

JUDICIAL TENDENCIES IN STATUTORY CONSTRUCTION: DIFFERING VIEWS ON THE ROLE OF THE JUDGE

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I remember once I was with [Justice Oliver Wendell Holmes]; it was a Saturday when the Court was to confer. . . . When we got down to the Capitol, I wanted to provoke a response, so as he walked off, I said to him, "Well, sir, goodbye. Do justice!" He turned quite sharply and he said, "Come here. Come here." I answered, "Oh, I know, I know." He replied, "That is not my job. My job is to play the game according to the rules."

—Judge Learned Hand¹

This exchange between two of America's greatest jurists is emblematic of the ongoing debate over the judge's role in our system of governance, a debate that has heated up in recent years as judges reexamine their role in interpreting the ever-increasing body of statutory law. Statutory interpretation is much of what appellate judges do, and frequently the decisions are difficult ones. Easy cases are resolved short of litigation or settled early; the costs of litigation normally filter them out, leaving appellate judges with the hard decisions. The statutory issues presented in the cases that we must decide are not only plentiful, but varied. They include instances where the phrase at issue, while seemingly of one clear meaning, seems odd or incoherent when applied to the situation at hand; cases in which a provision admits of multiple meanings, each leading to different consequences; and those in which a statute is

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1. Learned Hand, Address at the National Conference on the Continuing Education of the Bar (Dec. 16, 1958), in JOINT COMM. ON CONTINUING LEGAL EDUC., AM. LAW INST. & AM. BAR ASS'N, CONTINUING LEGAL EDUCATION FOR PROFESSIONAL COMPETENCE AND RESPONSIBILITY: THE REPORT ON THE ARDEN HOUSE CONFERENCE, DECEMBER 16TH TO 19TH, 1958 app. D 116, 119 (1959), *reprinted in* Learned Hand, *A Personal Confession*, THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 302, 306–07 (Irving Dilliard ed., 3d ed. 1960) [hereinafter SPIRIT OF LIBERTY].

unclear because its commands are not precise, contains contradictory provisions, or is in conflict with another statute.

Statutes are often highly complex, particularly those that enact into law broad or multifaceted federal policies. Social security, immigration, and tax legislation are examples.² As these policies change, Congress may amend the statute and then amend the amendments. At times, the amendments may be incomplete or contain errors that alter some, but not all, relevant provisions of the statute. Or at times, an amendment may affect the applicability of other statutes of which the drafters may not have been cognizant, leading to a confusing mixture of statutory commands in cases that are at the intersection of different laws.

Moreover, language is inherently imperfect. It also may be deliberately imprecise to accommodate political interests. Even when carefully drafted, a provision may convey different meanings to reasonable people. But careful draftsmanship is all too often absent; perhaps it is impossible in the crush of competing interests and activities that occur in the final moments of legislative enactments. Mistakes are made. In addition, a case that comes before the court years after the statute was passed may present an issue that was not in the minds of most, some, or any of the legislators. Or perhaps the case involves factual circumstances, such as technological advances, that could not have been imagined when the statute was passed, but that nonetheless now seem to fall within the scope of its terms.

In light of all of these potential pitfalls, how should a judge go about interpreting a statute? For me, answering the question invokes two clusters of considerations: the rules or methods of interpretation that judges apply in reaching decisions in particular cases,³ and the theories or philosophies of interpretation to which a judge might adhere, consciously or subconsciously. Adherence to a particular theory or philosophy might determine whether a judge follows, or eschews, particular rules or methods of interpretation.

2. See, e.g., 42 U.S.C. §§ 401 *et seq.* (Social Security); 8 U.S.C. §§ 1101 *et seq.* (immigration); 26 U.S.C. §§ 1 *et seq.* (internal revenue code).

3. These rules and methods include, inter alia, “intrinsic” aids, such as presumptions and canons of construction, including textual canons (e.g., *nocitur a sociis*, or “it is known by its companions”), grammar canons (e.g., the “and” versus “or” rule), and substantive canons (e.g., statutes in derogation of the common law should be strictly construed); and “extrinsic” aids, such as the common law, statutes that may aid in interpreting a different statute, and the legislative background of a statute. WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 633–37, 640–41, 652–55 (2d ed. 1995).

This essay will be confined to considerations of theory. It will briefly review theories that have found wide acceptance in judicial decisions in Part I, pointing out that they fall along a definable spectrum. Part II will then consider in greater depth the views of two eminent judges who represent different camps in the statutory construction debate: Second Circuit Judge Learned Hand, who, forty years after his death, is still widely regarded, along with Holmes, Brandeis, and Cardozo, as one of the four greatest judges of the twentieth century, and for whom legislative purpose was the light that guided statutory interpretation; and Supreme Court Justice Antonin Scalia, for whom the text is the proper focus of judicial attention and who, as much as any single person, has changed the theoretical debate over statutory interpretation in the last two decades to include, in addition to the optimal methodology for interpreting statutes, a discussion of the changed character of law in an age of statutes and the role of the judge in interpreting such law within our constitutional framework. Part III will undertake an examination of the interpretive issue presented in *Green v. Bock Laundry Machine Co.*,⁴ with a view to highlighting both the purposive and textualist approaches and some of the difficulties presented by each. Part IV will conclude the essay with some observations.

I.

THEORIES OF STATUTORY INTERPRETATION

A. *Two Conceptions of Law*

The debate about statutory interpretation arises out of two competing conceptions of the law. In one, the law—and here I mean statutory law (or its derivative, agency regulation)—is complete when it is ordained by the legislature (or administrative agency). It acquires its status as law, *the law*, at the moment of enactment, before the judge grapples with it. The judge may not alter its command. Rather, the judge's job is to understand the law as given and to convey that understanding in an interpretation that is faithful to the command that preceded the judge's involvement. In its most pristine form, this conception can be found in the words of Lord Atkinson in *Vacher & Sons, Ltd. v. London Society of Compositers*:⁵

If the language of a statute be plain, admitting of only one meaning, the Legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to

4. 490 U.S. 504 (1989).

5. [1913] A.C. 107 (1912) (appeal taken from Eng.).

absurd or mischievous results. If the language of this subsection be not controlled by some of the other provisions of the statute, it must, since its language is plain and unambiguous, be enforced, and your Lordships' House sitting judicially is not concerned with the question whether the policy it embodies is wise or unwise, or whether it leads to consequences just or unjust, beneficial or mischievous.⁶

The second conception regards the statutory command as not fully determined until the judge has finally articulated and applied it. Under this conception, the judge is not simply to apply the statutory law as stated, but to read it in such a way as to "improve" upon it by reaching an interpretation that comports with the larger purpose (or purposes) of the enactment and any practical concerns, as well as general notions of justice, social purpose, and morality. Indeed, in some variants of this conception, a judge may use his imagination to discern a meaning of the provision that embodies its animating spirit, even where such a meaning is not self evident from, and perhaps even contrary to, the statute's literal terms. Although it antedated them, this conception is frequently associated with the ideas of the legal realists, prominent in the middle of the twentieth century, who viewed the role of the judge, even in the statutory context, more as that of a lawgiver or creator than that of a law communicator.⁷

Neither conception has been exempt from criticism. The first is subject to claims that it is wooden and subject to mindless application; that it permits odd results that could not have been intended by the legislature; and that it may lead to injustices in particular cases. The second invites the charge that, in departing from the text in an effort to reach the "best" result in a particular case, it unsettles the law, obscuring it to the layman and his lawyer-advisor, and permits unelected judges to effectively enact their own personal preferences, robbing the law of its objective character while violating the Constitution's prescriptions on lawmaking in Article I, § 7,⁸ and the separation of powers between Articles I and III.

6. *Id.* at 121–22.

7. See generally AMERICAN LEGAL REALISM (William W. Fisher III et al. eds., 1993).

8. U.S. CONST. art. I, § 7 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated . . .").

B. Historical Background

The articulation of these competing approaches to statutory construction and understandings of the law owes much to the ongoing debate between the two camps. Neither approach has predominated to the exclusion of the other. Rather, the themes, concepts, and concerns of both have generally co-existed in some form, often developing in response to one another, and have resulted in a range of more refined theoretical views. Thus, an understanding of their historical background is helpful to understanding these two approaches.

The roots of the “purposive” approach are found in the evolution of our legal system. In the latter half of the nineteenth century, the principal assumption underlying the American legal system was the notion that “[j]udges do not make law: they merely declare the law which, in some Platonic sense, already exists,”⁹ and that the whole of the law was judge-declared. This idea, which was consistent with the efforts of Langdellian jurisprudence¹⁰ to achieve unity of doctrine on a case law level,¹¹ gave rise to the view that “common law cases were for all practical purposes the principal if not the exclusive source of law.”¹² As one observer has noted, “[f]or more than a century after the American Revolution, ideals

9. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 62 (1977).

10. Christopher Columbus Langdell, who became the first dean of Harvard Law School in 1870, espoused the idea that the law is a science. *Id.* at 42. In an address to the Harvard Law School in 1886, he suggested that:

[A]ll the available materials of that science [the law] are contained in printed books. . . . [T]he library is . . . to us all that the laboratories of the university are to the chemists and physicists, all that the museum of natural history is to the zoologists, all that the botanical garden is to the botanists.

