Chapter 8

THEORIES OF STATUTORY INTERPRETATION

> *Since the mid-1980s, the debate has raged among at least three schools of statutory interpretation theory: the old intentionalism, the old* Holy Trinity Church *purposivism, and the new textualism. The Supreme Court remains up for grabs. For every case that seems to be a victory of textualism, another can be found that reflects more conventional intentionalist methodologies, and the purpose approach is not dead, either. For the first time in a long while, perhaps the first time ever, the Justices are frequently debating statutory interpretation methodologies at a level of theory that far transcends the details of the case at hand, and that implicates the very question of the Court's interpretive role in a democracy.*
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> — **Philip P. Frickey**[1]

Over the last quarter-century, law professors and judges have been engaged in heady debates over theories of statutory interpretation. As the quote from Professor Frickey implies, the debates have been pitched and complex. A great deal is at stake. It is impossible to interpret a statute without a theory, and the choice of theory is critical to the outcomes of actual cases. On the other hand, as the quote from Professor Molot indicates, there has emerged from this debate, if not unanimity, a moderately strong consensus that holds among most contemporary judges.

It will help you to think in terms of two basic models of the judicial role in statutory cases: "agency" and "partnership."[2] In the first, courts are the agents (sometimes, for emphasis, "faithful agents") of legislatures, obediently carrying out their instructions with little or no independent judgment or discretion. This is the mainstream view, and it rests on the constitutional allocation of policymaking to the legislative branch. To say that courts should be faithful agents only leads to a separate question: *how* do judges best fulfill that role? Here the central, though not the only, disagreement is over when and to what extent to look beyond the statutory text itself. Should a judge try to discern and pursue the legislature's intent or purpose? If so, how does the judge determine what those were?

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[1] Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 256 (1992).

[2] Other labels are of course possible. For example, Reed Dickerson aims at a similar distinction in identifying the "cognitive function" of ascertaining or extracting meaning, on the one hand, and the "creative function" of assigning or adding meaning to the statute, on the other. *See* REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 13–33 (1975).

Under the second model, that of partnership, courts are lawmakers in their own right, working with the legislature to produce a coherent and sound legal regime. These are not really two separate categories; they are tendencies or points along a continuum. The basic question is the extent to which the court's task is, on the one hand, to discern or execute a decision made by the legislature or, on the other, to play a lawmaking role itself, supplementing, elaborating, refining, or even correcting the legislature's handiwork.

> It is a commonplace that, apart from constitutional issues, judges are subordinate to legislatures in the making of public policy. If this subordinate role means anything at all, it must somehow constrain judges who interpret statutes from implementing their own notions of public policy. Although this much is clear, the extent of the constraint is far from obvious. At the one extreme, judges may be free to implement virtually any policies they want; at the other, they may be forbidden even to consider their own views of public policy in deciding statutory issues.[3]

One other taxonomy may be helpful to keep in mind. Professor William Popkin divides approaches to statutory interpretation into three. A "writer-based" approach focuses on the will or intent of the legislature. A "reader-based" approach gives greater rein to the views of the court. A "text-based" approach rejects any extrinsic aids to interpretation, including indications of legislative intent or broader considerations of principle or policy, and looks exclusively to the words of the statute.[4]

These debates arise at all because of an inescapable fact: words *always* require interpretation. The reader must choose among possible meanings. Often, the task will be straightforward, and virtually everyone will agree on the "correct" interpretation. But that does not mean that no interpretation has occurred. Consider the following classic, though prosaic, example, first offered in 1830 by the once-famous Francis Lieber, who was to become the second member of the faculty of the Columbia Law School:

> Suppose a housekeeper says to a domestic: "fetch some soupmeat," accompanying the act with giving some money to the latter; he will be unable to execute the order without interpretation, however easy and, consequently, rapid the performance of the process may be. Common sense and good faith tell the domestic, that the housekeeper's meaning was this: 1. He should go immediately, or as soon as his other occupations are finished; or, if he be directed to do so in the evening, that he should go the next day at the usual hour; 2. that the money handed him by the housekeeper is intended to pay for the meat thus ordered, and not as a present to him; 3. that he should buy such meat and of such parts of the animal, as, to his knowledge, has commonly been used in the house he stays at, for making soups; 4. that he buy the best meat he can obtain, for a fair

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[3] Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 281–282 (1989).

[4] William D. Popkin, *Law-Making Responsibility and Statutory Interpretation*, 68 IND. L.J. 865 (1993).

> price; 5. that he go to that butcher who usually provides the family, with whom the domestic resides, with meat, or to some convenient stall, and not to any unnecessarily distant place; 6. that he return the rest of the money; 7. that he bring home the meat in good faith, neither adding any thing disagreeable nor injurious; 8. that he fetch the meat for the use of the family and not for himself. Suppose, on the other hand, the housekeeper, afraid of being misunderstood, had mentioned these eight specifications, she would not have obtained her object, if it were to exclude all possibility of misunderstanding. For, the various specifications would have required new ones. Where would be the end? We are constrained then, always, to leave a considerable part of our meaning to be found out by interpretation, which, in many cases must necessarily cause greater or less obscurity with regard to the exact meaning, which our words were intended to convey.[5]

We will invoke this example repeatedly in what follows. However, domestics and soupmeat both being much rarer than they once were, we will update Lieber's hypothetical: assume instead that I ask you to "go buy a quart of milk."

A. COURTS AS AGENTS OF THE LEGISLATURE

1. *Traditional Intentionalism*

On the standard account, affirmed by countless judicial opinions, the touchstone of statutory interpretation is legislative intent. As the Supreme Court said early in its history and has been repeating ever since: "In construing these laws, it has been truly stated to be the duty of the court to effect the intention of the legislature."[6] Or, as Judge Patricia Wald wrote: "When a statute comes before me to be interpreted, I want first and foremost to get the interpretation right. By that, I mean simply this: *I want to advance rather than impede or frustrate the will of Congress.*"[7] State courts, too, repeat the same refrain: "When presented with an issue of statutory interpretation, the court's primary consideration 'is to ascertain and give effect to the intention of the Legislature.' "[8] The leading early treatise on statutes stated flatly: "The intent of a statute is the law" and "[t]o find out the intent [is] the object of all interpretation."[9]

The task of the court is thus to determine what the legislature "had in mind" when it used the language at issue. This approach is modeled on the way in which we think about ambiguities in communication between individuals. I ask you to buy me a quart of milk. You are not sure if I mean whole milk, skim milk, or buttermilk.

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[5] FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 17–19 (3d ed. 1880), *reprinted in* 16 CARDOZO L. REV. 1883, 1904 (1995). For a very helpful application of contemporary debates to this example, *see* William N. Eskridge, *"Fetch Some Soupmeat"*, 16 CARDOZO L. REV. 2209 (1995).

[6] Schooner Paulina's Cargo v. United States, 11 U.S. (7 Cranch) 52, 60 (1812).

[7] Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 301 (1990) (emphasis in original).

[8] Long v. State of New York, 7 NY3d 269, 273 (2006) (citations omitted).

[9] J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 309, 311 (1891).

So you ask. I say, "Oh, I *meant* skim milk." You assumed that when I used the vague term "milk" I had in mind something like a picture of a container, on which I was conscious of the words "whole milk," or "skim milk," or "buttermilk." In answering your question, I specify the picture that was in my conscious mind when I spoke, what I "intended" "milk" to mean, and thus what my somewhat vague instructions actually meant (or, what is synonymous, what I meant by my somewhat vague instructions).

A court cannot ask the legislature directly what it meant. But it implicitly asks that question of the enacting legislature when it interprets the statute.

The cases you read in Chapter 7 generally took, or purported to take, this *intentionalist* approach. The courts described their function as carrying out legislative intent, disagreeing only over what the intent was and how to discern it. For example, *Deem* invoked the principle that the words are the best indicator of intent, and hewed to the literal language because by doing so "the legislative intent is ascertained."

It is no accident that this understanding of the court's role in a statutory case has long dominated the scene. It sounds right; it fits with our basic constitutional commitments and intuitions about policymaking in a democracy. The legislature is the (primary) lawmaking body; the executive implements statutes and courts apply statutes in resolving disputes, but the decision as to what the law should be, outside of constitutional questions, lies with the legislature. Indeed, in a system of legislative supremacy, what options could the courts possibly have other than to effectuate the legislature's will?

> By requiring adherence to the views of the enacting legislature, [intentionalism] attempts to impose constraints on the judge. This is the main attraction of [intentionalism]: it claims to curb policymaking by an unelected, life-tenured judiciary. Unless the pedigree of the result can be tied to the enacting legislature, the judge is free to roam the legal-societal landscape and render pure policy decisions. According to [intentionalism], such a judicial role cannot be reconciled with our democratic form of government.[10]

Note that identifying the proper judicial *role* (the end) is not the same as identifying the *tools or techniques* (the means) by which that role is best fulfilled. If you accept the traditional mission, you still have to decide *how* courts should figure out what the legislature's intent was. But means and ends are closely related; certain approaches will incline judges toward certain tools. In particular, intentionalism tends to lead judges beyond exclusive reliance on statutory text and to an examination of "legislative history," i.e. the circumstances and materials surrounding and produced during the legislative process that produced the statute in question.

> [E]xamination of circumstances preceding enactment may give interpreters a clearer understanding of how the legislature would have wanted

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[10] Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEXAS L. REV. 1073, 1079–1080 (1992).

> the particular statutory question resolved. Getting closer to what the legislature actually intended is thought to serve the goal of legislative supremacy better. Unlike textualism, which sees the words of the statute as "law," intentionalism locates statutory law beyond, or behind, the statutory language. The actual words used by the legislature may be strong evidence of its intent, but they are merely windows on the legislative intent (or purpose) that is the law. * * *
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> Some intentionalists are heady archeologists. They would scrutinize the legislative materials to see if the legislature actually considered and expressed an opinion on the question under review.[11]

The "legislative materials" relied on by the intentionalist include the transcripts of hearings and of congressional debates, reports written by congressional committees, amendments made and amendments rejected, and statements of the drafters and/or sponsors. As we shall see in Chapter 12, judicial use of these materials is controversial. For now, the key point is that the essential justification for consulting them is the belief that they shed light on legislative intent:

> [W]hy do American judges (and therefore lawyers) consult legislative history so avidly? One reason is the belief that it improves their access to actual legislative intent. * * * Another reason is that many courts feel a higher fidelity to legislative intent than they do to [statutes themselves, even though statutes are] the official, constitutional vehicles for expressing that intent.[12]

Accordingly, the intentionalist inquiry is not unlimited. As Cass Sunstein has observed:

> As agents, courts should say what the statute means, and in that process *language, history, and structure* are relevant; but background norms, policy considerations, or general principles are immaterial. Above all, those who accept the agency view would bar courts from undertaking value-laden inquiries into (for example) appropriate institutional arrangements, or statutory function and failure, as part of the process of interpretation. The judicial task is one of discerning and applying a judgment made by others, most notably the legislature.[13]

2. *Doubts About the Focus on Legislative Intent*

Despite its prominence, the focus on legislative intent in statutory cases has long been under attack. To some extent, the objections are purely practical: legislative intent may be difficult to discern. Still, that alone is not a reason *not* to make the search, and does not undercut the claim that the court should respect legislative intent, at least to the extent it can be determined.

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[11] T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 23–24 (1988).

[12] DICKERSON, *supra* note 2, at 137.

[13] CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION 112 (1990) (emphasis added).

But what if the search for intent is so difficult because the thing being searched for is not there? Legislative intent may be like the Loch Ness Monster: for years many have believed (generally against their better judgment) that it exists, and some claim even to have glimpsed it, but in reality there just is no such thing. If there is no "legislative intent," then the whole theory of intentionalism must be wrong.

