

pre-Webb-Kenyon Act extreme.⁷⁵ Moreover, the narrow interpretive approach adopted in *Heald*, if applied in a challenge to a nondiscriminatory but still “burdensome” state law, could render Section 2 wholly irrelevant.⁷⁶

On the rare occasion that Congress and the American people agree to cabin a line of judicial thought, the Court should be deferential to the scope of their endeavor and humble in the exercise of power. Instead, the Court’s ruling in *Heald* underscores its own power to shape our constitutional landscape, both in accordance with and in spite of the actual text of the Constitution.⁷⁷ Modern-day legislators, irrespective of their views on wine shipment, have good reason to scrutinize the Court’s reasoning in *Heald*. As several proposed constitutional amendments seeking to reverse elements of constitutional doctrine make their way through Congress,⁷⁸ proponents would be well advised to carefully craft their proposals to leave no doubt as to the specific doctrines such amendments seek to overturn.⁷⁹

II. FEDERAL JURISDICTION AND PROCEDURE

A. Diversity Jurisdiction

Supplemental Jurisdiction — Amount in Controversy Requirement.
— After Congress passed the Judicial Improvements Act of 1990,¹

⁷⁵ See *Scott v. Donald*, 165 U.S. 58, 101 (1897) (“[We hold] that when a State recognizes the manufacture, sale, and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in . . . from other States . . . [; it is] an unjust preference . . . against similar products of the other states.”). After *Heald*, the constitutionality of state licensing laws and even the three-tier distribution system itself are in question. In spite of Justice Kennedy’s frequent assertions of the legitimacy of the three-tier distribution system, see *Heald*, 125 S. Ct. at 1904–05, Justice Thomas provided compelling evidence that it will be difficult to impose principled limits that salvage most state regulations from the Court’s ruling, see *id.* at 1921–22 & n.6 (Thomas, J., dissenting).

⁷⁶ Such a result would occur if, for example, the Court held that Section 2 meant only to reverse the original-package doctrine, which the Court itself overturned in 1976. See *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976) (overruling the original-package doctrine).

⁷⁷ Elsewhere, Justice O’Connor has compared the Court’s modern Section 2 jurisprudence with a staple example of raw judicial power in action — *Lochner v. New York*, 198 U.S. 45 (1905). See 324 *Liquor Corp. v. Duffy*, 479 U.S. 335, 359–60 (1987) (O’Connor, J., dissenting).

⁷⁸ See Proposing an Amendment to the Constitution of the United States Relating to Marriage, H.R.J. Res. 39, 109th Cong. (2005) (defining marriage as between a man and a woman); Proposing an Amendment to the Constitution of the United States Authorizing the Congress To Prohibit the Physical Desecration of the Flag of the United States, H.R.J. Res. 10, 109th Cong. (2005).

⁷⁹ See Ronald J. Krotoszynski, Jr. & E. Gary Spitko, *Navigating Dangerous Constitutional Straits: A Prolegomenon on the Federal Marriage Amendment and the Disenfranchisement of Sexual Minorities*, 76 U. COLO. L. REV. 599, 613 (2005) (arguing that “the most prominent Federal Marriage Amendment proposals, as written, would not necessarily achieve their objectives”).

¹ Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended primarily in scattered sections of 28 U.S.C.).

commentators noted that the language of § 1367,² the new supplemental jurisdiction statute, arguably granted courts in diversity cases supplemental jurisdiction over claims brought by parties who did not meet the amount-in-controversy requirement of § 1332.³ Last Term, in *Exxon Mobil Corp. v. Allapattah Services, Inc.*,⁴ the Supreme Court confirmed that, “where the other elements of jurisdiction are present and at least one named plaintiff in the action satisfies the amount-in-controversy requirement,” § 1367 authorizes federal courts to exercise supplemental jurisdiction over the claims of additional plaintiffs in the same case or controversy, “even if those claims are for less than the jurisdictional amount specified in the statute setting forth the requirements for diversity jurisdiction.”⁵ In reaching this conclusion, the majority — over strenuous objections from four dissenting Justices — stated that the statute “by its plain text” required this result and that no reference to the legislative history was necessary because “§ 1367 is not ambiguous.”⁶ The majority’s interpretation of § 1367 was certainly plausible, but the dissenting Justices made a strong case for an alternative reading of the statutory text. *Allapattah* thus illustrates how the Court can give “ambiguous” a narrow meaning when determining whether consideration of a statute’s legislative history is appropriate. While this approach may assuage some of the Justices’ con-