Christopher Columbus Langdell, Address to the Meeting of the Harvard Law School Association in Commemoration of the Two Hundred and Fiftieth Anniversary of the Founding of Harvard College (Nov. 1886), in *RECORD OF THE COMMEMORATION, NOVEMBER FIFTH TO EIGHTH, 1886, ON THE TWO HUNDRED AND FIFTIETH ANNIVERSARY OF THE FOUNDING OF HARVARD COLLEGE* 97–98 (1887), reprinted in ARTHUR E. SUTHERLAND, *THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN, 1817–1967*, at 175 (1967), quoted in GILMORE, *supra* note 9, at 42. Underlying this idea was a conception that “there is such a thing as the one true rule of law which, being discovered, will endure, without change, forever.” GILMORE, *supra* note 9, at 43.

11. See GILMORE, *supra* note 9, at 70.

12. Justice Ellen Ash Peters, Common Law Judging in a Statutory World: An Address, Address at the University of Pittsburgh School of Law (Feb. 18, 1982), in 43 U. PITT. L. REV. 995, 995 (1982).

about the meaning of the rule of law were developed within an entirely judge- and court-centered system of thought.”¹³

Indeed, early efforts to codify the law in the nineteenth century were unsuccessful—“judges and lawyers [adhered to] an autonomous system of legitimation . . . [that] treated legislative initiatives with great suspicion (‘statutes in derogation of the common law are to be strictly construed’)”¹⁴ and reacted with hostility to the development of the administrative state.¹⁵ Eventually, and despite judicial recalcitrance, the primacy of the judge-declared system of common law was dramatically altered. The emergence of Legal Realism, a movement that replaced the idea of the judge as one who declares preexisting law with the notion that judges made the common law, “stripped the judges of their trappings of black-robed infallibility and revealed them to be human beings.”¹⁶ At the same time, “[b]etween 1900 and 1950 the greater part of the substantive law, which before 1900 had been left to the judges for decision in the light of common law principles, was recast in statutory form.”¹⁷ And such “statutorification” (Judge Calabresi’s term)¹⁸ was not confined to the arena formerly occupied by the common law. The growth of industry and unregulated labor practices fostered reform movements that in turn led to remedial legislation both at the state and federal levels.

Judicial habits die hard, however. When faced with statutes to interpret, judges did not abandon what was familiar to them—common law methods of judging. Instead, they adapted their common law reasoning to the modern statutory and administrative state.¹⁹ Statutory interpretation was affected by the idea of a statutory provision fitting within a legal fabric so that the whole made sense. The practice whereby courts resorted to the common law of a state to fill gaps in a federal statute was “superseded by the idea that federal statutes generate a common law penumbra of their own: gaps are to

13. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1870–1960*, at 221 (1992).

14. *Id.* at 221–22.

15. *See id.* at 222 (“As new administrative agencies were created, they were not treated as coordinate or parallel governmental entities but instead were pressed to conform to court-centered conceptions of legitimacy. The rise of administrative regulation thus represented a renewed threat to common law conceptions of legality, which had already resisted the earlier challenge of codification.”); *see also* Roscoe Pound, *Common Law and Legislation*, 21 *HARV. L. REV.* 383, 383–85 (1908).

16. GILMORE, *supra* note 9, at 92.

17. *Id.* at 95 (describing period as an “orgy of statute making”).

18. *See* GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES I* (1982).

19. *See id.* at 44–45.

be filled in by a process of extrapolation from whatever the court conceives the basic policy of the statute to be."²⁰

The movement to a statute-based system was followed in due course by corresponding changes in legal education. A curriculum consisting primarily of common law courses yielded to the emergence of statutory regimes: first in such areas as tax and bankruptcy, then in labor law, securities regulation, and, more recently, in such fields as environmental and immigration law. While at the turn of the century all three years of law school were spent studying the common law,²¹ today such study is largely confined to the first year or, at some schools, the first term of the first year. Despite the burgeoning of courses devoted to mastering the content of statutory regimes, however, it has been only in the past two decades that law schools have devoted resources to teaching, in a systematic way, theories and methods of statutory interpretation. This is so, even though most of what lawyers have been doing since the 1930s has consisted of reading, interpreting, and following (or advising their clients on how to follow) statutory commands.

C. *The Response by Legal Theorists*

As the nature of the American legal system changed in these fundamental ways, legal scholars and some judges began to think more systematically about what they believed judges were doing and what they ought to do when interpreting statutes. Early intimations could be gleaned from judicial pronouncements. Some judges believed, like Lord Atkinson, quoted earlier, that the judge's sole duty was to follow the plain command of the statute whatever the consequences.²² Others suggested that the judicial beacon should be the mischief to which the statute was aimed and that any proper inter-

20. GILMORE, *supra* note 9, at 94.

21. *See* Learned Hand, My Marks in the Harvard Law School (n.d.) (on file in the Learned Hand Papers at the Harvard Law School Library) *in* THE REMARKABLE HANDS: AN AFFECTIONATE PORTRAIT 131 (Marcia Nelson ed., 1983) [hereinafter THE REMARKABLE HANDS] (revealing, course by course, Learned Hand's remarkable Harvard Law School grades); Letter from Austin W. Scott to Judge Augustus N. Hand (Mar. 22, 1948) (on file with the family of Augustus N. Hand), *in* THE REMARKABLE HANDS, *supra*, at 130 (showing the even higher grades of Learned Hand's cousin, and companion on the Second Circuit, Augustus Hand, in a series of common law courses).

22. It is worthy of note that even where attempting to discern a statute's "plain command," virtually all judges seek to avoid interpretations of statutes that lead to absurd results. For example, the Supreme Court once stated:

It will always . . . be presumed that the legislature intended exceptions to its language, which would avoid [unjust, oppressive, or absurd] results . . .

pretation must be consistent with the purpose of alleviating that mischief, even if a straightforward reading might lead in another direction.²³ A view often expressed in the case law focused on the intent of the legislature in passing the statute; this intent should be inferred from the context in which the statute was passed, including a review of legislative materials, reports, colloquy, letters to and from legislators, and the like.²⁴

After examining these decisions, legal scholars and judges reached their own varying theories. For example, four leaders in the field, Justice Benjamin N. Cardozo, Professor Roscoe Pound, Justice Oliver Wendell Holmes, and Professor Max Radin, developed different ideas of the proper role for a judge in interpreting statutes, engendering a debate that persists to this day. The ideas of these legal thinkers fall along a spectrum; each of them ascribed varying degrees of importance to legislative purpose and reaching desirable outcomes, on the one hand, and following the text of the statute and abiding by the institutional restraints on the judiciary and legislature, on the other.

Writing in 1907, Pound endorsed an approach whose object was to determine the legislature's subjective intent. In what Pound called "genuine" interpretation, a judge endeavored

to find out directly what the law-maker meant by assuming his position, in the surroundings in which he acted, and endeavoring to gather from the mischiefs he had to meet and the remedy by which he sought to meet them, his intention with respect to the particular point in controversy.²⁵

Where the statute was incomplete or unclear, the task of statutory construction necessarily entailed efforts "to make, unmake, or remake, and not merely to discover," and hence was "essentially a legislative, not a judicial process."²⁶ Pound candidly called this method "spurious" interpretation, and further described it as one that "seeks to reach the intent of the law-maker indirectly"²⁷ by "as-

The common sense of man approves the judgment . . . that the Bolognian law which enacted, "that whoever drew blood in the streets should be punished with the utmost severity," did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit.
United States v. Kirby, 74 U.S. (7 Wall.) 482, 486-87 (1868).

23. See *infra* notes 25-35 and accompanying text.

24. See, e.g., *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892); see also *Fishgold v. Sullivan Drydock & Repair Corp.*, 154 F.2d 785 (2d Cir. 1946), *aff'd*, 328 U.S. 275 (1946), and discussion *infra* Part II(A).

25. Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381 (1907).

26. *Id.* at 382.

27. *Id.* at 381.

sum[ing] that the law-maker thought as we do on general questions of morals and policy and fair dealing.”²⁸ A “spurious” interpretation would thus identify the lawmaker’s intent with that interpretation “which appeals most to our sense of right and justice for the time being.”²⁹

Although he avoided the label “spurious,” then-Judge Benjamin N. Cardozo similarly described statutory interpretation as involving a legislative component. In a lecture entitled “The Judge as a Legislator,” Judge Cardozo declared that “the power to declare the law carries with it the power, and within limits the duty, to make law.”³⁰ A judge was constitutionally empowered and duty bound, as a necessary and inevitable part of his charged task of interpretation, to interpret the law in a way that would “maintain a relation between law and morals, between the precepts of jurisprudence and those of reason and good conscience.”³¹ As was true with Pound’s “spurious” interpretation, Cardozo, the quintessential common law judge, believed that judicial lawmaking was not confined to filling in the gaps of unclear or incomplete statutes, but also extended to updating and restating the statute so that it was in harmony with “customary morality”³² and prevailing notions of “social justice.”³³ Like Pound, Cardozo also sought to allay the concerns aroused by the idea of the judge as legislator by noting that the exercise of such discretion was limited to “occasional and relatively rare instances,”³⁴ and was further circumscribed by other limits, such as tradition, the method of legal reasoning, and the imperatives of social order.³⁵

In contrast to Pound’s and Cardozo’s concern with social justice, willingness to inquire into the subjective intent of the legislator, and acceptance of the notion that a judge’s role was in part legislative, Justice Oliver Wendell Holmes emphasized rule of law values and the attendant need for objective standards in statutory interpretation. In Holmes’s view, a government of laws, not men, demanded standards external to judges.³⁶ These were to be found in the plain meaning of the words actually enacted. “[W]e ask, not

28. *Id.*

29. *Id.*

30. Benjamin N. Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* 98, 124 (1921).

31. *Id.* at 133–34.