(a) Fictional Intent

It is a longstanding objection that the idea of legislative intent is largely fictional. A legislature cannot think of everything. Moreover, its many members are unlikely each to understand a bill in exactly the same way; after all, to quote the title of a well-known article, "Congress is a they, not an it."[14] For example, it seems highly unlikely that the legislators who voted for the statute at issue in *Deem v. Milliken* ever thought about its application to slayers, or that if they had each would have had the same understanding of its application in that setting.

Such doubts were strenuously expressed by the legal realists in the early 20th century. Just as the realists attacked the idea that judges were apolitical dispute resolvers who found rather than made the law in common law cases, so they attacked traditional views of statutory interpretation, denying that a statute can have a "plain meaning" or a legislature an "intent." The classic statement of exasperation with the judicial preoccupation with legislative intent comes from Max Radin.

> It has frequently been declared that the most approved method is to discover the intent of the legislator. Did the legislator * * * have a series of pictures in mind, one of which was this particular [case]? On this transparent and absurd fiction it ought not to be necessary to dwell. * * * A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs.
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> That the intention of the legislature is undiscoverable in any real sense is almost an immediate inference from a statement of the proposition. The chances that of several hundred men each will have exactly the same determinate situations in mind as possible reductions of a given determinable [i.e. the general principle set out in the statute], are infinitesimally small. The chance is still smaller that a given * * * litigated issue * * * will not only be within the minds of all these men but will be certain to be selected by all of them as the present limit to which the determinable should be narrowed. In an extreme case, it might be that we could learn all that was in the mind of the draftsman, or of a committee of half a dozen men who completely approved of every word. But when this draft is submitted to the legislature and at once accepted without a dissentient voice and without debate, what have we then learned of the intentions of the four or

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[14] Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

> five hundred approvers? Even if the contents of the minds of the legislature were uniform, we have no means of knowing that content except by the external utterances or behavior of these hundreds of men, and in almost every case the only external act is the extremely ambiguous one of acquiescence, 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. It is not impossible that this knowledge could be obtained. But how probable it is, even venturesome mathematicians will scarcely undertake to compute.[15]

Is Radin's objection that intent is (a) irrelevant, (b) undiscoverable, or (c) nonexistent? Does it matter? Is his critique overstated? Radin seems to treat the legislature's "intentions" and "motivations" synonymously. Is there a difference?

(b) Public Choice

The claim that intentionalism is incoherent is particularly strong in "public choice" scholarship.[16] Ambrose Bierce captured the essence of public choice theory, long before such a school existed, when he defined politics thus: "A strife of interests masquerading as a contest of principles. The conduct of public affairs for private advantage."[17]

Public choice scholarship applies principles of market economics to explain institutional and political behavior and decisionmaking. The public choice approach assumes that people are "egoistic, rational utility maximizers" in political as well as economic arenas. Under the public choice vision of legislation, many, if not most, important public problems are not resolved by the legislature. Even when the legislature does act on an important issue, the resulting statute "tends to represent compromise because the process of accommodating conflicts of group interest is one of deliberation and consent . . . What may be called public policy is the equilibrium reached in [the political] struggle at any given moment." The legislature is a political battlefield; most of its activity is no more purposive than the expedient accommodation of special interest pressures. "It is hard to imagine a more effective way of saying that Congress has no mind or force of its own than the prognosis of public choice theory."[18]

On this view, the vote of any given legislator is based on nothing other than self-interest. It is the result of interest group pressure (which in turn is powerful only because of its bearing on the legislator's chances for reelection), and reflects strategic choices and logrolling (I'll vote for your provision if you vote for mine)

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[15] Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 869–871 (1920). Compare Radin's equally exasperated view of stare decisis at *supra* page 165.

[16] For a readable and helpful summary of the public choice literature as applied to statutory interpretation, *see* DANIEL FARBER & PHILIP P. FRICKEY, PUBLIC CHOICE: A CRITICAL INTRODUCTION 88–115 (1991).

[17] AMBROSE BIERCE, THE DEVIL'S DICTIONARY 101 (1911). In a similar vein: "Lighthouse, n. A tall building on the seashore in which the government maintains a lamp and the friend of a politician." *Id.* at 78.

[18] William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 703 (1987).

rather than any sincere pursuit of sound policy or the public interest. Legislation is an incoherent compromise, negotiated by or on behalf of private interest groups. In the words of Judge Frank Easterbrook, "Legislation is compromise. Compromises have no spirit; they just are."[19] Its language is simply whatever it took to get a majority on board, and "legislative intent" does not exist.

This disheartening view of the political process is buttressed by the work of Nobel laureate Kenneth Arrow on the impossibility of aggregating preferences. Arrow demonstrated that, making certain assumptions, it is impossible to design a voting system that will reliably produce results that reflect majority preferences. In particular, outcomes depend on the order in which alternatives are considered, which gives enormous power to whoever controls the agenda. "Arrow's theorem" and related work further undercuts the meaningfulness of viewing statutes as the reflection of a particular design or intent.

Whether the pessimistic view of the legislative process offered by public choice scholars is accurate is a matter of debate. Certainly most legislators would deny it (as public choice theory would predict). Former Judge Abner Mikva, who sat on the U.S. Court of Appeals for the D.C. Circuit after many years in the Illinois Legislature and the U.S. House of Representatives, has argued that public choice theory is exaggerated past the point of usefulness:

> I have found it hard to read or to profit from the "public choice" literature. The politicians and other people I have known in public life just do not fit the "rent-seeking" egoist model that the public choice theorists offer. Perhaps I am still one of those naive citizens who believe that politics is on the square, that majorities in effect make policy in this country, and that out of the clash of partisan debate and frequent elections "good" public policy decisions emerge. Not even my five terms in the Illinois state legislature — that last vestige of democracy in the "raw" — nor my five terms in the United States Congress, prepared me for the villains of the public choice literature. * * *
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> My chief objection to the use of the public choice analysis is that it claims to be scientific and therefore infallible. By contrast, most defenders of the public interest model acknowledge that it is as much a goal as it is an analysis. The public choice theorists, adopting the economists' lingo, start equations by saying "everything else being equal"; but of course nothing else *is* equal in the political arena, and as such the models just aren't very useful. In fact, the claims for accuracy despite the lack of real empirical data put the public choice theorists in the league of the blind man who felt the trunk of the elephant and proclaimed the animal to be a tree.[20]

Needless to say, we cannot determine the validity of public choice theory here. But if it is valid, traditional intentionalist models of statutory interpretation collapse.

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[19] Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994).

[20] Abner J. Mikva, *Foreword*, 74 VA. L. REV. 167, 167, 169–170, 176–177 (1988).

3. *Agents of a Principal without Intent*

In light of the powerful criticisms just outlined, few theorists are now willing to describe statutory interpretation as merely the search for legislative intent. Many scholars and judges have instead tried to articulate theories of statutory interpretation that respect the agency model's view of the judiciary as a subordinate, non-policymaking branch but also acknowledge that the notion of a legislative intent is fictional. These efforts go in two basic directions: one broadens the judicial inquiry, the other narrows it. Both still portray the judiciary as subordinate to the policymaking authority of the legislature, but move away from the preoccupation with "legislative intent."

(a) Broadening Intentionalism

Even if it is fruitless to seek an intent with regard to the specific question of statutory meaning any given case presents, the court might still defer to legislative authority by (i) determining what the legislature *would* have decided if it *had* thought about the issue, and/or (ii) determining what resolution is most consistent with the broad purposes underlying the statute.

(i) "Imaginative Reconstruction".

As is so often the case, Aristotle anticipated us:

> Law is always a general statement, yet there are cases which it is not possible to cover in a general statement. * * * [I]t is then right, where the lawgiver's pronouncement because of its absoluteness is defective and erroneous, to rectify the defect by deciding as the lawgiver would himself decide if he were present on that occasion, and would have enacted if he had been cognizant of the case in question.[21]

Consider the following guidelines offered by Judge Richard Posner.

> I suggest a two-part approach. First, 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. This is the method of imaginative reconstruction. 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.
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> [This approach requires rather challenging historical reconstruction.] And it invites the criticism that judges do not have the requisite imagination and that what they will do in practice is to assume that the legislators were people just like themselves, with the result that statutory construc

[21] ARISTOTLE, NICOMACHEAN ETHICS V.x.4–6.

> tion will consist of the judge voting his own preferences and ascribing them to legislators. But the irresponsible judge will twist any approach to yield the outcomes that he desires, and the stupid judge will do the same thing unconsciously.
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> The judge who follows the suggested approach will not only consider the language, structure, and history of the statute, but also study the values and attitudes, as far as they can be known today, of the period when the legislation was enacted. It would be a mistake to ascribe to legislators of the 1930s or the 1960s and early 1970s the skepticism regarding the size of government and the efficiency of regulation that is widespread today, or to impute to the Congress of the 1920s current ideas of conflict of interest. The judge's job is not to keep a statute up to date in the sense of making it reflect contemporary values, but to imagine as best he can how the legislators who enacted the statute would have wanted it applied to situations they did not foresee. * * *
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> If the lines of compromise are not clear, if the judge's scrupulous search for the legislative will does not turn up anything, the second part of my approach ("reasonable result") comes into play — provided the case is at least within the statute's domain. If someone was shortchanged on the purchase of a bag of oranges and brought suit against the seller under the federal securities laws, arguing that the court should read "security" to include an orange because fraud is a bad thing, he would receive short shrift. The securities laws do not authorize the courts to deal with a sale of oranges. But if the case involves something that is or may be a security, and the judge is simply very uncertain whether the statute was meant to apply, he cannot just dismiss the case out of hand; it is within the scope of the legislative delegation to him. He must decide the case, even though on the basis of considerations that cannot be laid at Congress's door. These might be considerations of judicial administrability — what interpretation of the statute will provide greater predictability, require less judicial fact-finding, and otherwise reduce the cost and frequency of litigation under the statute? Or they might be considerations drawn from some broadly based conception of the public interest. It is always possible, of course, to refer these considerations back to Congress — to say that Congress would have wanted the courts, in cases where they could not figure out what interpretation would advance the substantive objectives of the statute, to adopt the "better" one; or to say * * * that legislators should be presumed reasonable until shown otherwise. But these methods of imputing congressional intent are artificial; and it is not healthy for a judge to conceal from himself that he is being creative.[22]

How would Posner have you go about deciding what type of milk to buy? First, you should put yourself in my shoes. If you knew what milk I usually bought, or what prompted me to ask for milk, or for whom I was buying it, or whether I had invested in a particular dairy, you might be able imaginatively to reconstruct my answer to the question of what type to buy. Absent such information, you must

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[22] RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 286–287, 289–290 (1985).

determine the most "reasonable" action, which will require some information, or some assumptions, with regard to the purpose for which I want the milk, or some independent judgment on your part as to what makes good milk, or an evaluation of what is available.

The opinion in *Riggs* includes a heavy dose of Posner; indeed, Posner has written approvingly of *Riggs*,[23] a case in which, he says, imaginative reconstruction "works splendidly."[24] For example, the following excerpt from *Riggs* is pure imaginative reconstruction:

> It was the intention of the law-makers that the donees in a will should have the property given to them. But it never could have been their intention that a donee who murdered the testator to make the will operative should have any benefit under it. If such a case had been present to their minds, and it had been supposed necessary to make some provision of law to meet it, it cannot be doubted that they would have provided for it.

Note that Posner is still very much seeking to be, at least as far as possible, the faithful agent of the legislature. Indeed, his proposed modifications to traditional interpretive methods are aimed at greater faithfulness. Does he believe in such a thing as legislative intent, or would he agree that legislatures don't have intents, only results? His archeology is at least challenging; is it impossible? Can we *ever* say with any confidence what the legislature would have done?

