purposive approach, where the intent of the drafters is the primary focus of interpretation, Rule 23(b)(2) would encompass at least some form of monetary damages. Monetary damages would be permissible under this approach because the Advisory Committee's note to Rule 23, which often indicates the intent of the drafters, simply states that injunctive or declaratory relief must predominate in any class action certified under the Rule,[275] thereby not precluding monetary damages in the request for relief. Therefore, by implication, under this approach, the relief requested in 23(b)(2) class actions need not be exclusively injunctive or declaratory relief, and there would be no need to split a class action or sever certain parts of the litigation when both monetary and injunctive relief are requested.[276]

Even though some form of monetary damages would likely be permissible under this approach, the standard of how to determine whether the monetary damages predominate over the injunctive or declaratory relief

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272. *See* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 417 (5th Cir. 1998) (stating that "[t]he very nature of [compensatory] damages, compensating plaintiffs for emotional and other intangible injuries, necessarily implicates the subjective differences of each plaintiff's circumstances; they are an individual, not class-wide, remedy"); *see also* Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 156-57 (2d Cir. 2001) (referring to the district court's opinion that the liability phase involving monetary damages would require an individualized determination of damages due to each class member).

273. *See supra* note 68.

274. Fed. R. Civ. P. 23(c)(4) (stating that "[w]hen appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly").

275. Fed. R. Civ. P. 23 advisory committee's note.

276. This interpretation is in accord with the text of the Advisory Committee's note to Rule 23(b)(2) and also with the purpose of the Rule as stated in the Advisory Committee's note, which is to enable plaintiffs in civil rights cases to adjudicate their claims. *See id.*

requested must still be decided.[277] Therefore, while it is the current practice of the majority of courts to allow for some form of monetary damages in class actions seeking certification under Rule 23(b)(2), the circuit split between the Fifth Circuit in *Allison* and the Second Circuit in *Robinson* must be resolved regarding the standard used in deciding when monetary damages are appropriate.

III. COURTS SHOULD INTERPRET RULE 23(b)(2) USING A PURPOSIVE APPROACH

Part III.A argues that the appropriate resolution to the conflict between the theories of interpretation is a purposive interpretation of the Federal Rules of Civil Procedure, which would require courts to consistently consider the Advisory Committee's notes to the Rules as a guide to interpretation. Finally, Part III.B applies this method of interpretation to Rule 23(b)(2) and argues that classes certified under this Rule should be permitted to bring claims for both injunctive and monetary relief, provided that the injunctive relief is not used only as a tool for enabling the maintenance of a class action for monetary damages.

A. *Federal Rules of Civil Procedure Should Be Interpreted Using a Purposive Approach to Interpretation*

While there are a number of compelling reasons to interpret the Federal Rules of Civil Procedure under the plain-meaning approach of statutory interpretation, many of the reasons for applying the plain-meaning approach to statutes do not apply to the Federal Rules of Civil Procedure. Additionally, in the interest of public policy,[278] and in line with current court practices, a purposive approach that encompasses regular use of the Advisory Committee's notes is appropriate when interpreting the Federal Rules of Civil Procedure.

While the primacy of the text of the Rules is a strong reason in favor of applying the plain-meaning approach,[279] using a purposive approach does not diminish the importance of the text, as the text is still the primary source examined.[280] Even under the purposive approach, the first step in interpreting a rule would be to attempt to determine the meaning of the text.[281] Therefore, the primacy of the text is preserved under the purposive

277. *See supra* Part I.A.3 (discussing the circuit court split between the Fifth Circuit and the Second Circuit over the standard to be used when determining whether monetary damages predominate).

278. *See, e.g.*, Eble, *supra* note 18, § 20.1 (listing a number of cases, including *In re Sumitomo Copper Litig.*, 182 F.R.D. 85 (S.D.N.Y. 1998), which have held that "Rule 23(b) should be applied with a liberal rather than a restrictive interpretation" because "important public policy benefits arise from class action certification in an appropriate case").

279. *See supra* notes 210-14 and accompanying text.

280. *See supra* note 118 and accompanying text.