² Section 1367 provides in pertinent part:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

28 U.S.C. § 1367(a)–(b) (2000).

³ See, e.g., Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445, 485 (1991) (“[T]he statute would appear to permit supplemental jurisdiction over claims by class members that did not meet the amount-in-controversy requirement.”). Currently, for diversity purposes, the matter in controversy must exceed “the sum or value of \$75,000, exclusive of interest and costs” in order for district courts to have original jurisdiction over a civil action. 28 U.S.C. § 1332(a).

⁴ 125 S. Ct. 2611 (2005). The opinion of the Court decided the consolidated cases of *Exxon Mobil Corp. v. Allapattah Services, Inc.* (No. 04-70) and *Rosario Ortega v. Star-Kist Foods, Inc.* (No. 04-79).

⁵ *Id.* at 2615.

⁶ *Id.* at 2625.

cerns regarding the use of legislative history, it ultimately gives inadequate deference to Congress's role in making law.

The first of the consolidated cases in *Allapattah* involved a May 1991 class action brought against Exxon by thousands of retail dealers who alleged that the company had “systematically and intentionally overcharged them for the wholesale purchase of motor fuel.”⁷ The jury returned a unanimous verdict for the dealers, and the district court denied Exxon's post-trial motion for judgment as a matter of law.⁸ The court, however, certified the case for interlocutory review, in part so that the Eleventh Circuit could determine whether the trial court had properly “extended supplemental jurisdiction to the claims of an entire class” once it had been found that at least one class member satisfied the amount-in-controversy requirement.⁹

The Eleventh Circuit affirmed the district court's ruling. The court concluded that § 1367 overruled the Supreme Court's decision in *Zahn v. International Paper Co.*,¹⁰ which held that “[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case.”¹¹ The Eleventh Circuit stated that it was “clear from the plain language of the statute that § 1367(a) is a general grant of supplemental jurisdiction, which is then narrowed for diversity cases by § 1367(b).”¹² Finding no exception in § 1367(b) that would preclude jurisdiction over the claims of members in a class action, the court held that the district court's exercise of supplemental jurisdiction was appropriate.¹³

The second of the consolidated cases in *Allapattah* involved a young girl, Beatriz Blanco-Ortega, who badly cut her finger on a can of Star-Kist tuna in April 1999.¹⁴ Beatriz, in conjunction with her parents and sister, brought a products liability action against Star-Kist in federal court, asserting diversity jurisdiction under 28 U.S.C. § 1332.¹⁵ In response, Star-Kist argued that none of the plaintiffs had claims

⁷ *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1252 (11th Cir. 2003). The plaintiffs invoked diversity jurisdiction under 28 U.S.C. § 1332(a). *Allapattah*, 125 S. Ct. at 2615.

⁸ *Allapattah*, 333 F.3d at 1252. An earlier trial resulted in a hung jury; the case was retried in January 2001. *Id.*

⁹ *Allapattah Servs., Inc. v. Exxon Corp.*, 157 F. Supp. 2d 1291, 1327 (S.D. Fla. 2001).

¹⁰ 414 U.S. 291 (1973); see *Allapattah*, 333 F.3d at 1256 (concluding that § 1367 overruled *Zahn*).

¹¹ *Allapattah*, 333 F.3d at 1253 (alteration in original) (quoting *Zahn*, 414 U.S. at 301) (internal quotation marks omitted).

¹² *Id.* at 1254.

¹³ *Id.* at 1255–56.