32. *Id.* at 136.

33. *Id.* at 137.

34. *Id.* at 128.

35. *Id.* at 141.

36. *See* OLIVER WENDELL HOLMES, *THE COMMON LAW* 41, 44 (1881).

what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used";³⁷ "the normal speaker of English is . . . external to the particular writer, and a reference to him as the criterion is simply another instance of the externality of the law."³⁸

Professor Max Radin criticized the very coherence of the concept of legislative intent as well as its legitimacy. That the object of statutory interpretation was to discover the intent of the legislator was, to Radin's mind, a "transparent and absurd fiction."³⁹ The chances were "infinitesimally small" that "several hundred men each will have exactly the same determinate situations in mind," and moreover, the only external sign of the content of their minds was the "extremely ambiguous" act of voting for the statute, "which may be motivated in literally hundreds of ways, and which by itself indicates little or nothing of the pictures which the statutory descriptions imply."⁴⁰

Nor would the situation be improved even if legislative intent were discoverable, because the intent of the legislature has no legal authority. The legislators' "function is not to impose their will even within limits on their fellow-citizens, but to 'pass statutes.'"⁴¹ Passing statutes, in turn, involves enacting "statements in general terms of undesirable and desirable situations."⁴² "To say that the intent of the legislature decides the interpretation is to say that the legislature interprets [the statute] in advance" in light of "an existing determinate event—the issue to be litigated—and obviously that determinate event can not exist until after the statute has come into force."⁴³ To ascribe a controlling legislative intent to the lawmaker, then, is to attribute an interpretative role to legislators that they do not constitutionally possess, and powers of prophecy that they do not humanly possess.

A conceptual thread running through this scholarship accounts for the judge's role in the system and, not surprisingly, it was viewed in differing terms. In conceptions of statutory interpretation that held to the text, the judge's role was more limited, while in those that relied on the legislature's purpose or intent in passing

37. Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417–18 (1899).

38. *Id.* at 418.

39. Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930).

40. *Id.* at 870–71.

41. *Id.* at 871.

42. *Id.*

43. *Id.* at 871–72.

a statute, the judge was free to go beyond what the legislature said, or meant to say, by enacting the words of the statute, to determine the broader question of what the legislature intended to accomplish by passing a law and to interpret that law accordingly.

The views of those who thought about the judge's role in statutory interpretation prior to mid-century thus fell along a spectrum from a limited to an expansive role, and by mid-century, the expansive view was ascendant. The mainstream thinking about statutory interpretation theory by scholars and, to the extent they thought about it, judges, was centered on the purposive model formulated by Henry M. Hart, Jr., and Albert M. Sacks in *The Legal Process: Basic Problems in the Making and Application of Law*.⁴⁴ In their seminal work, Hart and Sacks summarized the legal process approach to statutory interpretation as a method by which courts should determine the purpose underlying a particular statutory enactment using a process of imaginative reconstruction, and then interpreting the words of the statute in question "so as to carry out the purpose as best it can, making sure, however, that it does not give the words either (a) a meaning they will not bear, or (b) a meaning which would violate any established policy of clear statement."⁴⁵ In doing so, the Hart and Sacks model assumes that "the legislature was made up of reasonable persons pursuing reasonable purposes reasonably."⁴⁶ Despite the breadth of judicial discretion under the Hart and Sacks model, it was not unfettered: "The words of the statute are what the legislature has enacted as law, and all that it has the power to enact. Unenacted intentions or wishes cannot be given effect as law."⁴⁷ In this conception, then, the judge is a faithful agent of the legislature, trying to discern its goals in passing the statute and interpreting the statute accordingly.

Judge Learned Hand was an early proponent of a purposivist approach similar to that described by Hart and Sacks, and before them, Pound and Cardozo. Although this conception of statutory interpretation was modified by plain-meaning theorists, as will be seen, it was not squarely challenged until some two decades after Hand's death, when the emergence of a new textualism rekindled

44. See Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (tentative ed. 1958) (unpublished manuscript, generally available in law school libraries; published in 1994 under same title).

45. *Id.* at 1411.

46. *Id.* at 1415.

47. *Id.* at 1412.

the debate. It is to this debate, drawn largely from the writings of Judge Learned Hand and Justice Antonin Scalia, that I now turn.

II. JUDGE LEARNED HAND'S PURPOSIVISM VERSUS JUSTICE ANTONIN SCALIA'S NEW TEXTUALISM

Both Judge Learned Hand and Justice Antonin Scalia, in judicial opinions and essays, have articulated their different conceptions of how statutes should be interpreted and, although they have not occupied the same judicial stage, their writings set forth the essence of the debate between purposivism and the new textualism.⁴⁸ In this Part, I will highlight this debate and account for the emergence and rise of the new textualism.

A. *Judge Learned Hand and Purposivism*

Judge Learned Hand was a classic purposivist—he believed he could interpret a statutory provision so as to effectuate the common will of the government by discerning the underlying general purpose expressed by the legislature in enacting a particular statute.⁴⁹ Although he acknowledged potential problems with this method, he viewed it as the most reliable way to effect the legislature's aims as its faithful agent. As he explained in *Borella v. Borden Co.*,⁵⁰

[w]e can best reach the meaning here, as always, by recourse to the underlying purpose, and, with that as a guide, by trying to project upon the specific occasion how we think persons, actuated by such a purpose, would have dealt with it, if it had been presented to them at the time. To say that that is a hazardous process is indeed a truism, but we cannot escape it, once we abandon literal interpretation—a method far more unreliable.⁵¹

48. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990). Professor Eskridge uses the term “new textualism” to distinguish the textualism of Justice Scalia, Judge Easterbrook, and others from the textualism of the plain-meaning theorists discussed *infra*. I use Professor Eskridge's term in this essay.

49. See Learned Hand, *How Far Is a Judge Free in Rendering a Decision?*, Nat'l Advisory Council on Radio in Educ., Law Series I Lecture No. 14 (CBS radio broadcast, May 14, 1933) (1935), reprinted in *SPIRIT OF LIBERTY*, *supra* note 1, at 103, 109.

50. 145 F.2d 63 (2d Cir. 1944), *aff'd*, 325 U.S. 679 (1945).

51. *Id.* at 64–65.

Judge Hand felt free to examine a wide range of materials and sources in order to discern the underlying purpose of a particular legislative enactment.⁵² For example, in *Fishgold v. Sullivan Drydock & Repair Corp.*,⁵³ Judge Hand was faced with the question of whether the Selective Training and Service Act of 1940, which prohibited the “discharge” of a veteran within one year of his return to employment, proscribed layoffs as well.⁵⁴ In concluding that it did not, he first closely analyzed the text of the statute in question, paying close attention to the structure of the relevant statutory provisions and the ordinary meaning of the words used; he then surveyed the statute’s historical context, the congressional purpose at the time of enactment, subsequent administrative interpretation of the statute, the statute’s subsequent amendment, congressional testimony at the time of the amendment, and the reenactment of the statute without change after the administrative interpretation.⁵⁵

A traditional common law judge, Judge Hand took a holistic view of the statutory landscape and all related materials before settling on a particular interpretation of a statute, recognizing that, in the act of statutory construction, a judge is “pulled by two opposite forces”⁵⁶:

On the one hand he must not enforce whatever he thinks best; he must leave that to the common will expressed by the government. On the other, he must try as best he can to put into concrete form what that will is, not by slavishly following the words, but by trying honestly to say what was the underlying purpose expressed.⁵⁷

In rejecting a “slavish” adherence to the words, Judge Hand conceded that, at times, judges would have to legislate to effect congressional purpose and avoid absurd results; but he was careful to respect congressional limits. For example, in deciding that a miner, who was hired as an independent contractor, must receive the same statutory protections accorded employees, he wrote:

It is true that the statute uses the word “employed,” but it must be understood with reference to the purpose of the act, and where all the conditions of the relation require protection, protection ought to be given. It is absurd to class such a miner

52. See KATHRYN GRIFFITH, JUDGE LEARNED HAND AND THE ROLE OF THE FEDERAL JUDICIARY 171 (1973).

53. 154 F.2d 785 (2d Cir. 1946), *aff'd*, 328 U.S. 275 (1946).

54. *Id.* at 787.

55. *Id.* at 787–91.

56. Hand, *supra* note 49, at 109.

57. *Id.*

as an independent contractor in the only sense in which that phrase is here relevant.⁵⁸

Perhaps because of his sensitivity to the opposing forces at work in his interpretive tasks, Judge Hand's efforts to give effect to purpose did not appear to be results oriented:

Awareness and public acknowledgment by judges of their legislative power may well induce restraint in exercising it. . . . A judge like Learned Hand, who publicly admits that at times he cannot help legislating, is far more demanding of himself, far more restrained when doing so. Such a judge will do his best to enforce the policy of a statute even when he detests its aim.⁵⁹

In his theoretical writings, Judge Hand drew a distinction between two "extreme" schools—those who believe that "a judge ought to look to his conscience and follow its dictates; he ought not to be bound by what they call technical rules, having no relation to natural right and wrong,"⁶⁰ and those who adhere to "the dictionary school."⁶¹ As described by Judge Hand, the approach taken by an adherent to "the dictionary school" was as follows: "No matter what the result is, he must read the words in their usual meaning and stop where they stop."⁶² Judge Hand criticized this approach, suggesting that "[n]o judges have ever carried on literally in that spirit, and they would not be long tolerated if they did."⁶³

Despite rejecting strict literalism, Judge Hand did place initial emphasis on the text, observing that the words of a statute are "no doubt the most important single factor in ascertaining its intent."⁶⁴ However, he also believed that "[t]here is no surer way to misread any document than to read it literally."⁶⁵ As observed by Judge Jerome Frank, Judge Hand often spoke "of the way in which literalism in interpretation can thwart the purpose of Congress."⁶⁶ In de-emphasizing the text, he has described his own view of statutory construction as "an act of creative imagination" and an "undertaking of

58. *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 552 (2d Cir. 1914).

59. Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259, 1271 (1947).

60. Hand, *supra* note 49, at 103.

61. *Id.* at 107.

62. *Id.*

63. *Id.*

64. *Comm'r v. Ickelheimer*, 132 F.2d 660, 662 (2d Cir. 1943) (Hand, J., dissenting).

65. *Guisseppi v. Walling*, 144 F.2d 608, 624 (2d Cir. 1944) (Hand, J., concurring), *aff'd sub nom. Gemsco, Inc. v. Walling*, 324 U.S. 244 (1945).

66. Frank, *supra* note 59, at 1263.

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delightful uncertainty”⁶⁷; he held to the belief that “the meaning of a sentence may be more than that of the separate words.”⁶⁸ As he wrote in *Helvering v. Gregory*:⁶⁹

It is quite true, as the Board has very well said, that as the articulation of a statute increases, the room for interpretation must contract; but the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create.⁷⁰

In sum, Judge Hand’s approach represents an early example of purposivism, fully consistent with the later Hart and Sacks paradigm. Today, we can see it reflected in Judge Richard A. Posner’s “imaginative reconstruction” model.⁷¹ In stark contrast to these purposivist approaches are those championed by the advocates of new textualism, and the model within that school espoused by Justice Antonin Scalia, to whose theories I will now turn.

B. *The New Textualists*

The term “new textualism” was coined by Professor William N. Eskridge, Jr., to describe the proponents of a method of rigorous text-based statutory interpretation that emerged in the 1980s. Judge, now Justice, Antonin Scalia and Judges Frank Easterbrook, James Buckley, Kenneth Starr, and Alex Kozinski advanced this new, and in the eyes of critics “radical,” theory through their opin-

67. Learned Hand at the fiftieth-anniversary celebration of his judicial service in 1959, 264 F.2d 28 (*Proceedings in Commemoration of Fifty Years of Federal Judicial Service*), quoted in GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 471 (1994) (internal quotation marks omitted).

68. *Helvering v. Gregory*, 69 F.2d 809, 810–11 (2d Cir. 1934), *aff’d*, 293 U.S. 465 (1935).

69. *Id.*

70. *Id.* at 810–11.

71. RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 287 (1985). Judge Posner suggests that

the judge should try to put himself in the shoes of the enacting legislators and figure out how they would have wanted the statute applied to the case before him. . . . If it fails, as occasionally it will, either because the necessary information is lacking or because the legislators had failed to agree on essential premises, then the judge must decide what attribution of meaning to the statute will yield the most reasonable result in the case at hand—always bearing in mind that what seems reasonable to the judge may not have seemed reasonable to the legislators, and that it is their conception of reasonableness, to the extent known, rather than the judge’s, that should guide decision.

Id. at 286–87.

ions and other public writings and speeches.⁷² Although the new textualists rely on Holmes's view that it is the meaning of the plain text and not the intent of the legislature that determines a statute's meaning,⁷³ there are differences in degree between the new textualist and the traditional textualist or plain-meaning approach to statutory interpretation.

The traditional textualist or plain-meaning approach continues to look to legislative intent as the touchstone of interpretation, but holds that the text is the best evidence of intent, and, where its meaning is plain, the exclusive evidence. Under this approach, judges will look to external sources such as legislative history and the outcome resulting from a given interpretation, both to confirm a plain meaning and to discern the meaning when the text is ambiguous. Chief Justice Rehnquist describes this approach as follows: "Our task in this case, like any other case involving the construction of a statute, is to give effect to the intent of Congress. To divine that intent, we traditionally look first to the words of the statute and, if they are unclear, then to the statute's legislative history."⁷⁴ Moreover, deviation from the text is permitted. As Justice Kennedy has noted: "Where the plain language of the statute would lead to 'patently absurd consequences' that 'Congress could not *possibly* have intended,' we need not apply the language in such a fashion."⁷⁵ In its respect for legislative intent, this textualism of the plain-meaning variety represents a refinement of the purposive model of Hart and Sacks, not a rejection of it. Drawing on Professor Eskridge's analyses, I will briefly discuss the distinctions between the plain-meaning and new textualist approaches before turning to Justice Scalia's model.

The first distinction is the increased rigor with which the new textualists adhere to, and delve into, a statute's text to discern its meaning.⁷⁶ The new textualists adhere to what Professors Eskridge

72. Eskridge, *supra* note 48, at 624, 647; ESKRIDGE & FRICKEY, *supra* note 3, at 577. R

73. Eskridge, *supra* note 48, at 647 & n.100, 624 n.12. R

74. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 253-54 (1979) (Rehnquist, J., dissenting).

75. *Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring and joined by Rehnquist, C.J.) (quoting *United States v. Brown*, 333 U.S. 18, 27 (1948), and *FBI v. Abramson*, 456 U.S. 615, 640 (1982) (O'Connor, J., dissenting)) (emphasis added in *Pub. Citizen*) (citations omitted).

76. *Cf. Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 46-48 (1928) (Holmes, J.); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982) (Rehnquist, J.).

and Frickey call “a ‘harder’ version of the plain meaning rule,”⁷⁷ that is, they show an increased willingness “to find a statutory ‘plain meaning’ and less willing[ness] to consult legislative history, either to confirm or to rebut that plain meaning.”⁷⁸ Unconcerned with legislative intent or purpose, the new textualists seek to discern what the legislature said and meant to say in enacting the language of the statute. Unwilling to resort to legislative history because of its unreliability and lack of legal authority, the new textualists will consider, in addition to the text’s language, its place in the statutory scheme, other related usages in the statute, the structure of the statute as a whole, or even other related statutory schemes.⁷⁹ The method also employs grammatical and plain-meaning canons of construction and dictionary definitions to unlock the meaning of the words used.⁸⁰

Another difference between the new and the traditional, or plain-meaning, textualists is that the new textualists’ rejection of legislative intent or purpose as the object of interpretation is driven primarily by “formalist” concerns. As noted above,⁸¹ Professor Radin called it a “transparent and absurd fiction” to impute a collective intent to the 535 members of Congress whose votes were likely motivated by purposes ranging from their varying individual understandings of the statute to political horse trading and logrolling. Elaborating on these arguments, the new textualists, as Professor Eskridge notes, have advanced three main arguments in support of focusing on the text of a statute rather than legislative intent and, as a device for determining that intent, legislative history:⁸² (1) only the text of the statute as enacted, and not the aspirations or observations in the legislative history, has the force of law because it is the text alone that, in compliance with Article I, § 7,⁸³ has been passed by both houses of Congress and presented to the President;⁸⁴ (2) because the Constitution, under the separation of pow-

77. ESKRIDGE & FRICKEY, *supra* note 3, at 587.

78. Eskridge, *supra* note 48, at 656.

79. *Id.* at 660–66; ESKRIDGE & FRICKEY, *supra* note 3, at 587.

80. Eskridge, *supra* note 48, at 660–66; ESKRIDGE & FRICKEY, *supra* note 3, at 587; *cf.* Radin, *supra* note 39, at 873–74 (criticizing two canons of construction approved of by Justice Scalia, *expression unius est exclusio alterius* (the expression of one thing is the exclusion of another) and *eiusdem generis* (of the same class), as having little basis “in logic or in ordinary habits of speech”).

81. *See supra* notes 39–43 and accompanying text.

82. Eskridge, *supra* note 48, at 671–78; ESKRIDGE & FRICKEY, *supra* note 3, at 587–88.

83. U.S. Const. art. I, § 7.

84. Eskridge, *supra* note 48, at 671–73.

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ers between Articles I and III, reposes the lawmaking power in the Congress alone, the courts should refrain from even interstitial lawmaking activity by adhering to the limits imposed by the language of the statute;⁸⁵ and (3) the faithful agent role of the courts is inappropriate from a governance viewpoint. Rather, new textualism is “democracy enhancing”⁸⁶—judges help legislators do their constitutionally charged tasks better when judges refuse to engage in judicial lawmaking in the guise of statutory interpretation by, for example, rewriting or filling in the gaps of statutes.

This last point deserves a word of elaboration. In the course of making their democracy-enhancing arguments, the new textualists articulate institutional concerns about the judiciary’s role vis-à-vis the legislature. When judges consistently stay within the limits of their constitutionally defined role, the new textualists claim, legislators have a clearer idea *ex ante* of the effect their laws will have and an incentive to legislate more clearly and completely. This in turn enhances democracy by putting the onus on the democratically elected body of the legislature to make hard policy choices and resist the urge to hand the difficult decisions over to the life-tenured, unelected members of the federal judiciary. Judge Easterbrook has described the democracy-enhancing effect of textualism by likening statutory construction to the faithful but unenthusiastic implementation of the bargain struck in a contract.⁸⁷ Refusing to add or extend the “contractual terms” embodied in a statute,⁸⁸ and thereby give parties the benefits of bargains that were never actually struck, the judge promotes democratic values by only enforcing the terms upon which the parties, by mustering the necessary votes, were able to agree.