281. *See* Eskridge, *supra* note 82, at 624.

approach to interpretation.[282] The contrast between the purposive approach and the plain-meaning approach regarding the importance of the text, however, is that the purposive approach allows and encourages further examination of the context and extrinsic sources to the rule in order to determine the purpose of the rule.[283]

Another issue that is imperative with regards to statutory interpretation that does not play as significant a role with regards to the Federal Rules of Civil Procedure is the issue of separation of powers.[284] As discussed above, while the Supreme Court may be hesitant to take too active a role in attempting to discern legislative intent,[285] this should not be the case the with Federal Rules of Civil Procedure.[286] Since the Court plays a significant role in the creation of the Federal Rules, this hesitation to step on the toes of another branch of government would not apply in this case.[287] Therefore, it is appropriate for the Court to actively seek to interpret Federal Rules in accordance with their purpose, which supports using the Advisory Committee's notes regularly, regardless of whether there is ambiguity in the text.[288]

B. *Rule 23(b)(2) Should Be Interpreted Using a Purposive Approach to Interpretation, with Consistent Reliance on the Advisory Committee's Notes*

Rule 23(b)(2), in addition to the Federal Rules of Civil Procedure in general, should be interpreted by courts to reflect a purposive approach to interpretation. This would encourage courts to consult the Advisory Committee's note to the Rule, as the note indicates the purpose or intent of the Advisory Committee in drafting the Rule.

While Rule 23(b)(2) fails to address the permissibility of monetary damages in class actions certified under this section, the Advisory Committee's note specifically provides for this possibility.[289]

Additionally, examination of the Advisory Committee's note indicates that the purpose of Rule 23(b)(2) is to enable plaintiffs in "various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class" to litigate their claims.[290] As a result, under the

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282. *See id.* at 625.
283. *See supra* notes 112-14 and accompanying text.
284. *See supra* notes 223, 240-41 and accompanying text.
285. *See supra* note 244 and accompanying text.
286. *See* Joseph P. Bauer, *Schiavone: An Un-Fortune-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure*, 63 Notre Dame L. Rev. 720, 720 (1988) (arguing that because the Supreme Court promulgates the Rules, "federal courts are fully justified in taking an expansive view of the Federal Rule under scrutiny, giving it a liberal reading if that is required to fulfill the purposes of the Rule"); Moore, *supra* note 80, at 1093 ("Given [the] substantial . . . powers of the Court in the promulgation process, a more activist role in the interpretive stage . . . is appropriate.").
287. Bauer, *supra* note 286, at 720.
288. *See id.* at 723.
289. *See supra* notes 16-23 and accompanying text.
290. Fed. R. Civ. P. 23(b)(2) advisory committee's note.

purposive approach, courts should use their judicial discretion to encourage the certification of classes in cases where both monetary and injunctive or declaratory relief are appropriate, especially in civil-rights class actions.[291]

C. *Rule 23(b)(2) Should Be Interpreted in Accordance with the Standard Set by the Second Circuit in* Robinson

Class actions certified under Rule 23(b)(2) are unique when compared with those brought under 23(b)(1) or 23(b)(3). While 23(b)(1) and 23(b)(3) allow for classes to seek monetary damages for wrongs against the entire class of litigants, only 23(b)(2) allows for injunctive or declaratory relief to be sought.[292] Therefore, it is important to encourage litigants to bring claims under this Rule,[293] as classes are often primarily looking for the wrong that has been committed against the class to be corrected for the future, with any monetary damages received being largely incidental to the injunctive relief requested. If many obstacles are placed in the way of class actions being brought under Rule 23(b)(2), then it will be increasingly unlikely that classes will seek injunctive relief, which may discourage discriminatory practices from being corrected on a system-wide basis.

According to the Advisory Committee's note to Rule 23, Rule 23(b)(2) was created mainly to allow plaintiffs in civil rights cases to adjudicate their claims, where the primary relief sought is to reverse the effects of the class-based discrimination, a purpose well recognized in case law.[294] While the injunctive or declaratory relief should be the most important relief requested during the litigation, monetary damages should not be excluded simply because they are not mentioned in the Rule.[295] Even though monetary damages are not generally appropriate for a group remedy, there are instances where this is possible.[296] One possible resolution to this issue is that the class members can seek monetary damages in the form of a fund for class members, where the amounts received by individual class members is later determined either through individual litigation or a class action brought under Rule 23(b)(1).[297]

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291. The importance of judicial discretion is discussed extensively in *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 164-65 (2d Cir. 2001), and Stamps, *supra* note 4, at 436.

292. Fed. R. Civ. P. 23(b).

293. *See* Stamps, *supra* note 4, at 414-15 (stating that the 1991 amendments to the Civil Rights Act, which increased protection for victims of discrimination, were intended to "expand . . . the use of class actions to enforce civil rights").

294. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997) (citing Fed. R. Civ. P. 23 advisory committee's note).

295. Using a strict plain-meaning approach, Rule 23(b)(2) can be interpreted to allow for no monetary damages since the Rule only refers to injunctive or declaratory relief. *See supra* notes 264-67 and accompanying text.