¹⁴ *Rosario Ortega v. Star-Kist Foods, Inc.*, 370 F.3d 124, 126 (1st Cir. 2004); *Rosario Ortega v. Star Kist Foods, Inc.*, 213 F. Supp. 2d 84, 85 (D.P.R. 2002).

¹⁵ *Ortega*, 370 F.3d at 126. As the First Circuit noted, “Plaintiffs’ choice of federal court was no doubt influenced by the fact that civil jury trials are unavailable in the local courts of Puerto Rico.” *Id.*

that satisfied the amount-in-controversy requirement of § 1332.¹⁶ The district court agreed with Star-Kist and dismissed the case without prejudice for lack of jurisdiction.¹⁷

A divided panel of the First Circuit affirmed the judgment of the district court as to Beatriz's family members, but held that Beatriz herself had satisfied the amount-in-controversy requirement.¹⁸ The court then considered whether Beatriz's family members could proceed in federal court by claiming supplemental jurisdiction on the basis of Beatriz's sufficient claim.¹⁹ Turning to the text of § 1367, the court explained its belief that Congress, in using the terms "original jurisdiction" and "civil action," had "incorporated into § 1367 the longstanding, judicially developed doctrines that determined whether . . . statutes confer[red] 'original jurisdiction'" over an action.²⁰ Thus, given the longstanding rule prohibiting aggregation of multiple plaintiffs' claims to satisfy the amount-in-controversy requirement,²¹ as well as evidence from the legislative history indicating that § 1367 was not intended to make significant changes to the law of diversity jurisdiction,²² the court concluded that failure by one party to meet the amount-in-controversy requirement would destroy original jurisdiction over the entire action.²³

The Supreme Court affirmed the Eleventh Circuit's decision in *Al-lapattah* and reversed the First Circuit's decision in *Ortega*. Writing for the Court, Justice Kennedy²⁴ noted that Congress enacted § 1367 in response to *Finley v. United States*,²⁵ which held that supplemental jurisdiction does not permit plaintiffs to join additional, related claims against defendants not originally party to the litigation.²⁶ Although all

¹⁶ *Ortega*, 213 F. Supp. 2d at 87. The asserted value of each individual's total claims ranged from \$150,000 to \$900,000. *Id.* at 86–87. Upon defendant's challenge of the alleged damages, the burden shifted to plaintiffs to establish that it was "not a legal certainty" that their claims would not in fact satisfy the jurisdictional requirement. *Ortega*, 370 F.3d at 128.

¹⁷ *Ortega*, 213 F. Supp. 2d at 95.

¹⁸ *Ortega*, 370 F.3d at 131.

¹⁹ *Id.*

²⁰ *Id.* at 135.

²¹ See *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 589–90 (1939).

²² *Ortega*, 370 F.3d at 143.

²³ *Id.* at 136–37, 144. Judge Torruella dissented from the majority's reading of § 1367, arguing that the "plain meaning" of the statute required application of supplemental jurisdiction to cover the claims of Beatriz's family members. *Id.* at 146–47 (Torruella, J., concurring in part and dissenting in part).

²⁴ Chief Justice Rehnquist and Justices Scalia, Souter, and Thomas joined Justice Kennedy's opinion.

²⁵ 490 U.S. 545 (1989).

²⁶ *Id.* at 551, 556. *Finley* curtailed the expansive scope of supplemental jurisdiction suggested by *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), in which the Court held that "if the district court ha[s] original jurisdiction over at least one claim, the jurisdictional statutes implicitly authorize[] supplemental jurisdiction over all other claims between the same parties arising out of

parties to the *Allapattah* and *Ortega* cases agreed that § 1367 overturned the decision in *Finley*, the controversial issue was whether § 1367 did anything more.²⁷ Justice Kennedy framed the relevant question as “whether a diversity case in which the claims of some plaintiffs satisfy the amount-in-controversy requirement, but the claims of other[] plaintiffs do not, presents a ‘civil action of which the district courts have original jurisdiction.’”²⁸