As a final point of difference, in their strict adherence to the text, and to constitutional and other limits on judicial discretion, the new textualists are more willing than the traditional textualists to tolerate interpretations that do not appear to be the “optimal result” for the parties or generally. This is aptly illustrated by Judge Easterbrook’s opinion in *United States v. Marshall*.⁸⁹ In that case, the Seventh Circuit considered whether the phrase “mixture or substance containing a detectable amount,” as used in a federal narcot-

85. *Id.* at 674.

86. *Id.* at 677.

87. Frank H. Easterbrook, *The Court and the Economic System, Foreword to The Supreme Court: 1983 Term*, 98 HARV. L. REV. 4, 15 (1984).

88. *Id.*

89. 908 F.2d 1312 (7th Cir. 1990) (en banc), *aff’d sub nom.* Chapman v. United States, 500 U.S. 453 (1991).

ics statute, was limited to “pure” LSD or also included the paper blotter, sugar cube, or other medium in which the LSD was sold.⁹⁰ The federal statute at issue provided for a scheme of graduated penalties pegged to drug weight, based on the weight of the “mixture or substance.”⁹¹ By counting the weight of the blotter paper, which was exponentially greater than the weight of the pure LSD it contained, many cases would result in a sharp sentencing differential depending on whether the weight was of the pure LSD dosage or the dosage that included the blotter paper or sugar cube. If the weight of the carrying medium was counted, a drug kingpin dealing in pure LSD could, by selling thousands of doses of pure LSD that weighed less than a gram, be exposed to a significantly shorter prison term than a street-level dealer who sold one dose of LSD in a carrying medium weighing a gram or more.

Judge Easterbrook found that the blotter paper was a “mixture” containing a detectable amount of LSD and was thus includable in calculating the weight of the drug.⁹² His analysis focused on the ordinary meanings of the statutory terms and the structure of the statute rather than the harsh or inequitable sentences that would follow. According to Judge Easterbrook, the plain meaning of the word “mixture” simply could not mean “pure” LSD, a conclusion that was supported by the structure of the statute. Moreover,

90. *Id.* at 1315.

91. During the relevant period, 21 U.S.C. § 841 stated in pertinent part:

- (a) [I]t shall be unlawful for any person knowingly or intentionally
 - (1) to manufacture, distribute, or dispense . . . a controlled substance
- (b) [A]ny person who violates subsection (a) of this section shall be sentenced as follows:
 - (1)(A) In the case of a violation of subsection (a) of this section involving . . . (v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD); . . . such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life
 - (B) In the case of a violation of subsection (a) of this section involving . . . (v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD); . . . such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years
 - (C) [In the case of a violation of subsection (a) involving lesser amounts of LSD, such person] shall be sentenced to a term of imprisonment of not more than 20 years

21 U.S.C. § 841 (1988).

92. *Marshall*, 908 F.2d at 1318.

“[o]rdinary parlance” dictated that LSD was in fact “mixed” with its paper blotter.⁹³

In dissent, Judge Posner emphasized that the majority’s interpretation entailed a result that was not only “exceptionally harsh” but also, because it discriminated between like cases without a rational basis, even unconstitutional.⁹⁴ In his efforts to show that such a result was not compelled by the language of the statute, Judge Posner situated the statutory language “against a background” that included constitutional concerns and the perceived omissions of Congress and the Sentencing Commission in drafting the statute and related sentencing guidelines.⁹⁵ Judge Posner’s dissent described the differences between the new textualist approach of Judge Easterbrook and his own purposivist approach: the new textualist approach “buys political neutrality and a type of objectivity at the price of substantive injustice, while the [purposive method] buys justice in the individual case at the price of considerable uncertainty and, not infrequently, judicial willfulness.”⁹⁶ The differences between these two approaches are also evident in the outcome. Drawing on the context of the statute, and with an eye to achieving a just and rational result, Judge Posner interpreted the statute in a way that was arguably contrary to its text. His emphasis on justice and rationality is suggestive of Hart and Sacks’s assumption that “the legislature was made up of reasonable people pursuing reasonable purposes reasonably.”⁹⁷

The new textualist approach is given perhaps its fullest, most forceful expression by Justice Scalia in his essay *A Matter of Interpretation: Federal Courts and the Law*.⁹⁸ Justice Scalia’s answer to the criticism of his textualism as wooden and error-prone is that his approach is not strict literalism. While words “do have a limited range of meaning, and no interpretation that goes beyond that range is permissible,”⁹⁹ the language should be interpreted “to contain all that it fairly means.”¹⁰⁰ Thus, Justice Scalia would not interpret the language of a federal narcotics statute that provides an enhanced sentence for a defendant who “uses . . . a firearm” “dur-

93. *Id.* at 1317.

94. *Id.* at 1335 (Posner, J., dissenting).

95. *Id.* at 1337.

96. *Id.* at 1335.

97. Hart & Sacks, *supra* note 44, at 1415; *see supra* notes 44–47 and accompanying text.

98. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

99. *Id.* at 24.

100. *Id.* at 23.

ing and in relation to . . . [a] drug trafficking crime” to reach a defendant who purchased drugs in exchange for an unloaded firearm.¹⁰¹ The language “use a gun” should be understood to mean what it “fairly connoted,” the typical use of a firearm as a weapon and not its extraordinary use in this case as an object of exchange.¹⁰² By looking to the context of a statute to determine the “connotations” of its terms, Justice Scalia distinguishes his textualism from Hand’s caricature of the “dictionary school” of interpretation.¹⁰³

Justice Scalia’s advocacy of textualism is particularly noteworthy for its criticism of efforts to divine legislative intent to determine the statute’s purpose and for his complete rejection of the use of legislative history. As a practical matter, Justice Scalia views the examination of legislative intent, when it is sufficiently divorced from the text of the statute, as a subterfuge for judicial lawmaking. In asking himself what the legislature intended, the judge will ask what a wise and intelligent lawmaker would have intended; from there, the judge will proceed to ask himself what he, who is also wise and intelligent, thinks the law ought to mean.¹⁰⁴ This is but a variation of “common-law judging,” whereby a judge “has the intelligence to discern the best rule of law for the case at hand and then the skill to perform the broken-field running through earlier cases that leaves him free to impose that rule.”¹⁰⁵

When used to interpret statutes, judicial lawmaking of this sort is “a sure recipe for incompetence and usurpation.”¹⁰⁶ It entails, among other things, judges substituting their own policy preferences for those of the legislature.¹⁰⁷ As Justice Scalia makes clear, the very idea of judicial lawmaking is repugnant to democratic and separation of powers values because it involves unelected life-tenured federal judges arrogating to themselves the lawmaking function constitutionally vested in the elected legislature. Judicial lawmaking also increases the unpredictability and arbitrariness of the law, and thus undermines rule of law values, because neither the legislature nor any other interested party can know beforehand with any certainty how judges will refashion the law to suit their personal preferences.

101. *Id.* at 23–24.

102. *Id.* at 24.

103. *See supra* notes 61–63 and accompanying text.

104. *Id.* at 18.

105. *Id.* at 9.

106. *Id.* at 14.

107. *Id.* at 17–18.

For Justice Scalia, the incompetence and usurpation entailed by such purposive methods of statutory construction are vividly illustrated by the use of legislative history to ascertain the intent of the legislature. Though the use of such materials is “relatively new,” Justice Scalia states that “[i]n the past few decades . . . we have developed a legal culture in which lawyers routinely—and I do mean routinely—make no distinction between words in the text of a statute and words in its legislative history.”¹⁰⁸ As an example of the heights to which legislative history has risen, Justice Scalia cites a passage from a Supreme Court brief that stated: “Unfortunately, the legislative debates are not helpful. Thus, we turn to the other guidepost in this difficult area, statutory language.”¹⁰⁹

Justice Scalia’s objections to the use of legislative history go beyond his rejection of legislative intent as the object of statutory construction.¹¹⁰ As Justice Scalia observes, most members of Congress do not attend the floor debates or read, much less have a hand in authoring, committee reports.¹¹¹ Although members of Congress also might not have read the statute or know its details, there is an important difference between the documents in the legislative history and text of the statute. Whether or not read, the latter, having been enacted by Congress, is the law. The legislative history has no such provenance—rather, any claim to authority it has depends upon “the assumption that it was the *basis* for the [congressional] house’s vote and thus represents the house’s ‘intent.’”¹¹² Even more troubling than the legislators’ general inattentiveness is the role played by certain parties in generating the legislative history. Because interested parties expect that judges will look to it, lobbyist-lawyers and members of Congress routinely try to plant language in the debates and reports to influence future judicial outcomes when they are unable to garner the votes necessary to get the same language in the statute’s text.¹¹³ Thus, the nature of much legislative history has changed from its traditional role of informing or persuading the legislature, and in this sense arguably reflecting a sort

108. *Id.* at 31.

109. *Id.* at 31 (quoting Brief for Petitioner at 21, *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989) (No. 87-2084), *quoted in* *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 530 (1989) (Scalia, J., concurring)) (internal quotation marks omitted).

110. *Id.* at 31.

111. *See id.* at 32, 34.

