As I said at the outset, this case is about method. The Court transforms the meaning of § 2, not because the ordinary meaning is irrational, or inconsistent with other parts of the statute, see, *e.g.*, *Green v. Bock Laundry*; *Public Citizen v. Department of Justice* (Kennedy, J., concurring in the judgment), but because it does not fit the Court's conception of what Congress must have had in mind. When we adopt a method that psychoanalyzes Congress rather than reads its laws, when we employ a tinkerer's toolbox, we do great harm. Not only do we reach the wrong result with respect to the statute at hand, but we poison the well of future legislation, depriving legislators of the assurance that ordinary terms, used in an ordinary context, will be given a predictable meaning. Our highest responsibility in the field of statutory construction is to read the laws in a consistent way, giving Congress a sure means by which it may work the people's will. We have ignored that responsibility today. I respectfully dissent.

[The dissenting opinion of JUSTICE KENNEDY is omitted.]

WEST VIRGINIA UNIVERSITY HOSPITALS v. CASEY, 499 U.S. 83 (1991). In a majority opinion by **Justice Scalia**, the Court held that 42 U.S.C. § 1988, which permits the award of "a reasonable attorney's fee" to prevailing plaintiffs in civil rights cases, does not authorize the award to prevailing plaintiffs of fees for services rendered to their attorneys by experts. Justice Scalia presented a straightforward textualist path to this result: "The record of statutory usage demonstrates convincingly that attorney's fees and expert fees are regarded as separate elements of litigation costs. While some fee-shifting provisions, like § 1988, refer only to 'attorney's fees,' many others explicitly shift expert witness fees *as well as* attorney's fees." Justice Scalia cited a variety of federal statutes, such as the Toxic Substances Control Act, 15 U.S.C. §§ 2618(d), 2619(c)(2), which provides that a prevailing party may recover "the costs of suit and reasonable fees for attorneys and expert witnesses." Justice Scalia explained that, if attorney's fees includes expert fees, "dozens of statutes referring to the two separately become an inexplicable exercise in redundancy."

In response to the argument that attorney's fees under § 1988 should include expert fees because had Congress thought about the issue it surely would have included them as recoverable (the imaginative reconstruction approach), Justice Scalia stated: "This argument profoundly mistakes our role. Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law. We do so not because that precise accommodative meaning is what the lawmakers must have had in mind (how could an earlier Congress know what a later Congress would enact?) but because it is our role to make sense rather than nonsense out of the *corpus juris*. But where, as here, the meaning of the term prevents such accommodation, it is not our function to eliminate clearly expressed inconsistency of policy, and to treat alike subjects that different Congresses have chosen to treat differently. The facile attribution of congressional 'forgetfulness' cannot justify such a usurpation. Where what is at issue is not a contradictory disposition within the same enactment, but merely a difference

between more parsimonious policy of an earlier enactment and the more generous policy of a later one, there is no more basis for saying that the earlier Congress forgot than for saying that the earlier Congress felt differently. In such circumstances, the attribution of forgetfulness rests in reality upon the judge's assessment that the later statute contains the *better* disposition. But that is not for judges to prescribe."

Justice Stevens, joined by **Justices Marshall** and **Blackmun**, dissented. He contended that the primary source of meaning for § 1988 should not be the text of other statutes, but how the Court has interpreted § 1988's own text and legislative history. He would have provided a broad reading to "costs" and "a reasonable attorney's fee," either term being expansive enough to cover the expenses associated with "specialized litigation support that a trial lawyer needs and that the client customarily pays for." He also noted that the legislative history of § 1988 indicated that Congress intended to make prevailing plaintiffs whole.

Justice Stevens argued that the majority's textualism disserves democratic norms. He cited examples in which Congress has let stand statutory interpretation decisions rooted in "historical context, legislative history, and prior cases identifying the purpose that motivated the legislation." In contrast, "when the Court has put on its thick grammarian's spectacles and ignored the available evidence of congressional purpose and the teaching of prior cases construing a statute, the congressional response has been dramatically different."[i] He concluded: "In the domain of statutory interpretation, Congress is the master. It obviously has the power to correct our mistakes, but we do the country a disservice when we needlessly ignore persuasive evidence of Congress' actual purpose and require it 'to take the time to revisit the matter' and to restate its purpose in more precise English whenever its work product suffers from an omission or inadvertent error."

NOTES ON *CASEY*, *CHISOM*, AND THE NEW TEXTUALISM ON THE COURT

1. *The Rise of the New Textualism, 1987–95, and Its Relationship to the Plain Meaning Rule.* The Court's practice changed after Justice Scalia's

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i. Justice Stevens cited legislation effectively overruling the literalist decisions in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) (discrimination on basis of pregnancy not gender discrimination violative of Title VII); *INS v. Phinpathya*, 464 U.S. 183 (1984) (requirement of "continuous physical presence" of aliens did not permit even temporary or inadvertent absences from United States); *Grove City College v. Bell*, 465 U.S. 555 (1984) (narrow reading of Title IX of Civil Rights Act, which prohibits gender discrimination in programs that receive federal financial assistance); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (reallocating burden of proof in Title VII cases); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (42 U.S.C. § 1981 does not forbid racial harassment in employment setting); *McNally v. United States*, 483 U.S. 350 (1987) (limiting mail fraud statute to the protection of property interests). For support of Justice Stevens' point, see William Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331 (1991). For support for Stevens' more context-specific approach rather than Scalia's "whole code" methodology, see William Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. Pa. L. Rev. 171 (2000).