The Justices in the majority held that the appropriate unit of analysis for the amount-in-controversy requirement was each individual plaintiff, not the entire class of plaintiffs.²⁹ First, the Court reasoned that the leading alternative views — namely, that “all claims in the complaint must stand or fall as a single, indivisible ‘civil action’” or that “the inclusion of a claim or party falling outside the district court’s original jurisdiction somehow contaminates every other claim in the complaint” — were implausible readings of § 1367.³⁰ Second, the majority believed that its reading of § 1367 made better sense of the exceptions to supplemental jurisdiction listed in § 1367(b). For example, “[i]f the district court lacks original jurisdiction over a civil diversity action where any plaintiff’s claims fail to comply with all the requirements of § 1332, there is no need for a special § 1367(b) exception for Rule 19 plaintiffs who do not meet these requirements.”³¹ Finally, the Court rejected the argument that it should use other interpretive tools, such as legislative history, in its analysis of § 1367. Not only did the Court declare that consultation of legislative history was inappropriate because “§ 1367 is not ambiguous,” it also stated that,

the same Article III case or controversy.” *Allapattah*, 125 S. Ct. at 2619 (citing *Gibbs*, 383 U.S. at 725).

²⁷ See *Allapattah*, 125 S. Ct. at 2620.

²⁸ *Id.*

²⁹ *Id.* at 2620–21.

³⁰ *Id.* at 2621–22. The Court referred to the first alternative view as the “indivisibility theory” and the second as the “contamination theory.” *Id.* at 2621. The “indivisibility theory” failed because it was “inconsistent with the whole notion of supplemental jurisdiction.” *Id.* In the context of federal question cases, the Court found it paradoxical to require district courts to have jurisdiction over every claim in the case in order to exercise supplemental jurisdiction. It also found unconvincing the argument that the indivisibility theory applies in diversity cases, but not federal question cases. *Id.* at 2621–22.

The “contamination theory” failed because, although it made some sense “in the special context of the complete diversity requirement,” the Court found that this view made little sense with respect to the amount-in-controversy requirement. *Id.* at 2622. The Court stated that there was “no inherent logical connection between the amount-in-controversy requirement and § 1332 diversity jurisdiction.” *Id.*

³¹ *Id.* at 2624. Rule 19 addresses joinder of parties necessary for just adjudication. FED. R. CIV. P. 19. The Court conceded it was anomalous that Congress would “withhold supplemental jurisdiction over plaintiffs joined as parties ‘needed for just adjudication’ under Rule 19 but would allow supplemental jurisdiction over plaintiffs permissively joined under Rule 20.” *Allapattah*, 125 S. Ct. at 2624. Nonetheless, the Court stated that the inclusion of a Rule 19 exception in § 1367(b) was “at least as difficult to explain under the alternative view.” *Id.*

even if it *were* to rely on § 1367's legislative history, the history did not support a different reading of the statute.³² On this point, the Court noted that "the legislative history of § 1367 is far murkier than selective quotation from the House Report would suggest."³³ Moreover, the Court found evidence, based on statements made by the drafters of § 1367, that the House Report was "a *post hoc* attempt" to alter the statute's plain meaning.³⁴ Given the inconsistencies arising from alternative readings of the statute, as well as the circumstances surrounding the legislative history, the Court maintained that the only plausible reading of § 1367 was its own.

Justice Ginsburg dissented,³⁵ acknowledging that the majority's reading of § 1367 was "surely plausible," but arguing that a better reading of the statute would "incorporate the rules on joinder and aggregation tightly tied to § 1332 at the time of § 1367's enactment."³⁶ Justice Ginsburg thus favored a reading that would require dismissal of litigants whose claims failed to meet the amount-in-controversy requirement.³⁷ Moreover, she maintained that this reading was wholly justified by § 1367's use of the phrase "civil action[s] of which the district courts have original jurisdiction."³⁸ Justice Ginsburg also argued that this "less disruptive" view of § 1367 would explain the statute's failure to include Rule 20 plaintiffs and Rule 23 class actions among the exceptions listed in § 1367(b): if the supplemental jurisdiction statute were read to incorporate the nonaggregation rule of *Clark v. Paul Gray, Inc.*³⁹ and *Zahn*, then "plaintiffs who do not meet the amount-in-controversy requirement would fail at the § 1367(a) threshold," and Congress would have no need to create Rule 20 or Rule 23 exceptions in § 1367(b).⁴⁰ Although Justice Ginsburg noted evidence in the legis-

³² *Allapattah*, 125 S. Ct. at 2625.