Professor Einer Elhauge defends a variation on imaginative reconstruction, arguing that when confronted with unsolvable statutory ambiguity a judge should "maximize political satisfaction." By this Elhauge means adopting the interpretation that accords with the preferences of the *current* legislature, not the enacting legislature. He argues that an *enacting* legislature would actually prefer such an approach, because while it dilutes the legislature's future influence, it increases its current influence. Elhauge also argues that what should guide the court is not the general sentiments of the current legislature (or the public), but, more narrowly, the *enactable* preferences. So, for example, if a majority of Congress supports and would actually vote for reading A, but the current president would veto such legislation, the preferences are not *enactable* and do not control. (Note one obvious objection to this approach is whether courts can in fact meaningfully assess what the current Congress's enactable preferences *are*.) Elhauge's argument is too lengthy and complex to summarize here, but the essential proposition is a straightforward one that is borrowed from the private law setting. Basic principles of the law of agency hold that where the express instructions of the principal give out, the agent is expected to act consistently with the principal's current preferences.[25]

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[23] RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 106–107 (1990).

[24] *Id.* at 273.

[25] *See generally* EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION (2008).

(ii) Purposivism

Let us distinguish "intent" from "purpose." The two are often lumped together, but careful users mean different things by them. We will use "intent" to refer to what the legislature meant, the specific understanding it had in mind; we will use "purpose" to refer to what it is the legislature ultimately sought to accomplish. In Reed Dickerson's words, intent is "immediate," purpose "ulterior."[26] The distinction, like most distinctions, can become slippery, but intent is about means, and purpose is about ends.

Consider the milk purchase. My *intent* was that you purchase whole, or skim, or buttermilk. My *purpose* may have been to feed a baby that is just switching from formula, in which case whole milk is most appropriate; or to maintain a healthy diet for myself because I am on a recent health kick (a month ago I would have asked for Coca Cola), in which case skim milk would be appropriate; or to make my famous buttermilk cornbread, in which case buttermilk is appropriate. (*How* you know what my purpose is of course another matter.)

The following excerpt from Justice Frankfurter argues for judicial consideration of statutory purpose as opposed to legislative intent:

> You may have observed that I have not yet used the word "intention." All these years I have avoided speaking of the "legislative intent" and I shall continue to be on my guard against using it. * * * Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government. That aim, that policy is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute, as read in the light of other external manifestations of purpose. That is what the judge must seek and effectuate, and he ought not to be led off the trail by tests that have overtones of subjective design. We are not concerned with anything subjective. We do not delve into the mind of legislators or their draftsmen, or committee members.[27]

A focus on legislative purpose has a long history and many supporters. (Judge Learned Hand once described statutory interpretation as *nothing but* "proliferating a purpose."[28]) It reached its fullest flowering in the work of two Harvard law professors, Henry Hart and Albert Sacks, in the 1950s. Hart and Sacks's *The Legal Process* is surely the most famous *un* published book in law.[29] These teaching materials were put together as a tentative edition in 1958 and used at the Harvard Law School and elsewhere around that time.

Hart and Sacks began with a particular view of law: "[L]aw is a doing of something, a purposive activity, a continuous striving to solve the basic problems of

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[26] DICKERSON, *supra* note 2, at 285.

[27] Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538–539 (1947).

[28] Brooklyn Nat'l Corp. v. Commissioner, 157 F.2d 450, 451 (2d Cir. 1946).

[29] Although famous as an unpublished book, *The Legal Process* was ultimately published. Hart and Sacks never saw it in print, but Foundation Press published their opus, with an introduction by William Eskridge and Philip Frickey, in 1994.

social living";[30] it is an "on-going, functioning, purposive process."[31] This leads to a particular view of statutes: "Every statute must be conclusively presumed to be a purposive act. The idea of a statute without an intelligible purpose is foreign to the idea of law and inadmissible."[32] This assumption about statutes has a corollary assumption about legislatures. "[U]nless the contrary unmistakably appears, [the reader should assume] that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably."[33] Faced with an ambiguous statute, the task is to carefully consider the context of the statute in order to "[d]ecide what purpose ought to be attributed to the statute."[34] (Note how active and strong the interpreter's role seems to be in determining the purpose.) The proper interpretation is the one most consistent with that purpose. For Hart and Sacks, purpose seems to drive interpretation even more than text; the words, in historical context, limit the meanings the statute can bear, but they are equally or more important as guides to the statute's purpose.

What is the difference between "imaginative reconstruction" and "attribution of purpose"? Judge Posner sees the central divergence as follows:

> Hart and Sacks appear to be suggesting that the judge should ignore interest groups, popular ignorance and prejudice, and anything else that deflects legislators from the single-minded pursuit of the public interest as the judge would conceive it. But this approach risks attributing to legislation not the purposes reasonably inferable from the legislation itself but the judge's own conception of the public interest. When Hart and Sacks were writing — in the wake of the New Deal — the legislative process was widely regarded as progressive and public-spirited. Today there is less agreement that the motives behind most legislation are benign, and this should make the judge wary about too readily assuming a congruence between his conception of the public interest and the latent purposes of the statutes he is called on to interpret.
>
> A related characteristic of * * * Hart and Sacks is a reluctance to recognize that statutes often are the product of compromise between opposing groups and that a compromise is unlikely to embody a single consistent purpose. Of course, as I pointed out earlier, it is hard for judges, limited as they are to the formal materials of the legislative process, to identify the existence of compromise. But where the lines of compromise are discernible, the judge's duty is to follow them, to implement not the purposes of one group of legislators but the compromise itself.[35]

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[30] *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 148 (William N. Eskridge, Jr. & Philip P. Frickey eds. 1994).

[31] *Id.* at cxxxvii.

[32] *Id.* at 1124.

[33] *Id.* at 1378.

[34] *Id.* at 1374.

[35] POSNER, *supra* note 22, at 288–289.

(b) Narrowing Intentionalism — Herein of "The New Textualism"

Judge Posner is strongly influenced by the public choice view of the legislative process. His project is to define an honest intentionalism that is consistent with it. In contrast, the Hart and Sacks approach assumes the inaccuracy of the public choice model. Subscribers to public choice may have their doubts about Posner, but must find Hart and Sacks preposterous.

> If, as public choice theory asserts, legislation is the product of compromises among groups, then attributing a purpose to a statute either may improperly privilege the interests of one group over another (thereby undermining the bargain) or may impute a purpose where none (other than the desire to reach agreement) existed.[36]

The alternative response to the defects of intentionalism, then, is not to broaden but to narrow the judicial inquiry — to abandon intentionalism and purposivism in favor of a (nearly) exclusive focus on the statutory text. If the search for intent behind the words is doomed, the most obvious strategy for the faithful agent would be simply to follow the law as written. This approach is called *textualism*. Instead of attempting to adhere to the *subjective intent* of the legislature, the court would adhere to the *objective meaning* of the statutory text. Justice Antonin Scalia, the most visible and influential judicial textualist, argues that the judge's task is "not to enter the minds of the Members of Congress — who need have nothing in mind in order for their votes to be both lawful and effective — but rather to give fair and reasonable meaning to the text of the United States Code."[37] Or, to quote Justice Scalia again, "[i]t is the law that governs, not the intent of the lawgiver."[38] Thus, you do not ask me what I *meant* by "milk," indeed you do not care. Instead you ask what the average person means when she refers to milk, without any qualifying adjective. What is the ordinary meaning of the word "milk"?

Of course, the answer to that question is quite unclear. Many words have multiple meanings, and if by "ordinary" meaning we mean "most common," textualism will produce absurd and unacceptable results. Textualists turn frequently to dictionaries, but a dictionary alone is no more sufficient for the textualist judge than for the tourist who does not know the local language. When textualists speak of a term's ordinary meaning, what they mean (and this always implicit and often explicit) is its meaning *in context*.

> [I]t is now well settled that textual interpretation must account for the text in its social and linguistic context. Even the strictest modern textualists properly emphasize that language is a social construct. They ask how

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[36] Aleinikoff, *supra* note 11, at 28.

[37] Pennsylvania v. Union Gas Co., 491 U.S. 1, 30 (1989).

[38] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (1998). This short book, which also includes commentaries by leading academics, is an accessible, straightforward, and consistently interesting (for some, enraging) statement of Justice Scalia's views on constitutional and statutory interpretation. It is usefully compared with another brief book by one of Justice Scalia's colleagues, STEPHEN BREYER, ACTIVE LIBERTY (2005), though the latter is somewhat more focused on constitutional interpretation.

> a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context. This approach recognizes that the literal or dictionary definitions of words will often fail to account for settled nuances or background conventions that qualify the literal meaning of language and, in particular, of legal language.[39]

In its strongest version, textualism forbids reference to anything but statutory text in any and all cases. (The "statutory text" may include related provisions of the same Act and even other statutes that use the term in question.) One might say that it makes the judge the agent not of the legislature but of *the statute*. This idea is captured in a famous passage from Justice Holmes:

> [A statute] does not disclose one meaning conclusively according to the laws of language. Thereupon we ask, not 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. * * * But the normal speaker of English is merely a special variety, a literary form, so to speak, of our old friend the prudent man. He is external to the particular writer, and a reference to him as the criterion is simply another instance of the externality of the law. * * * We do not inquire what the legislature meant; we ask only what the statute means.[40]

Wadsworth v. Siek displayed a strong strain of textualism, particularly in the following passage:

> [To hold that] no felonious killer, *in any degree*, shall be permitted to inherit from his victim * * * would be directly contrary to the provisions of the statute. Had the legislature wished to include a person adjudged guilty of manslaughter, it could easily have done so, and it may do so in the future by amending the statute.
>
> Whether the omission by the legislature was intentional or inadvertent, the fact is that manslaughter *was* omitted, and this Court has no right to "amend" the statute by adding it.

What are the justifications for focusing so exclusively on text? Much of the argument is not that text is so illuminating, but that other sources of interpretation are so harmful and illegitimate. First, only the statutory text undergoes the full, constitutionally required procedures for lawmaking, including a vote by both houses and presentment to the President. Second, materials other than text — in particular, "legislative history" — are inaccurate indicators of the intent of the legislature as a whole and infinitely manipulable. Third, textualists are strongly influenced by the public choice view of the legislative process, under which arguments about intent are often incoherent and arguments from purpose fictional and misleading. Finally, resort to any interpretive guide other than the statutory text is an opportunity for judges to read their own policy preferences into the statute. (In this desire to cabin judicial discretion, statutory textualists have much

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[39] John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2392–2393 (2003).

[40] Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417–419 (1899), *reprinted in* COLLECTED LEGAL PAPERS 204, 207 (1920).

in common with constitutional originalists; indeed, the two generally go hand in hand.) So, for Justice Scalia, "legislative intent" is a "handy cover for judicial intent," and reliance on statutory purpose is "an invitation to judicial lawmaking."[41]

Do these justifications hold up? With regard to the last, consider whether textualism might actually *increase* judicial discretion. Justice Stevens has so argued:

> [T]he "minimalist" judge "who holds that the purpose of the statute may be learned only from its language" has more discretion than the judge "who will seek guidance from every reliable source." A method of statutory interpretation that is deliberately uninformed, and hence unconstrained, may produce a result that is consistent with a court's own view of how things should be, but it may also defeat the very purpose for which a provision was enacted.[42]

Textualism may further legislative intent; the *Deem* court even had a Latin maxim so asserting (*index animi sermo* [language indicates intention]). But modern textualists do not justify their method on that ground and will acknowledge that in some cases textualism will simply implement an unintentional mistake. Textualism's central claimed virtue is more negative: it prevents furthering mere *judicial* intent. The textualist's central fear is that judges will impose their own views of sound policy under the guise of having discovered a subtly hidden legislative intent in the legislative history or purpose.