112. *Id.* at 35.

113. *See id.* at 34.

of “intent” of the legislature, to informing and persuading the judiciary.¹¹⁴

Finally, Justice Scalia notes that legislative history does not simply provide one more way, in addition to canons of construction and all the other interpretative devices that are susceptible to manipulation, for judges to substitute their own will for that of the legislature.¹¹⁵ Legislative history is particularly pernicious because it is uniquely manipulable.¹¹⁶ As Justice Scalia puts it, “[i]n any major piece of legislation, the legislative history is extensive, and there is something for everyone. As Judge Harold Leventhal used to say, the trick is to look over the heads of the crowd and pick out your friends.”¹¹⁷ This manipulability is exacerbated by the absence of rules for assigning weight to various pieces of legislative history. While an interpretation of the legislative history can frequently be countered by a contrary interpretation using different material, rarely can it be conclusively refuted.¹¹⁸

Hence, in what some commentators call the most distinctive feature of Justice Scalia’s model of statutory construction, Justice Scalia maintains that “it is time to call an end to a brief and failed experiment” in which legislative history has been used to determine the legislature’s intent.¹¹⁹ Justice Scalia notes that he has opposed the use of legislative history for some time now,¹²⁰ and if the arguments already advanced were not enough, adds another reason for rejecting reliance on legislative history: it would save all parties an enormous amount of time and expense.¹²¹

The new textualist approach has, of course, problems as well. Some of the limitations of both the purposive and new textualist approaches are illustrated by the following case.

III.

GREEN V. BOCK LAUNDRY MACHINE CO.

In *Green v. Bock Laundry Machine Co.*,¹²² a design defect case in which the plaintiff sued the manufacturer of a machine that injured him, the defendant sought to impeach the testifying plaintiff with

114. *Id.*

115. *Id.* at 36.

116. *See id.*

117. *Id.*

118. *Id.* at 35–36.

119. *Id.* at 36.

120. *See id.*

121. *Id.* at 36–37.

122. 490 U.S. 504 (1989).

prior felony convictions. The Supreme Court was thus faced with the issue of whether the old version of Federal Rule of Evidence 609(a)¹²³ mandated that a judge admit evidence of prior felony convictions to impeach a plaintiff testifying in a civil case, even if the prejudicial value of the evidence outweighed its probative value such that, in the absence of a mandatory rule, a judge would exercise his discretion to exclude the evidence of the prior convictions.¹²⁴ The lower courts had interpreted the Rule to mandate admission of the plaintiff's prior felony convictions for burglary and conspiracy to commit burglary to impeach the plaintiff's testimony concerning the safety of the machine that injured him, even though this evidence was likely only marginally probative, but highly prejudicial.¹²⁵

The plain text of the Rule permitted probative versus prejudicial weighing only as to the effect of the impeaching evidence on "the defendant." Of concern to the Court was the different treatment accorded by the Rule to the opposing parties in a civil case. In addition to crimes of dishonesty or false statement (whether misdemeanors or felonies), under the Rule's plain terms, a judge is required to admit evidence of all other prior felonies to impeach plaintiff witnesses but not defendant witnesses unless the judge

123. Rule 609(a) formerly provided as follows:

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted . . . if the crime (1) was punishable by death or imprisonment in excess of one year . . . and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement

FED. R. EVID. 609(a) (1989) (amended 1990), *quoted in Green*, 490 U.S. at 509.

124. Shortly after the decision in *Green*, the Supreme Court notified Congress in January 1990 that it had adopted an amendment to Rule 609(a), provided that Congress did not disapprove of the change by statute. The amended Rule 609(a) now reads:

For purposes of attacking the credibility of a witness,

- (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
- (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

FED. R. EVID. 609(a); *see* ESKRIDGE & FRICKEY, *supra* note 3, at 603.

125. *Green*, 490 U.S. at 509.

finds that the probative value of that evidence outweighs its prejudicial effect to the defendant.¹²⁶

Writing for the Court, Justice Stevens began his analysis of Rule 609(a) by noting that the plain text of the Rule resulted in an unacceptable outcome in civil cases and hence “can’t mean what it says”¹²⁷: “No matter how plain the text of the Rule may be, we cannot accept an interpretation that would deny a civil plaintiff the same right to impeach an adversary’s testimony that it grants to a civil defendant.”¹²⁸ While this asymmetry favoring the defense might make sense in criminal actions, where certain special protections are afforded defendants, it did not make sense in the context of a civil action. However, nothing in the text of the Rule drew a distinction between criminal and civil cases. Finding the plain text wanting, Justice Stevens exhaustively reviewed the legislative history leading to the enactment of Rule 609 as law.¹²⁹ Tracing the development of Rule 609 from its common law antecedents, he examined versions of the Rule proposed by the American Law Institute and the American Bar Institute; the numerous draft rules proposed by the House, Senate, and Judiciary Committee in the process of developing the Rule; and comments on these drafts in floor debates and culled from House, Senate, Special, and Conference Committee reports.¹³⁰

On the basis of this extensive review, Justice Stevens concluded that the Rule’s silence as to its applicability in civil cases was the result not of legislative oversight, but rather of Congress’s intent to confine prejudice-weighting to criminal defendants. First, Justice Stevens cited a rule of construction for the proposition that the party claiming that legislation altered settled law must show that the legislature intended such a change.¹³¹ Here, where the pre-Rule weight of authority mandated admissibility and drew no distinction between civil and criminal cases, the legislature’s failure to make this distinction could not be understood to show that “Congress intended silently to overhaul the law of impeachment in the civil context.”¹³² Second, to the extent that various drafts and legislators distinguished between civil and criminal trials, Justice Stevens rea-

126. *Id.*

127. *Id.* at 511 (quoting *Campbell v. Greer*, 831 F.2d 700, 703 (7th Cir. 1987)) (internal quotation marks omitted).

128. *Id.* at 510.

129. *Id.* at 511.

130. *Id.* at 511–21.

131. *Id.* at 521 (citing *Midlantic Nat’l Bank v. N.J. Dep’t of Env’tl. Prot.*, 474 U.S. 494, 502 (1986)).

132. *Id.* at 522.

soned, they did so solely to protect criminal defendants from undue prejudice.¹³³ Finally, if Congress had wanted to protect civil defendants, it could have easily done so given the various drafts of the proposed Rule that protected civil as well as criminal defendants.¹³⁴ After further finding that Rule 609(a)(1)'s specific command overrode Rule 403's general provision of discretionary authority to weigh admissibility for unfair prejudice, the majority concluded that a district court did not have discretion to refuse to admit evidence of prior felony convictions in a civil case, whether or not it unfairly prejudiced the plaintiff or defendant, and it affirmed the interpretation of the lower courts.¹³⁵

Justice Scalia concurred in a separate opinion. Given the absurd and probably unconstitutional result produced by a literal reading of the statute's plain text, Justice Scalia accepted as proper consult[ing] all public materials, including the background of Rule 609(a)(1) and the legislative history of its adoption, to verify that what seems to us an unthinkable disposition [differentiating between plaintiffs and defendants in civil cases] was indeed unthought of, and thus to justify a departure from the ordinary meaning of the word "defendant" in the Rule.¹³⁶

However, he chastised the majority opinion's use of the legislative history to go beyond this limited role: "Approximately four-fifths of its substantive analysis is devoted to examining the [legislative history] with the evident purpose, not merely of confirming that the word 'defendant' cannot have been meant literally, but of determining what, precisely, the Rule does mean."¹³⁷

Such reliance was misplaced, Justice Scalia reasoned, because there was no reason to believe that "any more than a handful of the Members of Congress who enacted Rule 609" were aware of its evolution or voted on the basis of the various reports and statements referenced by the majority in its survey of the legislative history.¹³⁸ Instead, the meaning of terms in statutes should be determined

not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have

133. *Id.* at 522–23.

134. *Id.* at 523.

135. *Id.* at 527.

136. *Id.* at 527 (Scalia, J., concurring).

137. *Id.* at 527–28.

138. *Id.* at 528.

been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind.¹³⁹

Applying this method, and agreeing with the majority that Rule 403's prejudice-weighting was subordinate to the command of Rule 609, he listed the possible interpretations of "defendant" in Rule 609 and picked the one that he believed did "the least violence to the text."¹⁴⁰ As used in Rule 609, the term "defendant" could mean (1) all the parties in a civil or criminal case (civil plaintiff and defendant, criminal defendant and prosecutor); (2) both defendant and plaintiff in a civil case and a criminal defendant but not the prosecution; or (3) just a criminal defendant. The last alternative did the least violence to the text, and hence was preferable, because even though it "adds a qualification that the word 'defendant' does not contain . . . , unlike the others, [it] does not give the word a meaning ('plaintiff' or 'prosecutor') it simply will not bear."¹⁴¹ Justice Scalia further reasoned that the qualification "criminal" before the word "defendant" could easily have been inadvertently dropped and was consistent with the special protections afforded to criminal defendants by the law and the Federal Rules of Evidence.¹⁴²

After resolving the legal issues under review, Justice Scalia briefly explained why he declined to join the majority opinion. By giving such prominence to legislative history in its analysis, the majority ran the risk of "producing a legal culture in which, when counsel arguing before us assert that 'Congress has said' something, they now frequently mean, by 'Congress,' a committee report."¹⁴³ Such reliance on legislative history, Justice Scalia continued, threatened to turn the task of statutory construction on its head.