³³ *Id.* at 2626.

³⁴ *Id.* at 2627. The Court quoted a law review article written by three of § 1367's drafters, who stated that § 1367's "legislative history was an attempt to correct" the statute's failure to explicitly prohibit the exercise of supplemental jurisdiction over class members who did not meet the amount-in-controversy requirement. *Id.* (quoting Thomas D. Rowe, Jr. et al., *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943, 960 n.90 (1991)) (internal quotation mark omitted).

³⁵ Justices Stevens, O'Connor, and Breyer joined Justice Ginsburg's dissent.

³⁶ *Allapattah*, 125 S. Ct. at 2637–38 (Ginsburg, J., dissenting).

³⁷ See *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 294–95 (1973); *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 589–90 (1939).

³⁸ *Allapattah*, 125 S. Ct. at 2638 (Ginsburg, J., dissenting) (alteration in original) (quoting 28 U.S.C. § 1367(a) (2000)) (internal quotation mark omitted).

³⁹ 306 U.S. 583.

⁴⁰ *Allapattah*, 125 S. Ct. at 2639 (Ginsburg, J., dissenting). The dissent conceded, however, that its reading of § 1367(a) would seem to render superfluous the exception in § 1367(b) for the compulsory joinder of plaintiffs under Rule 19. *Id.* at 2640 n.13. One possible explanation is that Congress meant for courts to treat Rule 19 (necessary joinder) and Rule 24 (intervention) plaintiffs alike. *Id.*

lative history suggesting that Congress intended to adopt only “modest” and “noncontroversial” changes,⁴¹ she was careful to point out that her reading of § 1367 “does not rely on the measure’s legislative history.”⁴²

Justice Stevens wrote a separate dissent,⁴³ noting how Justice Ginsburg’s opinion “demonstrated that ‘ambiguity’ is a term that may have different meanings for different judges.”⁴⁴ Because ambiguity appeared to be merely “in the eye of the beholder,” Justice Stevens endorsed the view that judges should be “accountable to *all* reliable evidence of legislative intent,” regardless whether the statutory text was ambiguous.⁴⁵ Furthermore, Justice Stevens argued that § 1367 actually had an “uncommonly clear legislative history” that, together with Justice Ginsburg’s reading of the statutory text, indicated that the majority was wrong.⁴⁶

The *Allapattah* majority’s determination that § 1367 was not ambiguous conflicts with the common understanding of “ambiguous”⁴⁷ and illustrates how the Court can — with a little effort and patience — rid a statute of all ambiguity. The majority’s relentless examination of the statutory text appears to have been motivated in part by concerns about the reliability of legislative history in general, as well as by § 1367’s particular legislative history. While the Court may have had legitimate concerns about the use of legislative history in *Allapattah*, it would have been better for the Court to address this problem head-on instead of using an unrecognizably narrow definition of “ambiguous.”

⁴¹ *Id.* at 2634 (quoting H.R. REP. NO. 101-734, at 15–16 (1990)) (internal quotation marks omitted).

⁴² *Id.* at 2641 n.14.

⁴³ Justice Breyer joined Justice Stevens’s dissent.

⁴⁴ *Allapattah*, 125 S. Ct. at 2628 (Stevens, J., dissenting) (taking the majority to task for its “remarkable declaration that its reading of the statute is so obviously correct — and Justice Ginsburg’s so obviously wrong — that the text does not even qualify as ‘ambiguous’”).

⁴⁵ *Id.* In keeping with his view that judges are more, not less, constrained when they consider all the available evidence concerning legislative intent, Justice Stevens “remain[ed] convinced that it is unwise to treat the ambiguity *vel non* of a statute as determinative of whether legislative history is consulted.” *Id.*; see also *Koons Buick Pontiac GMC, Inc. v. Nigh*, 125 S. Ct. 460, 470 & n.1 (2004) (Stevens, J., concurring).