Textualism has proven enormously influential. The period from, say, 1985 to 2005 saw a significant decline in judicial reliance on legislative history (particularly in the federal courts, where such reliance had been most extensive) and a significant increase in the seriousness with which judges have grappled with statutory text. At the same time, textualists have avoided more extreme versions, or parodies, of their approach. The result is that there may be less to remaining debates than meets the eye.

> Textualism has outlived its utility as an intellectual movement. * * * Textualists have been so successful discrediting strong purposivism, and distinguishing their new brand of "modern textualism" from the older, more extreme "plain meaning" school, that they no longer can identify, let alone conquer, any remaining territory between textualism's adherents and nonadherents. Leading textualists may proceed today as if their quest is still worth pursuing, but in so doing they overlook a strong consensus on the interpretive enterprise that dwarfs any differences that remain. * * * It is time for us to put the textualism-purposivism debate behind us, acknowledge areas of agreement as well as disagreement, stop talking past one another, and engage in a more productive dialogue regarding the narrow differences that remain.[43]

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[41] SCALIA, *supra* note 38, at 18, 21.

[42] Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 133 (2001) (Stevens, J., dissenting) (quoting AHARON BARAK, JUDICIAL DISCRETION 62 (Yadin Kaufmann. trans. 1989)).

[43] Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 2 (2006).

B. COURTS AND LEGISLATURES AS LAWMAKING PARTNERS

You might take yet another approach to my request for milk. Given the vagueness in my choice of words, you might base the decision on some principle completely independent of *my* aims or desires and independent of the word I chose. For example, you might choose skim milk because it is healthiest, and you (or society in general) consider healthy eating a virtue. That is not the choice you would have made 50 years ago, of course; had we been living then you would have chosen whole milk for the same reason. Or you might choose whole milk because you think it tastes better. You are now not simply carrying out my command; we are making the decision together (though sequentially). I have narrowed the possibilities — you would not be free to bring back orange juice — but within the boundaries of the language I used, *you* are deciding what to do.

Some commentators suggest such an approach to the interpretation of statutes. The traditional model of statutory interpretation is "archeological": "statutory meaning [i]s determined on the date of the statute's enactment" and "the interpreter's task [i]s essentially a factual inquiry: a judge uncovers and describes an already fixed past." But one might also adopt a "nautical" approach, in which the legislature launches the statutory ship but the courts chart the voyage.[44]

1. *Independent Judicial Judgment*

Recall the analogy made by Ronald Dworkin between common-law decisionmaking based on judicial precedents and the chain novel. Dworkin has applied the metaphor to statutory interpretation. His model judge, Hercules,

> will use much the same techniques of interpretation to read statutes that he uses to decide common-law cases * * *. He will treat Congress as an author earlier than himself in the chain of law, though an author with special powers and responsibilities different from his own, and he will see his own role as fundamentally the creative one of a partner continuing to develop, in what he believes is the best way, the statutory scheme Congress began. He will ask himself which reading of the act * * * shows the political history including and surrounding that statute in the better light. His view of how the statute should be read will in part depend on what certain congressmen said when debating it. But it will also depend on the best answer to political questions * * *. He must rely on his own judgment in answering these questions, of course, not because he thinks his opinions are automatically right, but because no one can properly answer any question except by relying at the deepest level on what he himself believes.[45]

The so-called "new legal process" theorists contend that statutory interpretation must be a creative act. They are at least implicitly unfazed by the possibility of judicial policymaking that drives, or at least is reckoned with by, the various "agency" theories.

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[44] Aleinikoff, *supra* note 11, at 21–22.

[45] RONALD DWORKIN, LAW'S EMPIRE 313–314 (1986).

> [M]any [legal scholars] remain committed to the ideal of a legal process that seeks law reform and justice. These progressive scholars have responded to the challenge in a variety of ways; the directions they have taken have created a "new" legal process which self-consciously pursues substantive as well as procedural justice. Although responses to the attacks on legal process vary greatly, they have several common themes. One is anti-pluralist: legislation must be more than the accommodation of exogenously defined interests; lawmaking is a process of value creation that should be informed by theories of justice and fairness. Another theme is that legislation too often fails to achieve this aspiration, and, thus, creative lawmaking by courts and agencies is needed to ensure rationality and justice in law. A final theme is the importance of dialogue or conversation as the means by which innovative judicial lawmaking can be validated in a democratic polity and by which the rule of law can best be defended against charges of unfairness or illegitimacy.
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> * * * [These] scholars are willing to abandon the notion that all political choices must be made by the majoritarian legislature. Certain critical "public values" simply cannot be bargained away, and much of the process of political norm-creation must or should occur in the courts. * * * Like longstanding legal process work, this body of scholarship analyzes or defends the legitimacy of judicial lawmaking. Unlike prior legal process work, new legal process scholarship proceeds in wide-ranging new directions, based upon a more open pessimism about the rationality of the legislative process. * * *
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> [N]ew legal process theorists * * * explicitly emphasize the demands of substantive justice and the evolutive rather than formal nature of legitimacy. * * * [For example,] Ronald Dworkin has dealt with the problem of aging statutes, and he argues that judges can advance progressive social policy without imposing their own values onto statutes. * * * [For Dworkin,] "integrity in legislation" requires lawmakers to try to make the total set of laws morally coherent. * * * The courts' role is to interpret authoritative statements of law (the Constitution, statutes, common law precedents) in light of the underlying principles of the community. Thus, in the "hard cases" of statutory interpretation, the best interpretation is the one that is most consonant with the underlying values of society and makes the statute the best statute it can be (within the limitations imposed by the language).[46]

Of the cases in Chapter 7, *Riggs* shows the strongest tendency toward this approach. The court rejects a literal reading of the text, invokes a general principle of reasonableness, and asserts that all statutes "may be controlled in their operation and effect by general, fundamental maxims of the common law" — a "universal law administered in all civilized countries." Note that on this account the judge is still not simply making it up, or imposing her own, particular preferences; rather, she is pursuing right answers in light of prevailing societal values. Whether such an

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[46] Eskridge & Frickey, *supra* note 18, at 717, 720–722.

approach is legitimate, or even viable, will depend in large measure on whether you believe that such answers exist and, if they do, that judges are in a position to discern them.

2. *Dynamic Statutory Interpretation*

Responsiveness to the needs and values of society will mean that statutory meaning can change and develop; courts should not blindly enforce the legislative deals of the past but should adapt the legislation to contemporary needs and conditions. The idea of "dynamic statutory interpretation" is endorsed by and closely associated with Professor William Eskridge. Note that this approach goes beyond Professor Elhauge's argument that statutory ambiguity should be resolved by reference to the enactable preferences of the *current* legislature,[47] although that obviously has an element of dynamism. The idea is that even "clear" statutory meaning can change with time (and absent legislative amendment). Eskridge's theory is both descriptive and normative; he concludes both that in the real world judges *do* update older statutes (although they rarely acknowledge it) and that they *should*. The descriptive proposition is not very controversial; there is consensus that judges do update statutes, and most commentators agree that their doing so is, at least to some extent, unavoidable and inevitable. The normative prong of Eskridge's theory is more controversial. Eskridge explains:

> The static vision of statutory interpretation prescribed by traditional doctrine is strikingly outdated. In practice, it imposes unrealistic burdens on judges, asking them to extract textual meaning that makes sense in the present from historical materials whose sense is often impossible to recreate faithfully. As doctrine, it is intellectually antediluvian, in light of recent developments in the philosophy of interpretation. Interpretation is not static, but dynamic. Interpretation is not an archeological discovery, but a dialectical creation. Interpretation is not mere exegesis to pinpoint historical meaning, but hermeneutics to apply that meaning to current problems and circumstances.
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> The dialectic of statutory interpretation is the process of understanding a text created in the past and applying it to a present problem. This process cannot be described simply as the recreation of past events and past expectations, for the "best" interpretation of a statute is typically the one that is most consonant with our current "web of beliefs" and policies surrounding the statute. That is, statutory interpretation involves the present-day interpreter's understanding and reconciliation of three different perspectives, no one of which will always control. These three perspectives relate to (1) the statutory text, which is the formal focus of interpretation and a constraint on the range of interpretive options available (textual perspective); (2) the original legislative expectations surrounding the statute's creation, including compromises reached (historical perspective); and (3) the subsequent evolution of the statute and its present context, especially the ways in which the societal and legal

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[47] *See supra* page _____.

environment of the statute has materially changed over time (evolutive perspective).

Under dynamic statutory interpretation, the textual perspective is critical in many cases. The traditional understanding of the "rule of law" requires that statutes enacted by the majoritarian legislature be given effect, and that citizens have reasonable notice of the legal rules that govern their behavior. When the statutory text clearly answers the interpretive question, therefore, it normally will be the most important consideration. Exceptions, however, do exist because an apparently clear text can be rendered ambiguous by a demonstration of contrary legislative expectations or highly unreasonable consequences. The historical perspective is the next most important interpretive consideration; given the traditional assumptions that the legislature is the supreme lawmaking body in a democracy, the historical expectations of the enacting legislature are entitled to deference. Hence, when a clear text and supportive legislative history suggest the same answer, they typically will control.

The dynamic model, however, views the evolutive perspective as most important when the statutory text is not clear and the original legislative expectations have been overtaken by subsequent changes in society and law. In such cases, the pull of text and history will be slight, and the interpreter will find current policies and societal conditions most important. The hardest cases, obviously, are those in which a clear text or strong historical evidence or both, are inconsistent with compelling current values and policies.[48]

3. *Legislative Supremacy*

The fundamental question about invoking the evolutive or partnership perspective is whether doing so flouts the principle of legislative supremacy. For many, it is self-evidently inconsistent with this basic principle of the separation of powers, under which all legislature authority lies with Congress. Several writers have sought to square dynamic interpretation with legislative supremacy by arguing that the *enacting legislature itself* might well prefer such an interpretive methodology. If the legislature would prefer courts to read statutes dynamically, a court doing so is being a faithful agent after all. William Eskridge has made that argument.[49] The following is a slightly different version offered by Daniel Farber.

Perhaps the most obvious understanding of legislative supremacy is that courts must follow legislative directives: "Judges must be honest agents of the political branches. They carry out decisions they do not make." Hence, the "judges' role is to decipher and enforce" the statute. This is a "strong," or "formalist," conception of legislative supremacy. The strong conception views the supremacy principle as an all-encompassing prescription of the

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[48] William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1482–1483 (1987). Eskridge developed and refined the ideas from this seminal article in a 1994 book of the same title.

[49] William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319 (1988).

judicial role in statutory cases rather than as a mere constraint on judicial behavior. * * *

Judges have been compared to military officers attempting to obey unclear orders from headquarters.[50] This military analogy suggests some of the difficulties with the strong conception of supremacy. Within the confines of his orders, even a subordinate officer is expected to exercise his discretion in accordance with sound military judgement. In the absence of orders, the officer is not expected to sit on his hands regardless of circumstances. Again, the agency model can be misleading if oversimplified. The captain must follow the general's orders, but to do so the captain may have to interpret an occasionally unclear order in light of his primary allegiance to the United States Army. Similarly, legislative supremacy does not prescribe statutory interpretation that may result in the elimination of judicial policymaking. This is not to say, of course, that statutory interpretation is an exercise in raw policymaking, but only that on occasion, the judiciary may properly consider nonlegislative sources of public policy. * * *

Under the weak conception of legislative supremacy, a judge may not contravene statutory directives. Thus, unlike the strong conception, the weak conception views supremacy as a constraint on judicial action, rather than as a complete specification of the judicial role in statutory cases.