296. *See Robinson*, 267 F.3d at 163 (stating that even the *Allison* test allows for compensatory damages in Rule 23(b)(2) class actions in "those rare incidences in which the request for monetary relief [is] wholly 'incidental' to the requested injunctive relief" (quoting Robinson v. Metro-North Commuter R.R., 197 F.R.D. 85, 87 (S.D.N.Y. 2000))).

297. *See* Fed. R. Civ. P. 23(b)(1).

The "bright-line rule," set up by the Fifth Circuit in *Allison*, which has been characterized as virtually eliminating the ability of classes to seek any substantial monetary damages in Rule 23(b)(2) class actions,[298] has been called a "death knell" for class-action suits brought for discrimination under Title VII of the Civil Rights Act.[299] While the *Allison* standard restricts the availability of class actions to litigants requesting injunctive or declaratory relief, the *Robinson* test provides classes with a better opportunity to bring their claims by requiring courts to examine the specific circumstances of the claims to determine if the requested relief is appropriate.[300] Therefore, *Robinson* works to preserve Rule 23(b)(2) class-action claims for monetary relief, while *Allison* and its followers seem to close the door on these litigants.

The Fifth Circuit and others that have adopted the *Allison* standard, by severely limiting litigants' ability to bring the types of "hybrid"[301] class actions under Rule 23(b)(2), properly prevent classes certified under Rule 23(b)(2) from bringing claims that are primarily for monetary damages under the guise of some nominal injunctive or declaratory relief requested. At the same time, however, the *Allison* standard may also greatly discourage plaintiffs with meritorious claims from litigating their claims as class-action suits, which is not in the interest of public policy. Even though the ad hoc or "balancing" test created by the Second Circuit in *Robinson* fails to provide a reliable standard for other courts to follow, the flexible approach from *Robinson* is a great deal "more appealing to victims of discrimination who want access to the class action device,"[302] which supports the public interest in protecting people's rights. Therefore, in the interest of both the Advisory Committee's note, which indicates that Rule 23(b)(2) was intended to aid victims of civil-rights discrimination, and the public policy of encouraging litigants to bring meritorious claims in class actions, a more flexible approach to monetary damages, such as that set forth in *Robinson*, should be adopted by courts.

CONCLUSION

The issue of whether monetary damages can accompany injunctive or declaratory relief in class actions under Rule 23(b)(2) has important implications for class-action litigation throughout the country. In many cases, especially those involving civil rights, the opportunity to receive

298. Changelo, *supra* note 4, at 158.

299. *See generally* Nikaa Baugh Jordan, Allison v. Citgo Petroleum*: The Death Knell for the Title VII Class Action?*, 51 Ala. L. Rev. 847 (2000) (analyzing the effect of the Fifth Circuit's holding in *Allison* on class actions brought by victims of employment discrimination); Suzette M. Malveaux, *Fighting to Keep Employment Discrimination Class Actions Alive: How* Allison v. Citgo*'s Predomination Requirement Threatens to Undermine Title VII Enforcement*, 26 Berkeley J. Emp. & Lab. L. 405 (2005).

300. *See supra* note 68 and accompanying text.

301. See *supra* note 68 and accompanying text for a description of hybrid class actions.

302. Changelo, *supra* note 4, at 158-59.

monetary damages in addition to injunctive or declaratory relief influences whether a claim will be brought at all.[303] As a result, Rule 23(b)(2) should be interpreted using an approach that encourages victims of discrimination and other appropriate classes to bring class actions.

With this in mind, courts should interpret Rule 23(b)(2) using the purposive approach, which would require courts to regularly consult the Advisory Committee note to the Rule in order to understand its intended purpose.[304] As the Second Circuit in *Robinson*[305] best applies the purposive approach to the interpretation of Rule 23(b)(2), *Robinson* should be the model for other courts to follow.[306] The *Robinson* court correctly understood that the purpose of Rule 23(b)(2) is to provide a means of redress for plaintiffs claming violations of their civil rights or other group-wide injuries.[307]

More broadly, the purposive approach should be applied to all Federal Rules of Civil Procedure. As the primary extrinsic source to the Rules, the Advisory Committee's notes are intended to guide courts in their interpretation of the Rules;[308] they are an appropriate and reliable source for determining the drafter's intent[309] and should be consistently used by courts.[310]

303. *See supra* Part III.C.
304. *See supra* Part II.B.
305. Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147 (2d Cir. 2001).
306. *See supra* Part I.A.3.b.
307. *See supra* notes 17-18, 256 and accompanying text.
308. *See supra* notes 202, 207 and accompanying text.
309. *See supra* Part II.B.2.
310. *See supra* note 229 and accompanying text.