⁴⁶ *Allapattah*, 125 S. Ct. at 2631 (Stevens, J., dissenting). Justice Stevens noted that the House Report specifically stated that § 1367 was not intended to overturn *Zahn*. *Id.* at 2629. Moreover, Justice Stevens said that the Court’s claim that the House Report was a “deliberate effort to amend a statute through a committee report,” *id.* at 2627 (majority opinion), was an “unrealistic view of the legislative process,” *id.* at 2630 (Stevens, J., dissenting). The law review article written by three of the drafters of § 1367 was best understood, Justice Stevens argued, not as evidence of an attempt to manipulate the statute through legislative history, but merely as a statement that “the text of the statute was susceptible to an overly broad (and simplistic) reading, and that clarification in the House Report was therefore appropriate.” *Id.*

⁴⁷ “Ambiguous” means “capable of being understood in two or more possible senses or ways.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 36 (10th ed. 1993).

In eradicating ambiguity from the statute, the majority boldly asserted that § 1367 “by its plain text” overruled both *Clark* and *Zahn*, and that “[n]o other reading of § 1367 is plausible in light of the text and structure of the jurisdictional statute.”⁴⁸ But if the majority’s reading of § 1367 was so clearly correct, it seems peculiar not only that the courts of appeals had divided so sharply on this issue,⁴⁹ but also that — as Justice Stevens pointed out — the majority had to wade through “nearly 20 pages of complicated analysis, which explore[d] subtle doctrinal nuances and coin[ed] various neologisms,” in order to make the case for its own interpretation.⁵⁰ Justice Ginsburg, for her part, emphasized that “§ 1367’s enigmatic text defies flawless interpretation.”⁵¹ Indeed, given the considerable analysis of the text conducted by *both* the majority and the dissenting Justices, *Allapattah* suggests at the very least that neither side treated the “ambiguous” analysis as an inquiry into the meaning of a statute only on its face.⁵²

The majority’s intense scrutiny of § 1367 is explained in part by a general antipathy toward 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, 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.⁵³

⁴⁸ *Allapattah*, 125 S. Ct. at 2625.

⁴⁹ The Fourth, Fifth, Sixth, Seventh, and Ninth Circuits expressed views similar to the position taken by the Eleventh Circuit in *Allapattah*, while the Third, Eighth, and Tenth Circuits expressed views similar to the position taken by the First Circuit in *Ortega*. *Id.* at 2616.

⁵⁰ *Id.* at 2630 (Stevens, J., dissenting). Justice Stevens’s page count referred to the slip opinion.

⁵¹ *Id.* at 2640 (Ginsburg, J., dissenting) (footnote omitted); *see also id.* at 2637 n.8 (discussing the apparent anomaly in § 1367’s treatment of Rule 19 and Rule 20 plaintiffs).

⁵² *Cf.* Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 351–52 (1994) (“Textualism is not simply a revival of the old plain meaning rule. It is a sophisticated theory of interpretation which readily acknowledges that the meaning of words depends on the context in which they are used.”). The narrowness of the majority’s “ambiguous” inquiry is not surprising in light of the refusal of some Justices to join opinions that rely on legislative history. *See id.* at 365 (explaining how Justice Scalia and Justice Thomas’s dislike of legislative history increases the likelihood that the Court will rigorously interpret a statutory text in order to avoid ambiguity).