The military analogy is helpful in clarifying the nature of this constraint. We cannot readily specify just what it means to tell an officer to follow orders, because to do so would require a complete philosophical account of interpretation. Inverting the prescription may be more useful: whatever else an officer may do, he cannot *disobey* lawful orders.

One advantage of the weak conception is that it demands relatively little consensus about what sources of public policy, if any, a judge may bring to bear in interpreting statutes. It does not assume that statutes are determinate in the sense of having a single correct interpretation. It assumes only that methods of interpretation are not completely "up for grabs," and that a statute's language and legislative history together preclude at least some interpretations. * * *

When the statutory command is unclear, the supremacy principle does not preclude courts from bringing contemporary values to bear. But when

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[50] Judge Posner, who originated the military analogy, explains that "[i]n our system of government the framers of statutes and constitutions are the superiors of the judges. The framers communicate orders to the judges through legislative texts. . . . If the orders are clear, the judges must obey them." Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE WESTERN RES. L. REV. 179, 189 (1986-1987). [Ed. Note: Professor Eskridge has offered a similar analogy, comparing judges to "diplomats acting upon orders from their national foreign service. These diplomats must often apply ambiguous or outdated communiqués to unforeseen situations, which they do in a creative way, not strictly constrained by their orders. But they are, at bottom, agents in a common enterprise, and their freedom of interpretation is bounded by the mandates of their orders, which are not necessarily consistent or coherent over time, or even at any one time." Eskridge, *supra* note 48, at 1554.].

the statutory language and legislative history make the statute's meaning unmistakable, such "interpretation" is more in the nature of a partial repeal. * * *

A rational legislator might, however, favor a rule that would allow courts to disregard statutory directives under other circumstances. Our hypothetical military officer, for example, might not want his order carried out if unforeseen circumstances make the order obviously futile or counterproductive. For instance, it would hardly be an act of insubordination to disregard an order to shell a hill, if in the meantime the hill had been taken by friendly forces. Similarly, the legislature might not appreciate having its intended beneficiaries wiped out by the courts' "friendly fire."[51]

CONCLUDING NOTE

We have not asked many questions in this chapter. One big one — the biggest of all — is implicit, however: Which approach to statutory interpretation is correct?

One possibility is that all of them are. To be sure, they are to a large extent mutually exclusive. Yet examples of all of each can be found in decided cases; often several appear side by side in the same opinion. Perhaps the search for a *single* all-purpose theory of statutory interpretation is mistaken.

In the next chapter, we turn to a case that draws on several (though not all) of the theories we have reviewed here. Consider whether the opinion is stronger or weaker as a result of its eclectic approach.

Assignment

Review the *Shrader* case that concludes Chapter 7. How would that case be decided under each of the theories of statutory interpretation discussed above?

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[51] Farber, *supra* note 3, at 284–285, 287–288, 309–310.

Chapter 9

SOURCES OF STATUTORY INTERPRETATION

CHURCH OF THE HOLY TRINITY v. UNITED STATES
143 U.S. 457 (1892)

MR. JUSTICE BREWER delivered the opinion of the court.

Plaintiff in error is a corporation, duly organized and incorporated as a religious society under the laws of the State of New York. E. Walpole Warren was, prior to September, 1887, an alien residing in England. In that month the plaintiff in error made a contract with him, by which he was to remove to the city of New York and enter into its service as rector and pastor; and in pursuance of such contract, Warren did so remove and enter upon such service. It is claimed by the United States that this contract on the part of the plaintiff in error was forbidden by the act of February 26, 1885, * * * [which provides, in relevant part]:

> "[I]t shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, * * * under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States * * *."

It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words labor and service both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added "of any kind;" and, further, as noticed by the Circuit Judge in his opinion, the fifth section, which makes specific exceptions, among them professional actors, artists, lecturers, singers and domestic servants,[1] strengthens the idea that every other kind of labor

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[1] [Ed. Fn.] Section five of the Act provides, in part:

> [N]othing in this act shall be so construed as to prevent * * * any person, or persons, partnership, or corporation from engaging, under contract or agreement, skilled workmen in foreign countries to perform labor in the United States in or upon any new industry not at present established in the United States; *Provided*, That skilled labor for that purpose cannot be otherwise obtained; nor shall the provisions of this act apply to professional actors, artists, lecturers, or singers, nor to persons employed strictly as personal or domestic servants;

and service was intended to be reached by the first section. While there is great force to this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act. * * * In *United States v. Kirby*, 7 Wall. 482, 486, the defendants were indicted for the violation of an act of Congress, providing "that if any person shall knowingly and wilfully obstruct or retard the passage of the mail, or of any driver or carrier, or of any horse or carriage carrying the same, he shall, upon conviction, for every such offence pay a fine not exceeding one hundred dollars." The specific charge was that the defendants knowingly and wilfully retarded the passage of one Farris, a carrier of the mail, while engaged in the performance of his duty, and also in like manner retarded the steamboat General Buell, at that time engaged in carrying the mail. To this indictment the defendants pleaded specially that Farris had been indicted for murder by a court of competent authority in Kentucky; that a bench warrant had been issued and placed in the hands of the defendant Kirby, the sheriff of the county, commanding him to arrest Farris and bring him before the court to answer to the indictment; and that in obedience to this warrant, he and the other defendants, as his posse, entered upon the steamboat General Buell and arrested Farris, and used only such force as was necessary to accomplish that arrest. The question as to the sufficiency of this plea was certified to this court, and it was held that the arrest of Farris upon the warrant from the state court was not an obstruction of the mail, or the retarding of the passage of a carrier of the mail, within the meaning of the act. In its opinion the court says: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter. The common sense of man approves the judgment mentioned by Puffendorf, 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. The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II., which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire, 'for he is not to be hanged because he would not stay to be burnt.' And we think that a like common sense will sanction the ruling we make, that the act of Congress which punishes the obstruction or retarding of the passage of the mail, or of its carrier, does not apply to a case of temporary detention of the

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Provided, That nothing in this act shall be construed as prohibiting any individual from assisting any member of his family or any relative or personal friend, to migrate from any foreign country to the United States, for the purpose of settlement here.

mail caused by the arrest of the carrier upon an indictment for murder."

Among other things which may be considered in determining the intent of the legislature is the title of the act. We do not mean that it may be used to add to or take from the body of the statute, but it may help to interpret its meaning. * * * Now, the title of this act is, "An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories and the District of Columbia." Obviously the thought expressed in this reaches only to the work of the manual laborer, as distinguished from that of the professional man. No one reading such a title would suppose that Congress had in its mind any purpose of staying the coming into this country of ministers of the gospel, or, indeed, of any class whose toil is that of the brain. The common understanding of the terms labor and laborers does not include preaching and preachers; and it is to be assumed that words and phrases are used in their ordinary meaning. So whatever of light is thrown upon the statute by the language of the title indicates an exclusion from its penal provisions of all contracts for the employment of ministers, rectors and pastors.

Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body. The situation which called for this statute was briefly but fully stated by Mr. Justice Brown when, as District Judge, he decided the case of *United States v. Craig*, 28 Fed. Rep. 795, 798: "The motives and history of the act are matters of common knowledge. It had become the practice for large capitalists in this country to contract with their agents abroad for the shipment of great numbers of an ignorant and servile class of foreign laborers, under contracts, by which the employer agreed, upon the one hand, to prepay their passage, while, upon the other hand, the laborers agreed to work after their arrival for a certain time at a low rate of wages. The effect of this was to break down the labor market, and to reduce other laborers engaged in like occupations to the level of the assisted immigrant. The evil finally became so flagrant that an appeal was made to Congress for relief by the passage of the act in question, the design of which was to raise the standard of foreign immigrants, and to discountenance the migration of those who had not sufficient means in their own hands, or those of their friends, to pay their passage."

It appears, also, from the petitions, and in the testimony presented before the committees of Congress, that it was this cheap unskilled labor which was making the trouble, and the influx of which Congress sought to prevent. It was never suggested that we had in this country a surplus of brain toilers, and, least of all, that the market for the services of Christian ministers was depressed by foreign competition. Those were matters to which the attention of Congress, or of the people, was not directed. So far, then, as the evil which was sought to be remedied interprets the statute, it also guides to an exclusion of this contract from the penalties of the act.

A singular circumstance, throwing light upon the intent of Congress, is found in this extract from the report of the Senate Committee on Education and Labor, recommending the passage of the bill: "The general facts and considerations which induce the committee to recommend the passage of this bill are set forth in the

Report of the Committee of the House. The committee report the bill back without amendment, although there are certain features thereof which might well be changed or modified, in the hope that the bill may not fail of passage during the present session. Especially would the committee have otherwise recommended amendments, substituting for the expression 'labor and service,' whenever it occurs in the body of the bill, the words 'manual labor' or 'manual service,' as sufficiently broad to accomplish the purposes of the bill, and that such amendments would remove objections which a sharp and perhaps unfriendly criticism may urge to the proposed legislation. The committee, however, believing that the bill in its present form will be construed as including only those whose labor or service is manual in character, and being very desirous that the bill become a law before the adjournment, have reported the bill without change." And, referring back to the report of the Committee of the House, there appears this language: "It seeks to restrain and prohibit the immigration or importation of laborers who would have never seen our shores but for the inducements and allurements of men whose only object is to obtain labor at the lowest possible rate, regardless of the social and material well-being of our own citizens and regardless of the evil consequences which result to American laborers from such immigration. This class of immigrants care nothing about our institutions, and in many instances never even heard of them; they are men whose passage is paid by the importers; they come here under contract to labor for a certain number of years; they are ignorant of our social condition, and that they may remain so they are isolated and prevented from coming into contact with Americans. They are generally from the lowest social stratum, and live upon the coarsest food and in hovels of a character before unknown to American workmen. They, as a rule, do not become citizens, and are certainly not a desirable acquisition to the body politic. The inevitable tendency of their presence among us is to degrade American labor, and to reduce it to the level of the imported pauper labor." Page 5359, Congressional Record, 48th Congress.

We find, therefore, that the title of the act, the evil which was intended to be remedied, the circumstances surrounding the appeal to Congress, the reports of the committee of each house, all concur in affirming that the intent of Congress was simply to stay the influx of this cheap unskilled labor.

But beyond all these matters no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation. The commission to Christopher Columbus, prior to his sail westward, is from "Ferdinand and Isabella, by the grace of God, King and Queen of Castile," etc., and recites that "it is hoped that by God's assistance some of the continents and islands in the ocean will be discovered," etc. The first colonial grant, that made to Sir Walter Raleigh in 1584, was from "Elizabeth, by the grace of God, of England, Fraunce and Ireland, queene, defender of the faith," etc.; and the grant authorizing him to enact statutes for the government of the proposed colony provided that "they be not against the true Christian faith now professed in the Church of England." The first charter of Virginia, granted by King James I in 1606, after reciting the application of certain parties for a charter, commenced the grant in these words: "We, greatly commending, and graciously accepting of, their Desires for the Furtherance of so noble a

Work, which may, by the Providence of Almighty God, hereafter tend to the Glory of his Divine Majesty, in propagating of Christian Religion to such People, as yet live in Darkness and miserable Ignorance of the true Knowledge and Worship of God, and may in time bring the Infidels and Savages, living in those parts, to human Civility, and to a settled and quiet Government; DO, by these our Letters-Patents, graciously accept of, and agree to, their humble and well-intended Desires."

[Justice Brewer continues in this vein at considerable length, identifying numerous examples of the invocation of God in public discourse.]

There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons: they are organic utterances; they speak the voice of the entire people. While because of a general recognition of this truth the question has seldom been presented to the courts, yet we find that in *Updegraph v. The Commonwealth*, 11 S. & R. 394, 400, it was decided that, "Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania; . . . not Christianity with an established church, and tithes, and spiritual courts; but Christianity with liberty of conscience to all men." And in *The People v. Ruggles*, 8 Johns. 290, 294, 295, Chancellor Kent, the great commentator on American law, speaking as Chief Justice of the Supreme Court of New York, said: "The people of this State, in common with the people of this country, profess the general doctrines of Christianity, as the rule of their faith and practice; and to scandalize the author of these doctrines is not only, in a religious point of view, extremely impious, but, even in respect to the obligations due to society, is a gross violation of decency and good order." * * *

If we pass beyond these matters to a view of American life as expressed by its laws, its business, its customs and its society, we find everywhere a clear recognition of the same truth. Among other matters note the following: The form of oath universally prevailing, concluding with an appeal to the Almighty; the custom of opening sessions of all deliberative bodies and most conventions with prayer; the prefatory words of all wills, "In the name of God, amen;" the laws respecting the observance of the Sabbath, with the general cessation of all secular business, and the closing of courts, legislatures, and other similar public assemblies on that day; the churches and church organizations which abound in every city, town and hamlet; the multitude of charitable organizations existing everywhere under Christian auspices; the gigantic missionary associations, with general support, and aiming to establish Christian missions in every quarter of the globe. These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation. In the face of all these, shall it be believed that a Congress of the United States intended to make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation?

Suppose in the Congress that passed this act some member had offered a bill which in terms declared that, if any Roman Catholic church in this country should contract with Cardinal Manning to come to this country and enter into its service as pastor and priest; or any Episcopal church should enter into a like contract with

Canon Farrar; or any Baptist church should make similar arrangements with Rev. Mr. Spurgeon; or any Jewish synagogue with some eminent Rabbi, such contract should be adjudged unlawful and void, and the church making it be subject to prosecution and punishment, can it be believed that it would have received a minute of approving thought or a single vote? Yet it is contended that such was in effect the meaning of this statute. The construction invoked cannot be accepted as correct. It is a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute.

The judgment will be reversed, and the case remanded for further proceedings in accordance with this opinion.

BACKGROUND NOTE

This case has its roots in the efforts of one John S. Kennedy to hire an English gardener. The gardener was deported because he had been brought to this country in violation of the Act at issue in *Holy Trinity*. Apparently feeling much abused, and noticing an announcement in the newspaper of Reverend Warren's new appointment, on September 22, 1887, Kennedy fired off the following letter to the chief customs official in New York:

> DEAR SIR: I desire to call your attention to the fact that the Rev. Mr. Warren, an English gentleman and an alien, has been called to the pastorate of the Church of the Holy Trinity in this city, and I am informed he is expected to arrive on or about Saturday next.
>
> Under the act of Congress * * * he cannot be allowed to land on his arrival without directly violating both the letter and spirit of that law, and * * * he should be returned to England in the same manner and for the same reasons as other parties have recently been returned.
>
> In calling your attention to this matter I desire distinctly to say that I have nothing whatever against Mr. Warren * * * and my only object in serving this notification upon you is in order to make this a test case, and by enforcing a most obnoxious and unreasonable law I hope thereby it will lead to its total abrogation.[2]

Kennedy's letter prompted the following editorial in the *New York Times*:

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[2] Letter from John S. Kennedy to Daniel Magone, Collector of U.S. Customs, New York, Sept. 22, 1887, *in Importing a Rector. Does Mr. Warren's Engagement Conflict with the Law?*, N.Y. TIMES, Sept. 25, 1887, p. 2.

Mr. WARREN had already landed when Mr. KENNEDY'S letter was delivered to the Collector, and will in a week or two begin his unholy work of undermining our institutions by performing the "contract labor" for the performance of which he was imported. The duty of the Collector would have been much simplified if he had received the letter before the arrival of the gentleman who may be described, in his relation to the law, as a "coolie" clergyman. In that case Mr. MAGONE would have needed merely to notify the master of the *Adriatic* that in Mr. WARREN he had been conveying a pernicious and unlawful immigrant, a kind of human dynamite, and to warn that astonished skipper to take back the dangerous exile whence he came. Now it will be necessary for him to resort to some more complicated process in order to rid the Republic of Mr. WARREN.

Nevertheless, it seems clear that the emigration of a foreign clergyman to this country, under a call from an American parish, is a violation of the law, and we must applaud the purpose of Mr. KENNEDY to enforce the law in a case where its enforcement will be a riotous travesty upon sense and justice. The law is no respecter of parsons, and what is sauce for the agricultural and manufacturing goose must be sauce also for the theological gander. * * *

There are exceptions to the statute, but Mr. WARREN is not entitled to the benefit of any of them. Opera singers may come in under contracts, and actors and lecturers and domestic servants, but there is no mention of clergymen. An astute lawyer might endeavor to smuggle the new Rector of the Church of the Holy Trinity under the clause which permits the admission of "skilled workmen, in or upon any industry not at present established in the United States, provided that skilled labor for that purpose cannot be otherwise obtained." * * * [I]f it can be shown that there is anything peculiar in Mr. WARREN'S theology, and that it is not now inculcated from the American pulpit, he might come in as the practitioner of a new industry. Congress has no objection to heresiarchs any more than to Anarchists or dynamiters, so long as they do not compete with talent native or already established.

Seriously, nothing could be better adapted to show the complete absurdity of the law than this proposition to use it against a man who is in all senses a welcome and valuable citizen. For the terms of the law do apparently exclude Mr. WARREN, while they do not exclude the hundreds of Neapolitan paupers and criminals on board the *Alesia*, who are detained at present because they have brought cholera to the country, but are not detained when they bring only idleness and crime. If such a contrast cannot induce Congress to revise the outrageous statute invoked by Mr. KENNEDY the case for its revision is hopeless.[3]

A history of the Holy Trinity Church notes that "a controversy * * * raged when [Warren] first came to the United States," and the episode caused "a prolonged

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[3] *A "Coolie" Clergyman*, N.Y. TIMES, Sept. 25, 1887, p. 4.

public furor."[4] As for the final outcome:

> [The Supreme Court] reversed because Dr. Warren was classified as a "public speaker." The final decision annoyed Dr. Warren more than anything else in the whole affair, for he had hoped to be the cause of the defeat of a law he regarded as unfair. Furthermore, he objected to this classification of public speaker, feeling that the Ministry is more than that.
>
> With the exception of the slur on the Ministry, which he felt was represented in the final verdict of the Courts, Dr. Warren himself had little personal concern with the Kennedy suit, for it was aimed at the Trustees of the Holy Trinity in particular and the contract labor law in general. But the novelty of the case was enough to bring the name of Warren to the attention of New Yorkers. His effective preaching and leadership at Holy Trinity sustained the initial interest * * *.[5]

Is this description of the Supreme Court's opinion accurate? When the decision came down, the *Times*'s brief account was headlined: "Pastors Are Not Laborers."[6] Is that description of the holding accurate?

THE SOURCES OF INTERPRETATION

Holy Trinity presented a specific and clear question of law: whether the entry of Reverend Warren under a contract of employment with the Holy Trinity Church violated the Foreign Contract Labor Act. If the Church had come to you in advance to ask whether it could hire Reverend Warren where would you have looked for an answer? Where did Justice Brewer look? Consider the following catalogue:

1. *Text*

It is a commonplace that statutory interpretation must begin with the words of the statute. Justice Brewer's *opinion* does so. Do you think Justice Brewer *himself* began with the words of the statute when he was considering this case?

Justice Brewer basically concedes that the words are against him. Perhaps not surprisingly, then, he does not dwell on them. Did he give in too soon? Construct an argument, based solely on the text of the statute, to support the Court's result.

Alternatively, is the text even more strongly against him than Justice Brewer cares to acknowledge? Construct an argument, again based solely on the text of the statute, against the Court's result.

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[4] JAMES ELLIOTT LINDSLEY, A HISTORY OF SAINT JAMES' CHURCH IN THE CITY OF NEW YORK 1810-1960, at 59–60 (1960). In an interview, Lindsley offered a different take on Warren's reaction, saying that Warren "was always irritated by the implication that he was not a 'worker,' since ministers work as hard as anyone." Carol Chomsky, *Unlocking the Mysteries of* Holy Trinity: *Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901, 921 n.99 (2000).

[5] LINDSLEY, *supra* note 4, at 60–61.

[6] *Pastors Are Not Laborers, The Rev. Mr. Warren Came Here Legitimately*, N.Y. TIMES, Mar. 1, 1892, at 9.

With regard to both these arguments, of what relevance is the list of exceptions in § 5, which, as Justice Brewer notes with seeming dismay, seems not to include Ministers of the Gospel?

Brewer does not mention § 4 of the Act. That provision made it a crime for the master of any ship to "knowingly bring within the United States . . . any alien laborer, mechanic or artisan" who had contracted to perform "labor or service in the United States." Does this section support or undermine the Court's result? (Hint: your answer will largely depend on whether you think § 1 and § 4 should be read *in pari materia*; that is, whether they should be construed together because they cover the same subject.)

2. *Beyond Text*

Most of the opinion is an effort to accumulate sufficiently weighty considerations that run counter to the apparent meaning of the text to justify ignoring that meaning. Thus, the proposition for which *Holy Trinity* is generally cited is that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." Is this approach to statutory construction (or statutory *re* construction?) defensible, or is it the usurpation of the legislative function? Justice Scalia would say the latter. Indeed, he *has* said the latter. Dissenting in *Zuni Public School District No. 89 v. Department of Education*, 550 U.S. 81, 116 (2007), he argued that the statutory text directly contradicted the majority's result. "How then, if the text is so clear, are respondents managing to win this case? The answer can only be the return of that miraculous redeemer of lost causes, *Church of the Holy Trinity*."

The central problem of statutory interpretation, Justice Frankfurter once wrote, is figuring out "the extent to which extraneous documentation and external circumstances may be allowed to infiltrate the text on the theory that they were part of it, written in ink discernible to the judicial eye."[7] In *Holy Trinity* the Court moves increasingly further away from the actual words to more distant considerations. Is there a point at which it goes too far?

3. *Title*

Justice Brewer begins by invoking the Act's title, which suggests a narrower application in that it refers only to those under contract "to perform *labor*." Convincing?

Rarely if ever does statutory interpretation turn on an Act's title, but the standard rule is essentially as described by Justice Brewer: the title is relevant to the interpretation of the statute but not dispositive.

In *Bellew v. Dedeaux*, 240 Miss. 79 (1961), a criminal statute provided that someone found guilty of concealing an escaped prisoner "shall be fined not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00) or by imprisonment in the penitentiary not to exceed five (5) years." The defendant

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[7] Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 529 (1947).

argued that he could not be sentenced to prison because the only punishment authorized by the statute was a *fine*. The court disagreed. In light of the nonsensical reference to being "fined * * * by imprisonment," it relied primarily on the statute's title: "An Act to make it a felony for any person to conceal or harbor any prisoner." Since a felony is by definition a crime subject to punishment by imprisonment for more than one year, the title revealed that the legislature intended to provide for imprisonment for this crime.

Is the reliance on the title in *Holy Trinity* the same as in *Bellew*? Can the title trump the actual words of the statute? Do you imagine that legislators focus less, equally, or more on the title of a bill or on its actual provisions?

Compare the treatment of the Act's title by the District Court in *Holy Trinity*:

> If it were permissible to narrow the provisions of the act to correspond with the purport of the title, and restrain its operation to cases in which the alien is assisted to come here under contract "to perform labor," there might be room for interpretation; and the restricted meaning might possibly be given to the word "labor" which signifies the manual work of the laborer, as distinguished from the work of the skilled artisan, or the professional man. But no rule in the construction of statutes is more familiar than the one to the effect that the title cannot be used to extend or restrain positive provisions in the body of the act.[8]

4. *Purpose*

Central to the Court's method is the interpretation of the statute in light of "the evil to be remedied." This part of the opinion recalls Hart and Sacks, although Justice Brewer relies on evidence of actual purpose rather than "attributing" the purpose that a reasonable legislator would have been pursuing.

What was the particular problem on which Congress was focused? Would excluding Reverend Warren help remedy this problem? Might brain toilers have posed the same threat as unskilled laborers to Americans seeking employment?

Legislators almost always have a particular model before them, a specific, paradigmatic situation to which the legislation is a response. But this does not mean that they aim only at that situation and at none of its cousins when adopting a remedy. Given the breadth of the statutory language, is it not possible that Congress, though spurred to action by the influx of unskilled workers, said, in essence, "While we're at it, let's get rid of foreign competition across the board"?

It seems most likely that no one in Congress paused to think about the labor situation with regard to ministers. Assuming this to be so, is the Court's reliance on purpose pure fiction? Would it make more sense to say not that Congress intended to allow foreign ministers into American churches, but only that *if* Congress had thought about the question, that is what it would have done? Or does this confuse purpose and intent?

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[8] United States v. Rector of the Church of the Holy Trinity, 36 F. 303, 304 (S.D.N.Y. 1888).

Consider the following objections to judicial invocation of legislative purpose. Are they compelling as applied to *Holy Trinity*?

(a) It simply is not the court's job to interpret a statute in light of what it perceives to be the legislature's purpose. If the words of the statute seem inconsistent with the purpose, that just means the legislature did not do a very good job in writing the statute. It is not up to the court to rewrite it; that remains the legislature's task. In any event, the best indicator of the legislature's purpose is what it actually did, i.e. the words it used in the statute.

In an oft-cited passage, the Court defended the *Holy Trinity* approach against this criticism:

> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination."[9]

The foregoing more or less describes the methodology of *Holy Trinity*. Does it make sense? Or is it self-indulgent gibberish — simply a statement that we are bound by the words Congress has chosen except when we choose not to be — revealing only that the Court wants to have its cake and eat it too (which, being the Supreme Court, it can)?

(b) Emphasizing the legislative purpose is one-sided and will cause courts to expand statutory programs beyond what the legislature desired or enacted. Yes, purpose is important; but the legislature has always made a determination to go only so far and no further in pursuing a particular purpose. Where the legislature *stopped* is just as important as where it was *headed*. The text indicates that stopping point. A court errs if it reads the statute to do *everything* conceivable to further the relevant purpose.

This critique is most obviously relevant when a court reads a statute more broadly than its language might support rather than more narrowly, as was the case in *Holy Trinity*. But can you criticize the Brewer opinion along these lines? We will return to this idea in Chapter 11.

(c) Purpose is theoretically relevant, but is simply too hard to determine. Not having been present for the enactment, a later interpreter can never reconstruct the legislature's actual purpose. The malleability of the historical and legislative record invites judges to latch on to what seems to *them* a good purpose and to

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[9] United States v. American Trucking Ass'ns, 310 U.S. 534, 543–544 (1940).

advance their own policies under the banner of advancing Congress's. As Justice Kennedy has complained about *Holy Trinity*-style inquiries into the "spirit" of the statute: "The problem with spirits is that they tend to reflect less the views of the world whence they come than the views of those who seek their advice."[10]

How did the *Holy Trinity* Court discern Congress's purpose? Are you confident that it fairly describes Congress's *actual* purpose? Or did it merely identify what Justice Brewer thought *should have been* Congress's purpose?

(d) Reliance on legislative purpose is doomed from the start because there is no such thing. Different legislators no doubt had different purposes in mind — some may have had more than one — and they are likely to have been conflicting. Max Radin's debunking of the whole idea of legislative intent applies equally to the fiction of legislative "purpose."

(e) Even if there is such a thing as an identifiable statutory purpose, a court is not equipped — by training, available tools, or democratic mandate — to determine what construction of a particular provision will best further it. Deciding how best to advance a particular purpose is a quintessentially legislative task. For example, the *purpose* of a rent control ordinance is to ensure a reasonable stock of affordable housing; the court cannot decide what construction of such an ordinance will best achieve that goal without making tremendously controversial policy decisions as to which it lacks expertise, information, and authority.

In the Foreign Contract Labor Act, for example, Congress may have thought a blanket exclusion was the most effective *means* to achieve its narrower *end*:

> The breadth of the statutory text, the use of generic terms, and the repeated choice of alternative phrasing suggest that Congress may have intended to cast a wide net to prevent evasion of its policy, at the expense of including some situations that Congress would not regulate on their own merits.[11]

If so, the Court misread the statute even though it correctly identified Congress's purpose.

5. *Historical and Legislative Context*

The Court also refers to "the circumstances surrounding the appeal to Congress." In part, this is simply a reference to purpose, to "the evil to be remedied." But the context may also give clues as to what exactly the legislature was thinking when it passed the statute and/or what sort of coalitions and deals underlie it.

Long ago, Chief Justice Taney counseled against consideration of what the legislature *said* that its intent was, but distinguished, and endorsed, consideration of the social and political circumstances surrounding passage of a law:

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[10] Public Citizen v. United States Department of Justice, 491 U.S. 440, 473 (1989) (Kennedy, J., concurring in the judgment).

[11] James Willard Hurst, Dealing With Statutes 52–53 (1982).

> In expounding this law, the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed.[12]

Consider whether the following background information about "the public history of the times" has any bearing on the meaning of the Contract Labor Act.

For the first three-quarters of the nineteenth century, immigration into the United States was essentially uncontrolled. In 1875, Congress forbade the importation of prostitutes and alien convicts, and in 1882 it excluded idiots, convicts, and those obviously unable to care for themselves. The more significant immigration legislation in 1882 was the Chinese Exclusion Act. The outcome of a lengthy battle over cheap Chinese labor (referred to as "coolies," hence the *New York Times* reference to Reverend Warren as a "coolie" clergyman), the Chinese Exclusion Act suspended Chinese labor immigration for ten years (a period that was later extended). In 1885, during the middle of an economic depression (surely no coincidence), Congress enacted the Foreign Contract Labor Act, at issue in *Holy Trinity*, which it tightened by amendments in 1887 and 1888.

The new restrictions on immigration owed a good deal to the rise of organized labor. Indeed, John Kennedy (the frustrated seeker of an English gardener) complained that the "law is nothing better than a sop to the Knights of Labor."[13] Kennedy's reference is to the most important early labor organization, the Order of the Knights of Labor, founded in 1869, which

> was an attempt to unite workers into one big union under centralized control. Its professed object was to escape from the wage system through producers' co-operation, popular education, and the *union of all workers by hand or brain.* * * * [T]he order first became powerful in 1884 by winning a railroad strike in the Southwest. Capital met labor on equal terms, for the first time in America, when the financier Jay Gould conferred with the Knights' executive board and conceded their demands. The Knights were largely responsible for a congressional act of 1885 which forbade the importation of contract labor.[14]

Labor leaders were closely involved in drafting the legislation. As Senator Blair, a key supporter of the bill and the chair of the relevant Senate committee, stated on the Senate floor in objecting to efforts to amend the bill:

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[12] Aldridge v. Williams, 44 U.S. 9, 24 (1844).

[13] *Mr. Kennedy in Earnest*, N.Y. TIMES, Sept. 27, 1887, at 4.

[14] 3 SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 81–82 (1972) (emphasis added).

> The bill was not framed by children and babes, but by the men whose interests it undertakes to guard and conserve. By their leading and most intellectual representatives they came before the committee of the House of Representatives, as they did before our committee, asking for this bill, which they had studied, and which embodied the ideas and propositions which they thought necessary to remedy the public evils of which they complain.[15]

Labor representatives were not shy about making their feelings known, as the following comment from one of the Act's Senate opponents indicates:

> I could very conveniently allow this matter to go along and yield to the pressure that is brought to bear upon me by these hundreds and hundreds of labor unions, if I chose to do so and if I thought it was exactly what my duty is as a Senator; but I do not.[16]

Are the role and views of the Knights of Labor relevant to the interpretation of the statute? A realistic view of the political process might support saying so, since Congress is trying to please the most important stakeholders, or special interests. On the other hand, the Supreme Court has viewed such arguments dubiously. *See, e.g., Circuit City Stores v. Adams*, 532 U.S. 105, 120 (2001) ("We ought not attribute to Congress an official purpose based on the motives of a particular group that lobbied for or against a certain proposal — even assuming the precise intent of the group can be determined, a point doubtful both as a general rule and in the instant case. It is for the Congress, not the courts, to consult political forces and then decide how best to resolve conflicts in the course of writing the objective embodiments of law we know as statutes.").

The foregoing concerns the legislative and political context *at the time of enactment*. Does, or should, the legislative and political context *at the time of the judicial decision* influence statutory interpretation? When *Holy Trinity* was decided, the United States was on the verge of a crushing depression. Economic conditions had begun to look ominous. The major parties in the 1892 election both favored additional restrictions on immigration. Do you think these factors had, or should have had, any bearing on the proper enforcement and interpretation of the Contract Labor Act?

6. *Legislative History*

The process of enacting legislation is long and tortuous and, in the federal government at least, leaves a paper trail. (In most states, such materials are sketchier; the process is essentially the same as at the federal level, but the participants do not keep much of a record.) Lawyers and judges alike generally turn to a statute's legislative history to cast light on the statute itself. The relevance of legislative history to statutory construction is a matter of considerable dispute. Few judges have foresworn its use altogether, but courts rely on — or, to

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[15] 16 CONG. REC. 1622 (1885).

[16] 16 CONG. REC. 1632 (1885) (remarks of Senator Morgan).

be precise, cite (which is not necessarily the same thing) — legislative history far less than they did a generation ago.

The *Holy Trinity* Court relied on hearings testimony and the House Report to determine the background and purpose of the Act. But it also found what a litigator would view as a smoking gun: a directly relevant discussion in the Senate Report. The Senate Report goes directly to legislative intent as opposed to purpose. This case is the first instance in which the United States Supreme Court placed such reliance on the legislative record. Unusual for its time, this reliance on the report presaged modern trends.

Committee reports are usually treated as the most persuasive pieces of legislative history. They set out the understanding of the legislation of those most intimately acquainted with it, who may well have had a hand in drafting it, and on whom the other members of Congress rely. Articulate exactly why the Senate Report supports Justice Brewer's argument. Suppose you represented the United States in this case. How would you have argued against the value or relevance of the Report? Does the Report's explanation for leaving the poorly drafted statute intact ring true?

What does the Senate Report tell us about what the *House* thought about the scope of the Act? There is a strong argument that in this case the House Report (which, to be sure, is also helpful to the Court) should carry more weight than the Senate Report. Do you see why?

An opponent of the use of legislative history might object as follows:

> This reliance on a single sentence in the Report exhibits everything that is wrong with the judicial overreliance on legislative history. First, it creates all the wrong incentives for Congress. If the Committee really wanted a narrower statute it should have amended the bill so to provide. The Court let the Senate off the hook and only encouraged sloppy drafting in the future. Second, what the Senate actually *passed* was the statute; it never voted on the report. For all the Court knew most of the Senate was happy with the broad language of the bill. Third, it is entirely likely that the Committee's explanation for why it did not amend the House version of the bill is pure smoke. An equally plausible explanation is that it knew that an amendment did not have the votes. In that circumstance the Committee (more precisely, an unelected staffer under the sway of a lobbyist) did the politically expedient thing; it left the actual bill alone but attached this (unvoted upon) rider for the courts to discover later. In essence, it *did* amend the bill, but without having to put the amendment to a vote. In short, it is at least possible here that the Court had the wool pulled over its eyes. Instead of enforcing the duly enacted statute, approved by a majority of Congress and the President, which is its constitutionally assigned task, the Court rewrote the statute according to the instructions of a subterranean, closet Senate.

