

# TEXT, HISTORY, AND STRUCTURE IN STATUTORY INTERPRETATION

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All judges follow a simple rule: when the statute is clear, apply it. But people rarely come to court with clear cases. Why waste time and money? People come to court when the texts are ambiguous, or conflict, or are so old that a once-clear meaning has been lost because of changes in the language or legal culture.

No simple approach to these issues will be possible, because words are not born with meanings. Words take their meaning from contexts, of which there are many—other words, social and linguistic conventions, the problems the authors were addressing. Texts appeal to communities of listeners, and we use them purposively. The purposes, and so the meaning, will change with context, and over time.

This is the great attraction of legislative history. It provides clues when other avenues fail. It is also the source of the standard objection. Clues offer many avenues of investigation but do not themselves decide. These clues are slanted, drafted by the staff and perhaps by private interest groups.<sup>1</sup> A Sherlock Holmes could work through the clues, and those most reliable, and draw unerring inferences. Alas, none of us is a worthy successor to Holmes, even the Oliver Wendell variety. At our best, we err. And we are almost never at our best. Some other case knocks; the attention we can give is short, and our inferences correspondingly unreliable.<sup>2</sup> We hear in the debates what we prefer to hear—and our preferences differ widely.<sup>3</sup> Even when all of us hear the same thing, a search for these clues consumes resources but does not yield rewards comparable to the effort invested.

I have no doubt that these are cautions rather than bars to the use of legislative history. As Judge Mikva puts it: "The enemy is

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1. See Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005 (1992).

2. See Frank H. Easterbrook, *What's So Special About Judges?*, 61 COLO. L. REV. 773, 778-80 (1990).

3. See *Conroy v. Aniskoff*, 113 S. Ct. 1562, 1567-72 (1993) (Scalia, J., concurring).

not legislative records—only *bad* legislative records.<sup>4</sup> Sorting good from bad is tough. Perhaps you had to be there. Still, Congress believes legislative history useful—doubtless because it, too, knows the shortcomings of language and the need for clues. If Congress thought that reliance on legislative history threw judges off the scent too often, it would desist, or tell us not to use the stuff. Some nations have statutes, expanding on the interpretive rules in the Dictionary Act,<sup>5</sup> telling judges when, if at all, to use legislative history. In the United States history is used with the enduring consent of the legislature. When the authors of a statute deem legislative history valuable, who are judges to disagree?

This is enough, it seems to me, to follow clues on many questions. A statute imposes a duty on imported fruit. Is a tomato a fruit or a vegetable?<sup>6</sup> Best look to the legislative history, which may tell us whether Congress meant the scientific or the lay sense of fruit. A statute creates a special rule for pension funds if “substantially all” of their members are truckers. Only the legislative history helps us know whether this means  $\frac{2}{3}$ , or  $\frac{3}{4}$ , or  $\frac{4}{5}$ , or some other dividing line.<sup>7</sup>

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Wait. Am I not a notorious opponent of legislative history? That is indeed my position, and it grows out of a belief that becoming accustomed to mining the debates for clues creates some profound and unwelcome changes in how judges see laws.

A method that sees legislative history as a *friend* rather than as merely inevitable leads to a jurisprudence in which statutory words become devalued. We use our knowledge of the times in which the texts were written to deduce the purposes, goals, objectives, and values of the drafters. These, and not rules, are what we find in the committee reports and debates—the very things deliberately left out of the enacted text. The norm, in other words, becomes to start by boosting the level of generality. Having reduced to possession the values behind the texts, the judge proceeds to advance the cause of those values in the case at hand.

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4. Abner J. Mikva, *Statutory Interpretation: Getting the Law to be Less Common*, 50 OHIO ST. L.J. 979, 982 (1989).

5. 1 U.S.C. § 1 (1988).

6. See *Nixon v. Hedden*, 149 U.S. 304 (1893) (holding that tomatoes are vegetables).

7. See *Continental Can Co. v. Chicago Truck Drivers Pension Fund*, 916 F.2d 1154 (7th Cir. 1990).

No one could say that rules are always preferable to standards, or the reverse. What you should notice about this method of construction, however, is that rules are converted into standards in all tough cases. A method of construction concentrating on values and imputed intent denies to the drafters the ability to choose rules, with their gains, their pains, and their limited scope.

Changing the structure of laws, and the level of generality at which we read them, is not some consequence of reading legislative history “badly.” It is an outcome of the process when done well. Those who balk do so not because they believe that language is simple and statutory commands “plain”; instead the concern is that only a relatively mechanical approach can be reconciled with the premises of democratic governance. Consider some of these premises.

One thing we wish the legal system to do is to give understandable commands, consistently interpreted. This calls for empty-headed simplicity. Facilitate planning; facilitate settlement in litigation; avoid search for factors that will impress judges if only you can find them in a warehouse of documents.

Another thing political society wishes to do is to confine judges. We are supposed to be faithful agents, not independent principals. Having a wide field to play—not only the statute but also the debates, not only the rules but also the values they advance, and so on—liberates judges. This is objectionable on grounds of democratic theory as well as on grounds of predictability.

A third thing we wish to do is to empower Congress. Let it make rules. This means using whatever approach Congress picks, adhering rather than shifting. A shift from rules to standards frustrates compromises, undermines even the *ability* to choose. Sometimes concern that judges *will* shift levels on Congress leads to overspecificity. No one who has read the environmental laws can avoid concluding that there is excess specificity designed to tie the hands of actors who might pull a switch.

A fourth thing we wish to do is to constrain Congress. Yes, I know this is exactly the opposite of the third objective. Yet it too is an important part of the design. Congress must act bicameraly. It needs presidential approval. The laws must be published. These requirements serve important values—they cut down on the amount of legislation and drive bargains into the open where

they may be scrutinized. Enacting a vaporous statute and winking, or putting some stuff in the reports, avoids these constraints—which judges can resist by insisting that words in laws be taken seriously.

A fifth thing we wish to do is to make the law sensible, to improve the substance of rules. But this goal, I submit, is entirely subordinate to the first four, and usually incompatible with them. It can be accomplished only by the strategy of defining ends and seeking them, a strategy that costs us dearly in ability to achieve the principal objectives. Making the law *work* is a proper goal for judges only at the retail level; substance is in the main for the political branches. “Getting things right” may be a principal goal of *law* without its being a principal or even a particularly important goal of legal interpretation.

The first four objectives, and the subordination of the fifth, imply what is coming to be called “textualism”: sticking to lower levels of generality, preferring the language and structure of the law whenever possible over its legislative history and imputed values. Searching for meaning, to be found in structure and appeals to the objective legal culture, rather than in “intent”—for references to intent are just another way to shift the level of generality and scoot off in a new direction.



Have I just condemned “original intent?” This phrase has come to denote conservative judging in constitutional law. It is ensconced as the norm in statutory law. Judges look for and enforce the intent of Congress.

But in saying this we are just beginning with the problem. Consider two potential meanings of “legislative intent.”

FIRST. Because interpretation is a social enterprise, because words have no natural meanings, and because their effect lies in context, we must consult these contexts. The goals, purposes, concerns, of the authors illuminate things. Intent then informs a reading of the text, tells us its meaning.

SECOND. The legislature is supreme. Words are a feeble tool by which the legislature carries out its decisions. We should prefer to have access to the decisions without the intermediation. Those decisions lie in the thoughts of the authors. Texts then are

merely evidence of intent, which is the real law. When better evidence of intent comes along, we shall use it.

Both of these themes may be found in cases under the banner of fealty to legislative intent. But notice how different they are. The first treats the text as supreme but recognizes the difficulty of divining meaning; the second treats the intent as supreme. They may produce very different outcomes in practice.

What shows up as skepticism about legislative history is, by and large, skepticism about the second use of intent—on the ground that mental states are unknowable, that they cut the President along with most of the legislature out of the process, and that the search for these elusive intents so liberates judges that they become the law-givers in fact. How can you falsify claims about the mental states of deceased legislators?

Let me give you some illustrations that test the proper meaning of intent. I put them in two groups: (1) raw intent; (2) recorded intent plus open-ended statutes.

**RAW INTENT.** Let us suppose that we know intent perfectly, but that legislative desires cannot be matched to a statute. I have in mind the *Isla Petroleum* case from 1988.<sup>8</sup> Congress creates a system of price controls on oil. These are a catastrophe, producing long lines and allocating oil according to political pressure rather than economic benefit. Eventually Congress repeals the limits, and during the debates leading to the repeal there is a unanimous cry on both sides of the aisle to allow the market to take over. The committee reports proclaim a preference for market pricing.

As soon as the federal law ends, Puerto Rico institutes a system of price controls just like the expiring one. May the Commonwealth enforce these rules, or are they preempted? A unanimous court of appeals (not mine!) said that Congress' preference for the market must prevail. A unanimous Supreme Court reversed, distinguishing legislatures' preferences from rules of law. We knew the intent of Congress. It wanted to let the market alone. But the intent was not expressed in forms with legal effect. No law with bicameral approval, no signature of the President. Thus no law. Yearnings are not law—even if the people doing the yearning sit in the Congress. So, too, opinion polls of persons

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8. Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495 (1988).

sitting in Congress are not law. The process of approval is what defines the difference between opinion and law.

Consider a parallel from my court: Congress enacts a new chapter of bankruptcy code. May people convert pending cases to this new Chapter 12? The bill said no. The Conference Report said yes—and described in great detail the circumstances allowing conversion. Perhaps in the rush at the end of Congress, with pencil interlineations, someone picked up the wrong scrap of paper and sent it to the President. But there it was, and we held that text prevails over intent because only the text went through the constitutional process.<sup>9</sup> Once we discard the view that text is just a clue to intent, once we see that the goal is to ascertain the meaning of enacted texts, this is an easy case.

EXPLANATIONS OF OPEN-ENDED TEXTS. Legislatures usually manage to enact texts having at least colorable relation to the history. Who gets to fill the interstices? Courts? Agencies? The committee? The intent-as-law school looks to the committee—as Justice Frankfurter once cracked, in labor law the court looks to the text only when the committee report is unclear.<sup>10</sup> That attitude implied a need to send judges to re-education camps, from which they are beginning to emerge.

My example is a case from 1991, *American Hospital Ass'n v. NLRB*.<sup>11</sup> Congress required the Board to decide bargaining units case-by-case. It adopted a rule specifying the number of units, seven, for hospitals, with potential outs for extraordinary circumstances. The Court first rejected the argument that rules are inconsistent with case-by-case decisions. Rules just say what the Board will consider as it decides each case. Then it took up a committee report that sternly warned the Board against allowing the proliferation of bargaining units in hospitals. The Association's lawyer did not say that this report varied the text; instead he argued that it informed the meaning of the language requiring the Board to make case-by-case decisions.

Not so, the Court rejoined. Reports state views—that is, intent—but these views do not create rules. Instead they state intentions about how to legislate in the future. Let me quote it:

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9. *In re Sinclair*, 870 F.2d 1340 (7th Cir. 1989).

10. *See Greenwood v. United States*, 350 U.S. 366, 374 (1956) (carefully attributing the proposition to an unnamed wag).

11. 111 S. Ct. 1539 (1991).

We think the admonition in the Committee Reports is best understood as a form of notice to the Board that if it did not give the appropriate consideration to the problem of proliferation in this industry, Congress might respond with a legislative remedy. So read, the remedy for noncompliance with the admonition is in the hands of the body that issued it. . . . If Congress believes that the Board has not given 'due consideration' to this issue, Congress may fashion an appropriate response.<sup>12</sup>

Here we find clear, direct intent of Congress bypassed. Surely you assume that Justice Scalia wrote the opinion, and that between two and four Justices dissented, probably led by Justices White or Stevens, who are most devoted to legislative history and the intent-as-law school. Well, Justice Stevens wrote in this case all right—he wrote for the Court. I have quoted his words. There was no dissent. New times indeed.

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I want to reemphasize what should be obvious. "Plain meaning" as a way to understand language is silly. In interesting cases, meaning is not "plain"; it must be imputed; and the choice among meanings must have a footing more solid than a dictionary—which is a museum of words, an historical catalog rather than a means to decode the work of legislatures.

Any theory of meaning must be jurisprudential. What does the Constitution require legislatures to do to produce a law? What is the proper relation between tenured judges and evolving legislatures? To the extent the constitutional rules permit this inquiry, what are the relative costs of error from expansive versus beady-eyed readings? These are the right questions, and I believe the answer lies in a relatively unimaginative, mechanical process of interpretation.

Behind all I have been saying are eight propositions about interpretation in general, and the interpretive interaction of legislators and judges in particular. The more of these propositions you accept, the more likely you are to accept my conclusion that statutory text and structure, as opposed to legislative history and intent (actual or imputed), supply the proper foundation for meaning. This is not the time to explain or justify these propositions, so I will simply assert them.

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12. *Id.* at 1545-46.

1. *Intent is empty.* Peer inside the heads of legislators and you find a hodgepodge. Some strive to serve the public interest, but they disagree about where that lies. Some strive for re-election, catering to interest groups and contributors. Most do a little of each. And inside some heads you would find only fantasies challenging the disciples of Sigmund Freud. Intent is elusive for a natural person, fictive for a collective body.<sup>13</sup> The different strands produce quite a playground—they give the judge discretion, but no “meaning” that can be imputed to the legislature.

2. *Hard questions have no right answers.* Let us not pretend that texts answer every question. Instead we must admit that there are gaps in statutes, as in the law in general. When the text has no answer, a court should not put one there on the basis of legislative reports or moral philosophy—or economics! Instead the interpreter should go to some other source of rules, including administrative agencies, common law, and private decision.<sup>14</sup>

3. *Laws lack spirit.* Legislation is compromise. Compromises have no spirit; they just are. For example: the absence of a private right of action may be a limit on a substantive rule, the price some group charged to assent to the rule itself. You imply a private action because this would promote enforcement; hindering enforcement may have been the key to any legislation at all. If this is unprincipled, it is the way of compromise. Law is a vector rather than an arrow. Especially when you see the hand of interest groups.

4. *Rules differ from standards.* Sometimes Congress specifies values or ends, things for the executive and judicial branches to achieve, but often it specifies means, creating loopholes but greater certainty. Using legislative history and an imputed “spirit” to convert one approach into another dishonors the legislative choice as effectively as expressly refusing to follow the law.

5. *The Constitution limits what counts as “law.”* What lets out an intent-based approach is not simply the lack of useful intent but the structure of our Constitution, which requires agreement on a *text* by two Houses of Congress and one President. No matter how well we can know the wishes and desires of legislators, the only

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13. See generally Kenneth Shepsle, *Congress is a “They,” not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992).

14. See Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 553 (1983).

way the legislature issues binding commands is to embed them in a law.<sup>15</sup>

6. *Legislatures have limited terms.* The most valuable, and scarce, political resource is time, and the Constitution uses this scarcity to limit legislative power. Judges must respect this constriction. Imaginative reconstruction, asking how an expired Congress would have answered a question had the subject been presented, extends the term beyond the constitutional limit—and is of course fantasy anyway, since we can imagine any answer we want when we are inventing both question and answer.<sup>16</sup> Only living Congresses, and not homunculi sitting in the minds of judges, are authorized to make law.<sup>17</sup>

7. *Meaning does not follow the election returns.* Words take their meaning from interpretive communities, which poses the question: which community? Of generalists or specialists? Of legislators or the addressees of laws? Of those living at the time of enactment, or those living today? Laws are designed to bind, to perpetuate a solution devised by the enacting legislature, and do not change unless the legislature affirmatively enacts something new. This implies that the right interpretive community is the one contemporaneous with the enacting Congress.<sup>18</sup> Law does not change in meaning as the political culture changes.

8. *Interpreters are normal people.* Judges are overburdened generalists, not philosophers or social scientists. Methods of interpretation that would be good for experts are not suitable for generalists.<sup>19</sup> Generalists should be modest and simple. While recognizing that specialists might produce a more nuanced ap-

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15. See David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383 (1992).

16. A persistent fallacy indeed. In addition to modern exponents, see 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*59-60. See also Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988).

17. Petitioners . . . insist that if Congress had considered the issue, it would have granted federal courts exclusive jurisdiction over civil RICO cases. The argument . . . is misplaced, for even if we could reliably discern what Congress' intent might have been had it considered the question, we are not at liberty to speculate.

Tafflin v. Levitt, 493 U.S. 455, 461 (1990). A more recent opinion says that imaginative reconstruction "profoundly mistakes our role" and characterizes the process as "a usurpation." West Virginia Hospitals, Inc. v. Casey, 499 U.S. 83, 100 (1991).

18. See *West Virginia Hospitals*, 499 U.S. at 100 & n.7.

19. See Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 S. CT. REV. 231. See also Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinkoff and Shaw*, 45 VAND. L. REV. 715, 733 (1992).

proach, generalists must see that the process and error costs are much higher when they try to do the same thing.