⁵³ *Allapattah*, 125 S. Ct. at 2626 (citation omitted) (quoting Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1081 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (quoting Harold Leventhal, Conversation with Harold Leventhal)). The Court’s first concern addresses both the realist criticism that “legislative intent is an incoherent and indeterminate concept,” William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 641 (1990); *see also Allapattah*, 125 S. Ct. at 2627 (stating that reconciling the conflicting elements of § 1367’s legislative history is “a hopeless task”), and the formalist criticism that the use of legislative his-

Although the Court generally criticized the use of legislative history, it conveniently avoided the larger question arguably before it, expressly declining to “comment here on whether these problems are sufficiently prevalent to render legislative history inherently unreliable in all circumstances.”⁵⁴

In conjunction with its general attack on legislative history, the Court also employed a targeted attack on the legislative history at issue in *Allapattah*. In particular, the majority was disturbed by evidence suggesting that the House Report was a belated attempt to change the meaning of the statutory text.⁵⁵ The Court believed the “telltale evidence” of manipulation came from three of the drafters of § 1367, who stated that the statute “‘on its face’ permits ‘supplemental jurisdiction over claims of class members that do not satisfy section 1332’s jurisdictional amount requirement, which would overrule [*Zahn*]. . . . It would have been better had the statute dealt explicitly with this problem, and the legislative history was an attempt to correct the oversight.”⁵⁶ In light of its belief that the legislative history behind § 1367 was especially unreliable, the majority had additional incentive to find the statute unambiguous.⁵⁷

By appearing to allow its skepticism of § 1367’s legislative history to influence its determination as to whether the statute was ambiguous, the majority turned the prevailing framework for the use of legislative history on its head.⁵⁸ Under normal circumstances, the Court first considers whether a statute is ambiguous without *any* considera-

tory unacceptably increases the discretion of the judiciary to make “illegitimate policy choices” and thereby “usurp[.] . . . legislative power,” Eskridge, *supra*, at 648. The Court’s second concern addresses the formalist criticism that allowing Congress to explain its intended meaning via legislative history violates the constitutional requirements of bicameralism and presentment. *See id.* at 649; John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 707 (1997).

⁵⁴ *Allapattah*, 125 S. Ct. at 2626. The Court pointed out that its members have disagreed on this issue, thus suggesting that a majority does not exist for rejecting the use of legislative history in most circumstances. *Id.* Justice Scalia has been the leading proponent of rejecting legislative history. *See, e.g., Intel Corp. v. Advanced Micro Devices, Inc.*, 124 S. Ct. 2466, 2484–85 (2004) (Scalia, J., concurring).

⁵⁵ *Allapattah*, 125 S. Ct. at 2627.

⁵⁶ *Id.* (alteration in original) (quoting Rowe et al., *supra* note 34, at 960 n.90). *But see supra* note 46. Interestingly, the majority did not pass on the dispositiveness of the views of the nonlegislators who helped draft § 1367.

⁵⁷ Professor Thomas Merrill has pointed out that textualists have an incentive to “demonstrate that textualism in fact produces a narrower range of permissible meanings than does intentionalism.” Merrill, *supra* note 52, at 371. This provides another reason why the Court may have been motivated to find § 1367 unambiguous.

⁵⁸ “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*.” *Allapattah*, 125 S. Ct. at 2626 (emphasis added).

tion of legislative history.⁵⁹ But if the Court reserves to itself the power to narrow the meaning of “ambiguous” based on either a general distrust of legislative history or a specific concern regarding the reliability of a particular piece of such history, the prescribed order of analysis becomes reversed. Although a narrow framing of “ambiguous” helped the Court avoid basing its decision on the seemingly indeterminate grounds of extratextual sources related to § 1367, this reversal should cause concern, as it leaves Congress with a confusing message as to the boundaries of ambiguity.⁶⁰

If the majority was truly concerned about honoring the respective powers of the legislative and judicial branches,⁶¹ it might have done better to adhere to an everyday-usage meaning of “ambiguous” at the first stage of inquiry before dealing with the reliability of § 1367’s legislative history at the second stage.⁶² This approach would have clarified for Congress how closely courts will scrutinize statutory texts under the “ambiguous” standard and, consequently, how carefully legislators must draft legislation. This proposed framework would presumably lead to more frequent consideration of legislative history and would thus put pressure on the Court to articulate a methodology for screening out manipulated legislative history at the second stage of the suggested analysis. In *Allapattah*, the majority seemed content to rely entirely on a law review article published by three law professors involved in the drafting of § 1367 to support its contention that the House Report was a deliberate attempt to manipulate the statutory text and therefore should not be given any effect.⁶³ But the Court neglected to explain more generally how materials casting a negative light on a statute’s legislative history should be weighed against evidence tending to bolster reliability, apparently out of a belief that there