Even accepting the Senate Report at face value, should it be dispositive? Suppose you could show (through, for example, comments made on the floor of the Senate during debate on the bill), that the Committee's worst fears had been

realized and that many Senators did view the legislation as reaching non-manual labor. What's more, that is why they voted *for* it. Whose views should control the interpretation of the statute?

Consider the following exchange on the floor of the Senate during debate on the bill. Senator Blair was a primary supporter of the bill; Senator Morgan its primary opponent.

Mr. MORGAN: [This is] vicious legislation * * * in that, even in the admission of people into this country, it discriminates in favor of professional actors, lecturers, or singers. It makes an express exception and provision for professional actors, lecturers, and singers, leaving out all the other classes of professional men. * * * Personal or domestic servants are excepted; that is to say, a gentleman who has got the money can come here and bring his personal or domestic servants with him from abroad; but if he happens to be a lawyer, an artist, a painter, an engraver, a sculptor, a great author, or what not, and he comes under employment to write for a newspaper, or to write books, or to paint pictures, as we are informed that a recent Secretary of State sent abroad for an artist to paint his picture, he comes under the general provisions of the bill.

Mr. BLAIR: The Senator will observe that it is only the importation of such people under contract to labor that is prohibited.

Mr. MORGAN: Of course; I understand.

Mr. BLAIR: If that class of people are liable to become the subject-matter of such importation, then the bill applies to them. Perhaps the bill ought to be further amended.

Mr. MORGAN: People who can instruct us in morals and religion and in every species of elevation by lectures and by acting plays in the theaters and by singing are not prohibited. * * * Let them come and act and sing and play as much as they please for the enlightenment of humanity on this side of the Atlantic Ocean. * * *

Now, I shall propose when we get to it to put an amendment in there. I want to associate with the lecturers and singers and actors, painters, sculptors, engravers, or other artists, farmers, farm laborers, gardeners, orchardists, herders, farriers, druggists and druggists' clerks, shopkeepers, clerks, book-keepers, or any person having special skill in any business, art, trade, or profession.[17]

A few days later, when the Senate was considering amendments, it added "artists" to the list of exempted professions. Senator Morgan then moved to add

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[17] 16 CONG. REC. 1632–1633 (1885).

"artisans" to the list as well; his motion was defeated.[18] The Senate then passed the bill by a vote of 50–9, with Senator Morgan among the nays.

Does the Blair/Morgan exchange and the later amendment illuminate the statute's meaning? Construct an argument based on these bits of legislative history to support the Court's result. Construct such an argument against the Court's result.[19]

7. *Later Amendments*

In 1891 — that is, after the events that gave rise to the *Holy Trinity* litigation but before the Supreme Court's decision — Congress amended the statute. Among a number of changes, it added an explicit exemption for "ministers of any religious denomination." (Interestingly, when first introduced, in 1889, the amendment would have exempted "ministers of the gospel"; this phrase was considered too narrow because it would have covered only Christian ministers.) The amendment was not mentioned in the briefs or the opinion in *Holy Trinity*. Should it have any bearing on the decision?

The 1891 amendments explicitly provided that they did *not* apply to pending cases. How does that bear on the relevance of the 1891 exception for ministers to *Holy Trinity*?

8. *Public Policy and the Nature of Things*

Perhaps what counts most for Justice Brewer is none of the foregoing but rather that this is a religious — more particularly, a Christian — nation. He is quite frank about his unwillingness to read a statute of the United States Congress inconsistently with that premise.

(a) Is this judicial legislation or judicial deference? The answer depends in part on what exactly Justice Brewer is doing. One description of his method is that he is simply saying that Congress, being composed of reasonable people, could not possibly have wanted to exclude ministers. A less deferential version, not usually explicit in judicial opinions, is that he refuses to apply the statute because doing so would just be wrong, period; it would conflict with the Court's (or universal) views of sound policy. Which of these better describes Justice Brewer's method? Is either version an acceptable role for the judiciary?

Cass Sunstein suggests that the opinion can be read in three different ways:

> 1. General language will not be taken to produce an outcome that would, in context be taken as absurd by those who enacted it, at least if there is no affirmative evidence that this result was intended by the legislature. * * *

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[18] *Id.* at 1837.

[19] For lengthy reviews of the legislative history, reaching conflicting conclusions, compare Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833 (1998) (concluding that Justice Brewer misread the legislative history) with Chomsky, *supra* note 4 (concluding that Justice Brewer was correct that Congress did not intend to exclude someone such as Reverend Warren).

On this view, *Holy Trinity* is a rerun of the famous case of Riggs v. Palmer * * *.

2. General language will not be taken to produce an outcome that was clearly not intended by the enacting legislature, as those intentions are revealed by context, including legislative history. * * *

3. General language will not be taken to depart from long-standing social understandings and practices, at least or especially if the departure would raise serious constitutional doubts. * * * On this view, the background tradition of religious liberty thus operates as a "clear statement" principle, one that requires Congress to speak unambiguously if it wishes to intrude on that tradition. Congress will not be taken to have barred a church from paying for the transportation of a rector unless there is affirmative evidence that Congress intended to do precisely that.[20]

Which of these accounts is the most descriptively accurate? The most normatively appealing?

(b) Consider Justice Kennedy's criticism:

I should pause for a moment to recall the unhappy genesis of [the *Holy Trinity* approach] and its unwelcome potential. * * * The central support for the Court's ultimate conclusion that Congress did not intend the law to cover Christian ministers is its lengthy review of the "mass of organic utterances" establishing that "this is a Christian nation," * * *. I should think the potential of this doctrine to allow judges to substitute their personal predilections for the will of the Congress is so self-evident from the case which spawned it as to require no further discussion of its susceptibility to abuse.[21]

Justice Kennedy did not observe, though it might support his argument about "personal predilections," that Justice Brewer was the son of Christian missionaries and generally fond of the "Christian nation" theme.

[Justice Brewer's mother] grew up in the impoverished home of an austere New England pastor. Her father was convinced of the majesty and immutability of the Biblical law and reality of hell; the nine Field children were faced with the glories of perseverance and personal frugality. She ended these formative years abruptly in 1829 when her head was turned by a Reverend Josiah Brewer, fresh from divinity training at Yale. The nuptials were barely spoken when the couple * * * was headed for the Mediterranean Sea to staff a school for women recently established by the Ladies Greek Association of New Haven. Eight years later (June 20, 1837) in Smyrna, Asia Minor, David Josiah was born. There he spent his early years, developing an abiding concern for missions and the rights of women,

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[20] CASS R. SUNSTEIN, ONE CASE AT TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 219–220 (1999).

[21] Public Citizen v. United States Department of Justice, 491 U.S. 440, 473–474 (1989) (Kennedy, J., concurring in the judgment).

and maturing in the Christian virtues.[22] * * *

> [Justice Brewer] saw character to lie at the base of the nation's strength, doubly so because of the democratic nature of the Republic. Countless times he repeated the assertion that this was a Christian nation — in pamphlet, speech, and court decision. * * * [While rejecting an active political role, Justice Brewer was quick] to advocate from the public platform causes dear to his heart. The reduction of arms, international arbitration, women's suffrage, Philippine independence (to prevent our "Anglo-Saxon stock" from being "submerged"), high professional standards at the bar, and "Christian citizenship" won frequent platform support from him. He was throughout his life an active member of the Congregational Church, both at the local and national level. On the day of his death he was Vice President of the American Missionary Association.[23]

Justice Brewer's own Christian faith was deep and abiding. In a 1904 address delivered in Boston's Old South Church, he noted the impossibility of a human judge ever having the level of understanding necessary to render true justice, but found reassurance in the idea of ultimate justice in the hereafter:

> [T]he answer which has come out of my long experience on the bench is that somewhere and some time all the failures of human justice will be made good. Through the light of the judicial glass I have seen the splendid vision of immortality. * * * So out of my judicial experience, and looking through the glass of my life-work, I have learned to see in the cross the visible symbol of faultless justice, and in the resurrection of Christ the prophecy and truth of its final triumph.[24]

Does this information about Justice Brewer affect your view of the result in *Holy Trinity*? Of the method of the opinion? Of its style? Can Justice Brewer's approach be justified notwithstanding its correspondence to his religious faith in this particular case?

If you were the Chief Justice, would you have assigned Justice Brewer the opinion?

(c) The method of *Holy Trinity* has found favor with modern commentators who are not at all sympathetic to its particular "Christian nation" theme. Professors William Eskridge and Philip Frickey, two of the most important contemporary

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[22] [Ed. Fn.] Lack of financial support forced Josiah Brewer to abandon his foreign missionary work. He then became chaplain of the St. Francis Prison in Wethersfield, Connecticut. Arnold M. Paul, *David J. Brewer, in* II THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS at 1515 (Leon Friedman & Fred L. Israel eds., 1969).

[23] Robert E. Gamer, *Justice Brewer and Substantive Due Process: A Conservative Court Revisited*, 18 VAND. L. REV. 615, 617–620 (1965).

[24] David J. Brewer, *The Religion of a Jurist*, THE OUTLOOK, June 24, 1905, at 533, 534–536. This speech was one of many. Though Brewer is now largely forgotten, while on the bench he was the Justice most familiar to the American public, largely as a result of "his love of public speaking and his willingness to go almost anywhere to address an audience." J. Gordon Hylton, *The Perils of Popularity: David Josiah Brewer and the Politics of Judicial Reputation*, 62 VAND. L. REV. 567, 571 (2009).

writers on statutory interpretation, largely endorse *Holy Trinity* as an example of their preferred style of interpretation, what they call "practical reason":

> *Holy Trinity Church* is a classic critique of naive textualism. When generalized, the critique illustrates the operation of our practical reasoning model. According to the model, the text of the statute powerfully supports the government's position, creating a strong presumption for that interpretation. But the apparent meaning of the text becomes less clear when we consider the statute's purpose and legislative history, and test that meaning against background social values. This evidence suggested an alternative reading to the Court, one that emphasized the value of religious freedom, and the Court's faith in this as a "Christian nation." The values of textualism seem little impaired by this reading, and the Court appears admirably sensitive to legislative expectations. The Court's opinion may be more persuasive because it weaves different arguments together to present powerful reasons for rethinking the apparent meaning of the bare text.[25]

Noting Justice Kennedy's criticism, Eskridge and Frickey counter that the Court did not simply substitute its values for those enacted by Congress. Its holding is supported by a "much richer combination of arguments * * *. The opinion's unfortunate genuflections toward Christianity should not obscure its central message."[26]

(d) If societal values *do* count, which should prevail: those prevalent at the time of the statute's enactment or those prevalent now? If this statute had remained on the books unchanged and the *Holy Trinity* situation arose today, might the Supreme Court reach a different result by invoking contemporary values rather than historical ones? If so, hat values would be relevant? Is the United States less a Christian nation, or less a religious nation, now than a century ago?

A CONCLUDING NOTE ON THE SOURCES OF STATUTORY INTERPRETATION

The *Holy Trinity* Court is typical in not finding any of the sources to which it turns dispositive. Courts often, and litigators almost always, review all of these various clues as to statutory meaning without relying on any one alone. One might conceive of this process as a sort of football game. The ball begins on the 50-yard line, then moves in one direction or the other as different sources are consulted until finally it is in an end zone.

Holy Trinity is somewhat less typical in that it is fairly candid in acknowledging a conflict between different sources of statutory meaning. Not infrequently, a court discovers that text, purpose, history, and policy all point toward a single meaning, while the dissent finds that they all point toward the opposite single meaning. Does that mean that there is *no* constraining force in these sources of statutory interpretation?

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[25] William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 361–362 (1990).

[26] *Id.* at 362 n.151.