Justice Blackmun, in a dissent joined by Justices Brennan and Marshall, reached a different outcome by relying, in part, on the legislative history. Although agreeing with the majority and concurrence that Rule 609 cannot mean what it says, Justice Blackmun argued that the "better interpretation" of the Rule would extend

139. *Id.*

140. *Id.* at 529.

141. *Id.*

142. *Id.*

143. *Id.* at 530.

the protections of prejudice-weighting to any party.¹⁴⁴ According to the dissent, applying the protections of the Rule to all parties would prevent “unjust results” in the instant case and others “until Rule 609(a) is repaired, as it must be,” and would avoid the “irrationality and unfairness” of the majority’s and concurrence’s interpretation.¹⁴⁵

In his analysis, Justice Blackmun dismissed most of the legislative history relied upon by the majority on the ground that it was generated in connection with rules or versions of the Rule that were not adopted.¹⁴⁶ The only relevant piece of legislative history, according to the dissent, was the report of the Conference Committee that hammered out the version of Rule 609 that was enacted into law.¹⁴⁷ Though that report seemed to speak of protecting only criminal defendants against the prejudicial effect of evidence of prior convictions, and thus appeared to support the majority’s interpretation, Justice Blackmun found the report to be as ambiguous and unreliable as the Rule’s text.¹⁴⁸ Thus, he preferred “to rely on the underlying reasoning of the Report, rather than on its unfortunate choice of words.”¹⁴⁹ Because evidence of prior convictions threatened to prejudice all parties in all cases, Justice Blackmun read the terms “prejudice to defendant” to mean “prejudice to a party.”¹⁵⁰ In seeking to give effect to the underlying intent of the legislature, the dissent specifically faulted Justice Scalia’s efforts to adopt a reading of “defendant” that did the least “violence” to the text. Though Justice Scalia’s reading did the least “violence” in the sense of adding or deleting words, Justice Blackmun noted, his and the majority’s reading “does violence to the logic of the only rationale Members of Congress offered for the Rule they adopted.”¹⁵¹

Green is a hard case that exemplifies both the textualist and the purposivist approaches, while highlighting some of their difficulties. As this case shows, some statutes are so poorly drafted and lead to results so unacceptable that even a textualist must abandon the text. But Justice Scalia, beyond observing that the literal meaning

144. *Id.* at 530–31 (Blackmun, J., dissenting).

145. *Id.* at 531.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 533.

151. *Id.*; *see also id.* at 532–33 (relying on the Report of the Conference Committee to conclude that Congress was concerned with situations where the unduly prejudicial nature of a witness’s past convictions might improperly influence the outcome of the trial).

of the text in this case was unacceptable and probably unconstitutional, advances no specific rules to provide guidance as to when a statute's literal meaning is so unacceptable as to warrant departure. The absence of such rules opens the door for judicial discretion. Interpreting the statute in the Judge Learned Hand or Hart and Sacks traditions, as Justice Stevens and Justice Blackmun do, arguably fares even worse in this case because the approaches yield two results. Although both Stevens and Blackmun attempt to ascertain Congress's purpose or intent in enacting Rule 609, they reach opposite results by crediting different parts of the legislative history and relying on different maxims of statutory construction. Justice Blackmun states in dissent that he "prefer[s] to rely on the underlying reasoning"¹⁵² extrapolated from the Conference Committee report, but, in light of the long history of the Rule and conflicting legislative history, Justice Stevens's majority opinion cuts the other way.

After reading *Green*, one is left questioning whether there is really any ascertainable congressional purpose or intent. Moreover, by placing such an emphasis on reaching the right result, and so lightly dismissing the contrary evidence in both the text and the legislative history, Justice Blackmun's dissent appears willful and results driven. Someone attempting to defend the Hart and Sacks approach could deny that Justice Blackmun's opinion actually applied it. This defense might describe Justice Stevens as using the legislative history in an attempt to imaginatively reconstruct the congressional intent, while asserting that Justice Blackmun merely dresses up a result-oriented decision in the clothes of purposivism to add legitimacy. Similarly, the advocate of purposivism might describe Justice Scalia's characterizations of the different choices as stacking the deck. If Justice Scalia had framed the choice as between broadening "defendant" to "party," or "defendant" to "criminal defendant," the conclusion that the latter reading does less violence to the language would have been less strong. Still, interpreting "defendant" as "party" (substituting a general noun for a specific) is a bigger step than interpreting "defendant" as "criminal defendant" (adding a limiting modifier), and even if Justice Blackmun's decision can be dismissed as not true purposivism, it suggests the ease with which the Judge Learned Hand or Hart and Sacks framework can be used to justify judicial policy preferences well apart from any choices that Congress actually made. When faced

152. *Id.* at 531.

with difficult cases such as this one, where traditionally espoused methods fail, how are judges to proceed?

IV. OBSERVATIONS

A response to the foregoing question should take into account the practical as well as the theoretical issues implicated in judging. For me, and I think most judges, the act of judging is not a static enterprise; although I am guided by certain disciplines, these disciplines are informed by a skepticism that any particular approach is necessarily the correct one in all cases. In the end, it is far easier to say what judges should not be doing, and to adhere to it, than to prescribe a particular method to be invariably applied. General rules and preferences, however deeply held, must retain sufficient play in the joints to withstand the difficult case. Thus it makes more sense to speak of judicial tendencies in statutory interpretation and to disassociate oneself from the idea of fixed practices that are invariable for all time. After discussing certain practical considerations involved in statutory interpretation, primarily in relation to the proper use of legislative history, I will conclude this essay by considering theoretical concerns about the role of the judge in our system of governance that are informed by, and inform, those practical considerations. In the context of discussing the judge's role, I will also consider some of the strengths and weaknesses of the competing approaches to statutory construction.

A. *Practical Considerations*

In deciding a question of statutory interpretation in the real, as opposed to the theoretical, world, few judges approach the interpretive task armed with a fixed set of rigid rules. In briefs, the parties make all of the arguments they can think of, whether based on the relevant case law, the "plain text," the legislative history, or the statute's underlying purpose or purposes in effectuating a policy or remedying mischief.¹⁵³ I have difficulty imagining that any judge, presented with such arguments, would, for example, simply evaluate the so-called plain meaning of the statute and then stop reading the brief. Even a judge's strongest theoretical inclinations are tempered by the judge's desire to accord a fair hearing to the parties' arguments and to be open to all credible materials that might en-

153. As observed by Judge Posner, parties often do not start with the language of a particular statutory text or constitutional provision that the court is being asked to interpret. POSNER, *supra* note 71, at 277-79.

hance the judge's understanding of the case. Generally, when an appellate judge decides a case, something like the following happens: (1) the judge reads all he can to try to understand all facets of the law and facts pertinent to the case; (2) the judge thinks about what he has read, weighing the arguments and materials before him, deciding what the applicable law is and how it applies to the facts of the case, and formulating in his mind a reasoned justification for the outcome; and (3) the judge articulates the results of this process in a written, reasoned opinion. In a case involving statutory interpretation, when trying to determine the meaning of a statute, a judge's mind typically moves back and forth between text and context as the judge considers all available and persuasive or binding materials at the judge's disposal, including any prior precedent. As part of this dynamic, a judge typically will consider whether the legislative history can be helpful in deciding the issue and what weight, if any, to give it.

Legislative history, even the most questionable legislative history, is part of the mix of materials before the judge, and different judges will treat it differently. Because of the problems associated with legislative history, including its unreliability, manipulability, and lack of authority as law, I have come to attach very little, or no, weight to it, both in deciding cases and in relying upon it in published opinions. But even here, hard and fast rules are not entirely reliable. Despite the obvious shortcomings of legislative history, I see no reason to categorically exclude it from consideration in all cases.

It is important to be clear about just what use a judge may make of legislative history. There is a significant difference between using legislative history to derive a larger statutory purpose that the judge may use to guide his interpretation of a specific provision and using legislative history to directly discern the meaning of specific words used or to rule out other meanings. Assuming that one can overcome the substantial, often fatal, problems of reliability and manipulability, the former use suffers from the fact that the legislative history is not law. However, when a judge looks to legislative history to assist his understanding of what the legislators meant to say when they used the specific words in question, he is using legislative history, assuming problems of reliability and manipulability can be overcome, to perform a function similar to the use he makes of parol evidence to interpret a contract. Just as it is sometimes helpful to look to the negotiating and drafting history of a contract to understand its ambiguous terms, it may be helpful to look to the drafts of a statute.

Suppose, for example, the legislative history in *Green* contained all prior drafts of the provision at issue, each containing the word “criminal” as the antecedent of “defendant,” but no explanation for the omission of “criminal” in the final version. Suppose further that every discussion of the provision in committee reports uniformly referenced the appropriateness of prejudice-weighting in criminal cases but not in civil cases. Such a legislative history would strongly suggest scrivener’s error and that the legislature intended the word “defendant” as it appeared in the text to refer only to a “criminal defendant.” In this example, the legislative history would serve to inform the judge as to what the legislature meant to say by using the language that it did, as well as what it did not mean to say—but it would not be used to attribute a larger intent or purpose in passing the statute.

I also draw a distinction between legislative history and *statutory* history. Statutory history is the record and results of votes taken, bills passed or not passed, and bills signed or vetoed. These are all official acts, provided for in the Constitution. Such statutory history accounts for the collective action of the legislature and thus is more objectively determined and less susceptible to judicial and legislative manipulation than legislative history as it is generally understood. Bills rejected by a recorded vote in the legislature or vetoed by the President may shed light on the meaning of provisions ultimately enacted into law.

The foregoing discussion of the use of legislative history does nothing, in my view, to undercut Justice Scalia’s persuasive institutional and practical objections to legislative history: resort to legislative history does not comply with the bicamerality and presentment requirements; it fosters a legal culture where the text of the statute is diminished in importance and legal argument impoverished; it can be easily manipulated by legislators, judges, and lobbyists for favored interests; and its use leads to sloppy drafting and to legislative avoidance of difficult political issues.

B. *The Role of the Judge*

These practical considerations are influenced by theoretical concerns. And, for me, one of the most important is the carefully circumscribed role of the judge in our system of governance. My understanding of a judge’s proper role not only informs my views of the limited circumstances under which legislative history may be used, but also my general assessment of the competing approaches to statutory construction discussed in this essay.

The new textualists see the judge as the faithful agent, not of the legislature but of the Constitution which, in Articles I and III, separates the powers of the courts from those of the legislature, and, in Article I, § 7, prescribes with specificity how statutory enactments become law.¹⁵⁴ In holding the legislature to the actual commands that are passed in bills and, upon presentment to the President, signed into law, the new textualists are insisting that members of Congress fulfill their constitutional responsibility to legislate by disabusing them of the expectation that the courts will do it for them. If the resulting interpretation seems to be something other than the “better” or “most just” interpretation, they hold that it is beyond the province of the unelected judiciary to correct it.

But Justice Scalia’s concurrence in *Green* confirms that there are limits even to this proposition. He refused to let stand a pure textual result that prejudice-weighting would apply to a civil defendant’s witness but not a civil plaintiff’s, believing it to be anomalous and probably unconstitutional. In doing so, he engaged in what I think most judges would accept as a normal, but vital, component of the judicial function. When the application of a statute in a particular case would be manifestly absurd, or plainly contrary to the legislature’s intent, the judge may have to serve as a kind of judicial backstop. Here the judge is not thwarting legislative policy or implementing his own policy preferences, but avoiding an application that lacks rationality and does harm. This can occur when the legislature unconsciously errs or when its actions have unforeseen or unforeseeable consequences. The trial judge performs an analogous function when, in the rare case, he cannot let a jury verdict stand, not because he simply disagrees with it, but because the jury verdict is patently irrational or unjust.

The arguments advanced by the new textualists, however compelling, are not without their difficulties. While Article I, § 7 specifies the point at which the legislature has made “law”¹⁵⁵ and, by implication, tells us that legislative pronouncements, speeches, and reports are not law, it does not explicitly limit interstitial lawmaking and thus resolve that debate. Also, it seems to me that despite the new textualists’ desire to eliminate altogether opportunities for judicial willfulness, this goal cannot be fully achieved by the new textualist approach. As is evident from Justice Scalia’s famous “dictionary shopping” case, *MCI Telecommunications Corp. v. Ameri-*

154. U.S. CONST. art. I, § 7.

155. *Id.*

can Telephone & Telegraph Co.,¹⁵⁶ in which he rejected one dictionary's definition of "modify" because it contradicted not only alternative meanings in that dictionary, but also another meaning contained in virtually all other dictionaries,¹⁵⁷ a judge's resort to external objective tools does not inexorably lead the judge to a result certain. Choices still remain and such tools as dictionary definitions and canons of construction are capable of being manipulated to achieve the result the judge wants. Justice Scalia's acceptance that interpretation may rest on a word's connotations, as distinct from its denotations, allows for further choices. On the other hand, textualism's proponents might argue that these flexible features serve to answer the charge that new textualism is wooden and mindless literalism. These features do leave room for nuanced interpretation.

The purposive approach is open to no less criticism, and perhaps more. Judge Learned Hand believed, like Hart and Sacks, that a larger purpose could be identified and attributed to the will of the legislature and that the judge was the partner to the legislature in effectuating that purpose through interpretation. Under this paradigm, he believed, the "better" or "more just" result could be obtained. I have little doubt that a "purpose" that society would accept as reasonably approximating the notion of a common legislative will can be fairly assigned to most statutes. But such a purpose, whether derived from legislative history, the entirety of the statute, the mischief at which the statute is aimed, or the judge's imagination, is normally of such generality as to be useless as an interpretive tool, unless, of course, it is being used as a cover for the judge to "do justice" as he sees fit.

It is entirely reasonable, for example, for Congress to pass statutes to improve environmental quality, distribute welfare funds, or collect revenues, but these general purposes tell us next to nothing about what the legislature means when it uses words that, for example, set forth the requirements for a pollution permit, or the standards for welfare check eligibility, or provide for an exception to a depreciation allowance for oil reserves. Subordinate "purposes" or "intentions" might be more specific to particular provisions but, even putting aside the difficulties of ascertaining them, the likelihood of their generating common legislative acceptance, so as to equate to a "purpose" or "intent" that could guide interpretation, rapidly diminishes in proportion to their specificity. Very soon one is in the

156. 512 U.S. 218 (1994).

157. *Id.* at 225-27.

realm of murky and competing legislative history, often manufactured, where political tradeoffs eclipse any larger general “purpose” of the legislation. When such a “larger purpose” or reliance upon general notions of fairness or justice remain as the justification for the interpretation reached, it may be that the judge, consciously or otherwise, is placing his personal preferences as a thumb on the scale in favor of a particular outcome, in derogation of the judicial function and the separation of powers. But apart from such outcome-driven results, the judicial discretion promoted by seeking to effect purposes or to “do justice” detracts from the law’s certainty and predictability. All of these undesirable possibilities are far less likely to result from an approach that is centered in the text and thus are strong points in favor of a text-based approach.

Perhaps because he viewed himself as the agent of the legislature, Judge Hand’s writings do not reveal any particular concern over usurpation of the legislative function. In part, Judge Hand may have been motivated by a sense of a larger judicial role because of his grounding in the common law, where judges were often called upon to declare law in important areas. As our system of law has become more statutory, particularly in federal law, the traditional conception of the common law judge as crafting wide areas of the law even in the context of statutes has to be reconsidered. Given the restrictions inherent in the task of interpreting and applying legislative commands embodied in statutes, as opposed to declaring an evolving common law, it is important to acknowledge a correspondingly limited role for judges in interpreting statutes as they are written by the legislature.

Other differences between the legal landscape and political realities of today and those in Judge Hand’s day might also help to explain the increased emphasis in recent times on limiting judicial discretion and text-centered methods of statutory construction as a means to that end. When Judge Hand sat, the statutes, in addition to being fewer in number, were typically drafted with a greater degree of generality and thus were more amenable to being interpreted in light of a general purpose. Today, judges are frequently faced with very complicated, detailed, and reticulated statutes, typically in areas affecting broad swaths of policy such as immigration, Medicaid, welfare, habeas corpus, federal taxation, and retirement security. Such large and complicated laws have proved to be fertile grounds for the growth of voluminous and often contradictory legislative history. Moreover, the work of the federal judiciary is more likely to be seen in political terms today than it was in Judge Hand’s day. Questions of statutory construction, constitutional interpreta-

tion, and even other high profile trial and appellate court decisions are frequently likely to provoke partisan skirmishing and debate. As a result, political controversy swirls around Supreme Court appointments and, increasingly, even appointments to the federal appellate courts. Finally, given that there are many more appellate judges on the bench—nearly three times the number of fifty years ago—and a greater caseload, there is bound to be more variation in the interpretation of statutes.

These realities, in addition to an increased awareness of theory and its relationship to methodology, all shed light on the current trend in which judges are increasingly gravitating towards an approach that places greater value on the text. Text-centered approaches, whether plain-meaning textualism or new textualism, accompanied by a reduced reliance on legislative history or the disavowal of its use, tend to shift the spotlight away from the judge and back to the legislature. By interpreting the words of statutory commands according to their common usage, with as little help as possible from one's "friends," to borrow Judge Leventhal's phrase,¹⁵⁸ and thereby narrowing judicial discretion, judges may hope to reduce the dissonance generated by divergent statutory pronouncements from multiple judges and, at the same time, turn down the political heat on the judiciary by affirming the limited role of judges.

In the final analysis, how a judge interprets a statute is not simply a matter of his or her views on particular discrete issues, such as whether a statutory purpose should or can be discerned, the reliability of legislative history, or the importance of strict adherence to the text. At issue in statutory interpretation theory is the fundamental conception of the role of the judge in our federal system of coordinate government.¹⁵⁹ The questions raised in this debate persist. Should the judge act as a mini-legislator, filling in the interstices of a statute and giving it a voice where it is silent to advance what the judge determines to be the legislative purpose or intent? Or, by giving words their commonly and fairly understood meaning in the context in which they are found, should the judge adhere to the text and leave lawmaking, even interstitial lawmaking, to the

158. *See supra* text accompanying note 117.

159. *See, e.g.*, GRIFFITH, *supra* note 52, at 171 ("Hand's devotion to legislative purpose came from his understanding of the constitutional allocation of powers which gives the legislature the responsibility for announcing the laws by which the community will be governed. It conformed to his view that democracy is simply a process which permits all interests a voice in formulating policy through the legislature.").

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elected branch? How a judge answers these questions will determine the judge's tendencies—whether the judge is more inclined to “do justice” or “play the game according to the rules.”¹⁶⁰

160. Hand, *supra* note 1, at 307.