⁵⁹ The “traditional” approach, popular before the rise of “new textualism,” gave much more weight to legislative history than the current framework. During the Warren and Burger Courts, “[t]he plain meaning of a statute govern[ed] its interpretation, unless negated by strongly contradictory legislative history. . . . [E]ven an apparently plain meaning [could] be rebutted by legislative history.” Eskridge, *supra* note 53, at 624, 626–30.

⁶⁰ The Court’s narrow definition of “ambiguous” calls into question the manipulability of the ambiguity threshold in statutory interpretation cases generally — not only in cases involving questionable legislative history, such as *Allapattah*.

⁶¹ See *supra* note 53.

⁶² Under this approach, the Court’s investigation of extrinsic materials, including § 1367’s legislative history, would have some dispositive force in the resolution of the case. Alternatively, one might argue that *any* predictable rule of decision would have been preferable to the approach employed by the *Allapattah* Court. If, for example, the Court were to hold that legislative history would no longer be consulted even in situations where statutes are ambiguous, at least Congress could then adjust its legislative process accordingly to ensure that statutes would withstand judicial review. Although this would likely increase the costs of passing legislation, it would put to rest the Court’s concerns over the “murky” nature of legislative history and the threat of nonelected parties circumventing the requirements of Article I. See *Allapattah*, 125 S. Ct. at 2626.

⁶³ *Id.* at 2627.

was nothing redeeming about § 1367's history.⁶⁴ Ultimately, the Court managed to keep its theory of statutory interpretation frustratingly opaque.

Allapattah illustrated the Court's continuing inability to reach agreement on the appropriate use of legislative history in statutory interpretation. Justice Kennedy, for his part, voiced general concern regarding the use of legislative history, but was careful not to take a position on whether reference to legislative history should be banned in all circumstances⁶⁵ — a move that may well have been necessary in order to bring together the five-Justice majority in *Allapattah*. Meanwhile, Justice Stevens noted that ambiguity is a concept capable of both broad and narrow meanings, and therefore advocated broad use of legislative history in determining the meaning of statutes, believing that this would in fact constrain the opportunity for federal judges to graft their own policy preferences onto congressional laws.⁶⁶ It may be open to debate whether Justice Stevens's call for judges to make themselves "accountable to *all* reliable evidence of legislative intent"⁶⁷ or Justice Scalia's general disavowal of legislative history is the better approach, or whether another alternative might yield superior results. But Justices on both sides of the debate seem to believe in limiting the ability of the judicial branch to make policy decisions from the bench.⁶⁸ By failing to find common ground on how to use legislative history, and instead setting forth a standard that allows courts to manipulate the definition of "ambiguous" beyond recognition, *Allapattah* unfortunately gives inadequate deference to the legislative branch. Indeed, the Court continues to hamper the ability of Congress to serve its proper function — an ironic consequence in light of the Court's professed desire to restrict its own power.

B. Status of International Law

Force of Judgments by the International Court of Justice — Vienna Convention on Consular Relations. — The Vienna Convention on Consular Relations¹ provides that when a foreign national is arrested, the arresting authorities must inform him that he has the right to notify

⁶⁴ Even if the Court had laid down a workable framework, serious problems may have persisted. Some commentators remain deeply skeptical of the ability of courts to screen out manipulated legislative history. See, e.g., W. David Slawson, *Legislative History and the Need To Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 413 (1992) (arguing that attempts by courts to "distinguish manufactured from legitimate legislative history would soon drive the manufacturing process underground").

⁶⁵ *Allapattah*, 125 S. Ct. at 2626.

⁶⁶ *Id.* at 2628 (Stevens, J., dissenting).

⁶⁷ *Id.*

⁶⁸ See *id.* at 2626 (majority opinion); *id.* at 2628 (Stevens, J., dissenting).

¹ Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention].