A Practical Guide to Statutory Interpretation Today

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A PRACTICAL GUIDE TO STATUTORY INTERPRETATION TODAY

WILLIAM L. REYNOLDS*

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I. INTRODUCTION

This Article is about current developments in statutory interpretation and about what these developments might mean to those who practice law. This would have been a much easier Article to write twenty years ago. Neither judges nor scholars were particularly interested in 1970 in thinking about how statutes should be interpreted. Rather, at the end of the Warren Court and at the high-water mark of judicial activism, federal courts, at least, generally treated statutory text only as an aid to interpretation to be used along with legislative history and other information to arrive at a

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result. The approach used was neither consistent nor theoretical; *ad hoc* is the best term that comes to mind. Although it is always difficult to generalize about state courts, the practice there was probably the same. The consequences for the practitioner were clear: any evidence that could be used to convince the court that your client was right was fair game for the lawyer to use. Moreover, the practitioner did not have to fit any of this into a theoretical framework. Rather, the evidence could be used for its emotional impact, much like an argument made to the jury.

A writer on statutory interpretation today, in contrast, faces a bewildering array of theories by judges and professors on the topic. Liberals, conservatives, strict constructionists, and judicial activists have all contributed. The debate was centered (although not exclusively) around two issues: first, what use should be made of history, rather than (or in addition to) text; and second, should we limit activism of the legislative or judicial variety?

This rebirth of interest in statutory interpretation probably can be traced to a renewal of interest in constitutional interpretation, a related (although not necessarily identical) problem. That concern arose as Warren Court decisions re-inventing the Constitution came under attack, and scholars on both sides began to think about how constitutional provisions should be construed.

1. A bit of background: Legislative history generally was not used in federal courts until around the time of the New Deal. See Hans W. Baade, "Original Intent" in Historical Perspective: Some Critical Glosses, 69 Tex. L. Rev. 1001, 1088 (1991). Courts instead routinely invoked the Plain Meaning Rule, a doctrine which limited the judges, at least in theory, to the text, unless the document was ambiguous. The critical opinion, United States v. American Trucking Ass'n., 310 U.S. 534, 543-44 (1940), renounced the Plain Meaning Rule in no uncertain terms. It came after judges grew less distrustful of American legislatures and more confident of their own ability to handle interpretive matters. See John W. Johnson, Retreat from the Common Law?: The Grudging Reception of Legislative History by American Appellate Courts in the Early Twentieth Century, 1978 Det. C. L. Rev. 413.

2. The process is captured by a well-known quote from Justice Marshall's opinion in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 412 n.29 (1971): When legislative history is ambiguous, he said, "it is clear that we must look primarily to the statutes themselves to find the legislative intent."

3. At least in those states that had any legislative history. Many states have little or none, an absence which makes the interpretive task quicker, if not better. Of course, other non-textual aids such as newspaper reports, treatises, and bar association studies are still available.

4. The landmark was Paul Brest's wonderful casebook focusing on interpretive questions entitled *Processes of Constitutional Decision-Making* (1975), and an article, Thomas C. Grey, *Do We Have An Unwritten Constitution?*, 27 Stan. L. Rev. 703 (1975). For good summaries of what is happening today in theoretical constitutional interpretation, see Richard S. Kay, *Adherence to the
This Article will discuss briefly some of the current thinking about statutory interpretation. It will then examine some of the practical problems judges actually face. Finally, it will make some observations about how to achieve a better method of looking at statutes. All of this will be done in the context of practical problems judges and lawyers encounter in real life.

II. SOME THEORY

This part of the Article will discuss scholarly writing. First, I will describe the still-dominant model for statutory interpretation. Next, I will describe several alternatives. Then I will discuss those proposals in relation to those who prefer Congress as a decision-maker and those who prefer the Court; I will also compare those who prefer to freeze interpretation and those who prefer evolution.

A. Legal Process

A dozen years ago it was fairly safe to say that statutory interpretation as a theory had been captured by the Legal Process School and its “purpose” approach. That approach is a variant


6. The name comes from a casebook, never published, written by Professors Henry Hart and Albert Sacks, The Legal Process: Basic Problems in the Making and Application of Law (tent. ed. 1958). Legend has it that the book was written in order to provide a theoretical and structured basis for criticizing judicial opinions, especially those of the Supreme Court. The book was never published because, as Professor Sacks told me a few years ago, Henry Hart was never satisfied with it. Certainly the book is not well-edited, and, at times, its organization borders on the chaotic. Students are often frustrated by it because it requires real effort. That effort, however, is richly rewarded. The Legal Process materials are extremely challenging and creative, and probably the finest set of teaching materials ever produced in American law schools. The book is still being used as primary teaching materials despite being hopelessly outdated in many respects in many law schools around the country, including this one, thirty-odd years after its first distribution in manuscript form.

on the old "Mischief Rule," a form of interpretation which can be dated to the sixteenth century. Legal Process devotees ask what goals the legislature had in mind when it passed the law; the statute then should be construed so as to achieve those goals. "Purpose" is an objective term; the Hart and Sacks acolyte does not ask what the individual legislators "thought" or "intended" about the specific problem up for resolution. Rather, the acolyte asks what good did they seek to achieve (or what evil did they attempt to eliminate). The interpreter then construes the statutes to further that goal, at least if that can be done without doing violence to statutory language.

Several important points follow from this definition. First, inquiry into legislative meaning focuses not so much on statements by individual legislators or even testimony at hearings (where evidence of an individual legislator's subjective "intent" is more likely to be found), but on more accessible and easier-to-digest committee reports, preambles, and special study commissions. Second, the relation of the statute to a specific set of facts may change over time as society changes, and the method of achieving statutory goals may also change. Thus, the enacting legislature might give a very different answer to a problem than today's legislature would give when applying the statute's goals to today's problems. Third, Legal Process analysis requires that the statute be placed in context; other parts of the statute, as well as other legislation, must be parsed and reconciled. Finally, the statute also should not be read to impinge on "fundamental values" unless there is a "clear statement" that the legislature meant the law to be read that way.


8. See Heydon's Case, 76 Eng. Rep. 637, 638 (1584), for the original description of the "mischief" rule. The case, as reported by Lord Coke, said:

1st What was the common law before the making of the Act.
2nd What was the mischief and defect for which the common law did not provide.
3rd What remedy the Parliament hath resolved ... 
4th The true reason of the remedy ... 

9. Hart and Sacks summarize their approach to statutory interpretation at pages 1412-17 of their casebook cited supra at note 6.
A standard criticism of Hart and Sacks centers on their belief that a court "should assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably." Judge Posner writes about that passage, for example, that,

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.

I think that Hart and Sacks were not nearly so naive. First, they argue that their assumption is almost constitutional in character, an argument which has a good deal of merit; after all, it ill behooves courts to work on the assumption that legislators are irrational or venal. More important, however, the assumption of rationality enormously aids the practicing lawyer faced with the task of interpretation. I can interpret a rational law because I can match purpose and result, but I simply have no idea how to interpret a statute if it is not designed to achieve rational and benevolent ends.

The Legal Process approach to interpretation provides a coherent framework for practitioners. The search for purpose can be carried out with relatively little effort, because purpose generally should not be difficult to identify, requiring primarily the use of text and readily-available materials. Moreover, it reinforces what one does instinctively—that is, look for rational ends to be achieved.

B. Alternative Theories

The Legal Process School attempted to provide practical answers to interpretive problems. It is not surprising that when the legal academy turned its attention to statutory matters, theory became increasingly important. Some interpretive methods are really not at all. Rather, they are critiques of interpretation itself, and their conclusions (if believed) would free judges from statutory language

10. Hart & Sacks, supra note 6, at 1415.
12. Hart & Sacks, supra note 6, at 1413.
13. Although an enormous amount of evidence might be cited to support that view.
and history. Prominent among these are the Critical Legal Studies movement and the work of Professor Fish.

1. Critical Legal Studies

In the mid-1980's, law schools witnessed the phenomenon known as Critical Legal Studies. Based on the work of a French scholar (Jacques Derrida), CLS, as it became known, argued that it is never possible to discover the intention of a document’s author. That conclusion is based on the argument that one can never discern the one proper interpretation of a document because every document has an infinite number of possible meanings. That argument, in turn, rests on an assumption that an author’s “true” intent can never be discerned by another because all communication must be filtered through the reader’s own subjective experiences and preconceptions. Thus, the meaning a judge will give a statute depends on the various experiences the judge brings to that task. As a corollary, the smart lawyer, therefore, can manipulate meaning so that virtually any interpretation is possible; hence, the “meaning” of a statute is not known until a court hands down its decision. Presumably that interpretation, in turn, is up for grabs in the next case.

A less extreme version of CLS argues that because the identification of meaning is inherently subjective, any interpretation must rest on the predilections and prejudices of individual judges. “[I]nterpreting statutes,” in other words, “is just as political a process as enacting them. There is no greater political justification for an interpretation in any given case beyond the social justice of that result.”14 Thus, the court’s method of interpretation “serves a critical rather than constructive function.”15

Obviously, arguments like those sound very strange to anyone who has never practiced law. Law, in a sense, is the opposite of literature. The goal of the latter is to open the reader’s mind, to encourage reflection and self-analysis.16 The goal of law, in contrast, as reflected in statutes and precedent, is to control or direct the activities of those the law attempts to reach. A statute, therefore,

14. Eskridge & Frickey, supra note 5, at 715.
15. Schanck, supra note 5, at 821.
16. At least, I assume this to be the goal of literature. That is what the literary critics tell me. I merely read literature for pleasure.
must be subject to reasonably certain interpretations if it is to do its job. Any practicing lawyer knows this. CLS is surely correct in asserting that the interpreter must recognize that she is viewing the law through the prism of her own experiences. But there is more to interpretation than that. One can also try to learn what the writer really was trying to do.

2. An Understanding Community

Stanley Fish, a professor of English and law at Duke, has provided a variation on the second CLS scenario, a variation which does have some practical value. Fish argues that, although statutes may be incapable of being read in some absolute sense, the members of the "community of interpretation" formed by the American legal community will nonetheless all generally reach the same result. That is because each of us (lawyer, judge, or professor) has been trained to read statutes in the same way; we read them, in other words, in the light of shared understandings about the way in which our legal and social cultures operate.

This theory does provide a useful method of interpretation. A lawyer advising a client on a statutory problem can come up with a confident answer, based on her understanding of how judges and other actors in her legal world will understand the language. That community makes the practical effect of the statute predictable.

Fish's method is the last word in Legal Realism. It is, however, a mixed bag. On the one hand, he shows how legal interpretation can work; indeed, his observation may even be a tautology. On the other hand, it abandons the quest for objective meaning, for the goals that the legislators sought to achieve. Surely we should demand more of our courts than that.

a. Public Choice Theory, or Cynicism Run Amok

Another prominent academic movement, law and economics, has also spawned a literature on interpretation. The writers in this genre,

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17. Of course, CLS did not originate this rather obvious point. They did belabor it to death, however.
however, reach a conclusion opposite from that of the CLS devotees: They believe legislation has a discoverable meaning; they just don’t like the meaning they find. “Public choice” theory developed among a small group of legal scholars centered at the University of Chicago Law School, several of whom were to become federal judges, who believe generally that modern economic theory has much to teach us about how the law should work.

Public choice theory divides all legislation into two groups, public and private. The former group is made up of those laws, such as the civil rights acts, which genuinely attempt to advance the common cause. Most laws, however, should be thought of as “private,” because their goal is to ratify deals struck by private interests. “In other words, legislation is like a contract between the legislature and special interest groups.” The goal of the interpreter, therefore, is to identify the deal and enforce it.

This may not be as easy as it sounds. The legislature, naturally enough, may be reluctant to expose openly the true nature of the process. Hence, it is likely that the deal has been camouflaged by language suitable for consumption by voters. The interpreter, therefore, must sort through the legislation for evidence of the deal. Because the more accessible documents are likely to have been “sanitized,” the search must be extended to hearings and even non-legislative materials.

b. The Creationists

Creationists come in a number of different flavors. The two main types are easy to spot. One treats the text as sacred; the other is interested in original understanding (which may require looking at sources outside the text). Both are creationists, however, because they care about determining the meaning that existed when the statute was adopted.

20. The law and economics movement gives primacy to the efficient working of markets. “Public choice” deals with the non-market (i.e., legislative) part of that movement.
22. Schanck, supra note 5, at 843 (citing Easterbrook, supra note 21).
23. Remember the old joke that politics is like sausage because the consumer should not see either one made.
24. Schanck, supra note 5, at 846-48 has a good description of the process.
C. The Textualists

A textualist believes that the text of the document is of paramount importance. In questions of interpretation, this argument usually goes under the name of the Plain Meaning Rule.²⁵ Led by Justice Scalia, the textualists have been very influential on the Supreme Court. There are few scholarly defenders of the Plain Meaning Rule, however; indeed, the most prominent of them, Professor Schauer, recently lamented the "striking unity of voice and approach"²⁶ among scholars of statutory interpretation.

The reasons for "the unity of voice" in condemning the Plain Meaning Rule should be obvious. The Plain Meaning Rule, for any number of reasons, in its pure form, at least, is just wrong. There is the well-known linguistic fallacy of assuming that the meaning of words can be determined free from context. Then there is the arrogance of ignoring Congress' efforts to place the legislation in context; Justice Stevens recently wrote of the "disservice" the Court does when it "needlessly ignore[s] persuasive evidence of Congress' actual purpose and require[s] it 'to take the time to revisit the matter' and to restate its purpose in more precise English."²⁷ It is not surprising, therefore, that the Supreme Court's plain meaning decisions get overturned by Congress more frequently than do those statutory decisions which use history and context in reaching a result.²⁸

D. The Intentionalists

In contrast, many judges and writers profess concern about the actual intent of the enacting body with regard to the resolving issues before the court. This intent can be found in sources other than the language of the enactment. Indeed, intentionalism is probably the most commonly invoked form of interpretation in judicial opinions. In its looser forms, legislative intent can be gleaned from any source.

²⁵. The parol evidence rule is the analogy in contract interpretation.
²⁶. Frederick Schauer, Statutory Construction and the Coordinating Function of Plain Meaning, 1991 Sup. Ct. Rev. 231, 250 n.81. Schauer's article provides a refreshing relief from those works which quote at length from philosophers and philologers. I love his opening line: "The Justices have not been reading their Derrida." Id.
²⁷. W. Va. Hosp. Inc. v. Casey, 111 S. Ct. 1138, 1155 (1991) (Stevens, J., dissenting). A number of advocates of the Plain Meaning Rule suggest its use is necessary in order to discipline apparently sloppy legislative drafting. Hence, the last part of Justice Stevens' comment.
Thus, committee hearings and statements in debate made by individual legislators are good grist for the intentionalist’s mill. The search for intent can become arduous and expensive. Predictability is lessened because it is often easy to find conflicting signals and because statements are often made by non-authoritative sources (such as a statement by an obscure legislator at a hearing).

Moreover, it is not nearly as easy as it sounds to determine the meaning of language at the time it is written. This trite observation needs always to be borne in mind when considering text-based interpretive methods; it is very difficult to put yourself in the minds of someone legislating a half-century ago.

The worst problem with intentionalism, however, is its failure to deal with changed circumstances. The intent of the legislature is based on its understanding of how the law will operate in the context in which it was adopted. But the context of legal problems changes as society evolves, and the goals of the enacting legislature (that is, the Hart and Sacks ‘purpose’) may well require that a different answer be given to the problem in light of the problems of an evolving society.\textsuperscript{29}

1. The New Legal Process

The creationists have been the only post-Legal Process writers who have been successful at a practical level. The Supreme Court’s recent embrace of the Plain Meaning Rule is certainly the most vivid illustration of that success. This success has led some Legal Process scholars to a revived interest in that method of looking into statutory meaning.

Professor Aleinikoff has divided the interpretive world into two camps.\textsuperscript{30} The first, what I have called the “creationists,” he styles “archeological;” to members of this camp, “the meaning of a statute is set in stone on the day of its enactment, and it is the interpreter’s task to uncover and reconstruct that original meaning.”\textsuperscript{31}


\textsuperscript{30} Aleinikoff, supra note 5, at 21.

\textsuperscript{31} Id. at 21. Judge Posner asks the judge “to imagine as best he can how the legislators who enacted the statute would have wanted it applied to situations they did not foresee.” Posner, supra note 11, at 287.
A practitioner of what Aleinikoff calls “nautical” interpretation, in contrast, “understands a statute as an on-going process (a voyage) in which both the shipbuilder and the navigator play a role. The dimensions and structure of the craft determine where it is capable of going, but the current course is set primarily by the crew on board.” Aleinikoff concludes, perhaps not very consistently with his metaphor, that we should “treat the statute *as if it had been enacted yesterday* and try to make sense of it in today’s world.”

The practitioner can easily live with a sea-going style of interpretation. Indeed, that style really is the practitioner’s, who finds it difficult to go to the meaning of the law when it was adopted, but who is perfectly comfortable with determining what it means today.

**E. The New Maximists**

The bad old days of statutory interpretation relied heavily upon the use of maxims or canons of interpretation to buttress decisions. After Karl Llewellyn trashed the use of traditional maxims in a famous 1950 article, however, traditional maxims have been relegated to the ashcan of history. Beginning with Hart and Sacks, however, a number of judges and scholars have developed different sets of new maxims to help in the construction effort. Hart and Sacks, for example, emphasized a principle of “clear statement:” Statutes should not be read to displace basic social understandings unless they contain a clear statement to that effect.

Professor Sunstein has recently developed a comprehensive set of maxims for use in administrative law. Like the “policy of clear statement,” his canons are derived from basic concepts underlying our concept of government and distilled from our long experience

33. *Id.* at 49 (emphasis in original).
34. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 Vand. L. Rev. 395 (1950). Llewellyn observed with great effect that every maxim (e.g., “statutes in derogation of the common law will not be extended by construction”) had a counter-maxim (e.g., “such acts will be liberally construed if their nature is remedial”). See *id.* at 401-06.
35. Hart & Sacks, *supra* note 6, at 1240. Their example: federal criminal laws should not lightly be read to displace state criminal laws.
with the administrative state. The use of these “interpretive norms,” Sunstein argues, “would convert some hard cases into easy ones, by providing principles with which to decide cases that might otherwise be in equipoise.”

These efforts to recognize explicitly what our experience teaches us to be right make good sense, at least if you believe that the legislature is really trying to achieve rational ends. Statutes are adopted with a mind-set that cannot be explicitly written into the document. Unless the contrary is fairly clear, a court should not find that Congress has violated basic societal norms. Thus, the new canons are “exemplars of a reasoning style that begins with the proposition that statutory law is entitled to sympathetic and thus progenitive implementation.” Moreover, by giving a useful nudge to the scales in close cases, maxims properly used can make judicial decision-making easier and more predictable. As we shall see, the Supreme Court recently has expressed its approval of that method.

Not very much of the scholarship on statutory interpretation pays attention to the real world. A recent article by Professors Eskridge and Frickey, however, attempts to deal with the issue as lawyers might. The two authors believe interpretation to be a “dynamic process,” and that it must take into consideration all available evidence. The interpreter must test “various possible interpretations against the multiple criteria of fidelity to the text, historical accuracy, and conformity to contemporary circumstances and values.” Practicing lawyers can identify with this approach. Their arguments are based on all of those considerations; indeed, the astute reader will have noticed that this description of “practical interpretation” matches the description at the start of this Article of statutory interpretation before the academics became interested in the topic. Academic fashion has come full circle. The Supreme Court has not.

36. Sunstein, supra note 18, at 462-503. Some of his examples: statutes should protect the disadvantaged, they should encourage agency accountability, and they should minimize interest group transfers. For a criticism of Sunstein, see Eben Moglen and Richard J. Peirce, Jr., Sunstein’s New Canons: Choosing the Fictions of Statutory Interpretation, 57 U. Chi. L. Rev. 1203 (1990).
37. Sunstein, supra note 18, at 503.
40. Id. at 345.
41. Id. at 352.
III. CURRENT PROBLEMS IN THE SUPREME COURT

Scholars do not write in a vacuum (although it often seems so). Much of the writing has been a direct response either to real issues before the Court or perceived ideological concerns over the Court’s decision-making. This part of the Article, therefore, will look at several current hot topics for debate. The most vexing problems involve legislative history. Two particularly sensitive areas are the Plain Meaning Rule and the significance of legislative silence.

Until the mid-1980’s it could be safely said that the Plain Meaning Rule was dead, at least in the Supreme Court. In 1976, for example, Justice Marshall, writing for an unanimous Court, said:

To the extent that the Court of Appeals excluded reference to the legislative history of the [statute in question] in discerning its meaning, the court was in error. As we have noted before: “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 in ‘superficial examination.’”

No commentator in 1970 would have mentioned the Plain Meaning Rule without putting an adjective (obsolete) in front of the term.

Here, as in so many other places, however, Justice Scalia has changed the game. While still on the circuit bench, he led an assault on the Plain Meaning Rule which achieved some success, and his accession to the Supreme Court accelerated the process. In recent years, a fair number of opinions by different Justices have deliberately stated the Plain Meaning Rule. A recent example is Freytag v. Commissioner, where Justice Blackmun wrote: “When we find the terms of a statute unambiguous, judicial inquiry should be complete except in rare and exceptional circumstances.”

These opinions, to be sure, all refer to a number of other methods of interpreting statutes. Nevertheless, as Professor Schauer has observed, the heart of these opinions is the search for plain meaning.

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42. The Plain Meaning Rule was alive and well, at least in theory, in some state courts. The incantation of the rule usually seemed to be mere ritual, however, as many courts proceeded to discuss whether non-textual material seemed useful. See, e.g., William L. Reynolds II, The Court of Appeals of Maryland: Roles, Work and Performance, 38 Md. L. Rev. 148 (1978).
45. Id. at 2636.
There can be no doubt, however, of the sea change in interpretation. Professor Schauer notes that "the use of 'plain meaning' discourse is hardly limited to its most prominent proponent [e.g., Scalia], but by every member of the Court . . . [even] in the opinions they write when Justice Scalia is on the other side." 46

The Court, or at least Justice Scalia, has been more than willing to proffer justifications for the Plain Meaning Rule. Scalia believes that legislative history is generated primarily by interest groups; as a result, reliance on legislative history increases the power of those groups with respect to Congress. 47 Giving substantial weight to legislative history, at least when the words are reasonably clear and the textual-driven result is not absurd, 48 is necessary in order to prevent the courts from usurping legislative powers. After all, it is the text that Congress has enacted and not the history. 49

Listen to Judge Posner's response to the "tired saw" of the usurpation argument:

[I]nterpretation must begin with the linguistic and cultural competence presupposed by the author of the statute . . . [S]tatutes are purposive utterances and . . . language is a slippery medium in which to encode a purpose. When a court can figure out what Congress probably was driving at and how its goal can be achieved, it is not usurpation it is interpretation in a sense that has been orthodox since Aristotle for the court to complete (not enlarge) the statute by reading it to bring about the end that the legislators would have specified had they thought about it more clearly or used a more perspicuous form of words. 50

Need more be said? 51

Troubling as the Court's resort to plain meaning may be, it is positively refreshing compared to the recent tendency to draw text-like messages from a legislative silence; that is, for the Court to

46. Schauer, supra note 26, at 246.
47. See Sunstein, supra note 18, at 429-30.
49. Id. at 1994 (Scalia, J., concurring in the judgment).
50. Friedrich v. City of Chicago, 888 F.2d 511, 514 (7th Cir. 1989).
51. Professor Schauer has observed that the Court's plain meaning opinions appear in non-controversial [in an ideological sense] and technical cases. He, therefore, sees the Plain Meaning Rule serving a useful "coordinating" function so that the Court can devote its efforts to more difficult matters. Schauer, supra note 26, at 254-55. He may well be right. See also Frederick Schauer, The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw, 45 VAND. L. REV. 715 (1992).
read an omission in the statute as if it codified a negative. An example is the recent case of *Northbrook National Insurance Co. v. Brewer*,\(^{52}\) involving the construction of 28 U.S.C. § 1332(c) which states that in a direct action *against* an insurer, the defendant is deemed a citizen of the state where the insured is a citizen. The statute is silent concerning what happens when the action is brought by an insurer. A plain reading of the statute created an anomaly even the majority recognized. Nevertheless, ignoring policy and common sense,\(^{53}\) the omission of any reference to an insurer as plaintiff led the Court to conclude that the "plain meaning" of § 1332(c) did not include actions with insurers as plaintiffs.\(^{54}\)

The Court has also given controlling effect to an omission in legislative history. In *Chisom v. Roemer*\(^{55}\) the Court was asked to find that the statutory language showed that Congress meant to exclude certain claims from an act. Justice Stevens responded: "We reject that construction because we are convinced that if Congress had such an intent, Congress would have made it explicit in the statute, or at least some of the Members would have identified it or mentioned it . . . ."\(^{56}\) Stevens added in a footnote: "Congress' silence in this regard can be likened to the dog that did not bark."\(^{57}\)

Dissenting, Justice Scalia was outraged at a case turning on a gap in legislative history, especially when that gap was given preference over what he perceived to be the plain meaning of the text. He, too, used the sleeping dog to illustrate his story:

> As the Court colorfully puts it, if the dog of legislative history has not barked nothing of great significance can have transpired . . . [W]e have forcefully and explicitly rejected the Conan Doyle approach to statutory construction in the

\(^{52}\) 493 U.S. 6 (1989).


\(^{54}\) Judge Easterbrook, another plain meaning fan, goes so far as to invoke the concept in contract cases. See Dennis M. Patterson, *A Fable From the Seventh Circuit: Frank Easterbrook on Good Faith*, 76 Iowa L. Rev. 503, 524 (1991).


\(^{56}\) *Id.* at 2364.

\(^{57}\) *Id.* at 2364 n.23. The reference, of course, is to the story "Silver Blaze" by the British Holmes:

"The significant thing is what the dog did in the night."

"But the dog did nothing."

"That is the significant thing."
past . . . We are here to apply the statute, not legislative history, and certainly not the absence of legislative history. Statutes are the law though sleeping dogs lie. 58

Both of these cases are silly, of course. Silence or sleeping dogs can be relevant, but only if a good reason can be advanced for finding significance in the sounds of silence. Neither opinion advanced one.

The people in Washington have also noticed the scholarly writing advocating the use of new canons of construction in interpreting federal statutes. The most prominent example involves the Eleventh Amendment. 59 Congress, the Court has held, has power to impose monetary damages on states if the statute "clearly evinces an intent to hold states liable in damages in federal court." 60 Similarly, in Pennhurst State School & Hospital v. Halderman, 61 the Court held that Congress must "speak unambiguously" if it wished to grant various legal rights as a condition to the receipt of federal money. The Court explained: "By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." 62

A final example is Justice O'Connor's opinion in Gregory v. Ashcroft, 63 concerning whether the Age Discrimination in Employment Act requires state judges to retire at age 70. O'Connor found the statute ambiguous on that point, and, therefore, she invoked the "plain statement" rule as a tie breaker. That rule, she wrote, recognizes that the states "retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." 64 Thus, if Congress wishes to "interfere" with the states' "sovereign powers" it must be explicit.

These canons of construction, or presumptions concerning Congressional purpose, are very useful in close cases. They remove the

58. Chisom, 111 S. Ct. at 2370.
59. Even more prominent is the Court's wholesale change of heart in the area of implied causes of action. Compare the restrictive view of Touche Ross & Co. v. Redington, 442 U.S. 560 (1979), with the "if-it-feels-good-do-it" attitude of J.I. Case Co. v. Borak, 377 U.S. 426 (1964).
62. Id. at 17. See Sunstein, supra note 18, at 500-02 for a discussion. See also EEOC v. Arabian American Oil Co., 111 S. Ct. 1227, 1230 (1991) (presumption against extra-territorial application of domestic statutes can only be overcome by a "clearly expressed intent" to the contrary).
64. Id. at 2401.
ambiguity inherent in resolving such cases by tilting the scales decisively in one direction. No doubt the tilt can change with the ideological balance of the Court. Nevertheless, the "clear statement" guideline provides an easily used and practical method of interpreting statutes.

IV. THE CONSTITUTION AND INTERPRETATION

The hornbooks tell us that the Congress makes the law and the President executes it. What they don't tell us is what "law" is. This omission is surprising, for some theories of interpretation, at least, turn on how "law" is defined. Justice Scalia, for example, bases his fondness for textualism on the constitutional notion that only legislatures can make law, a term he circularly limits to the text of the statute. This is not simply an academic exercise, for the definition of law has important practical consequences in the statutory interpretation game. Hart and Sacks, as one article points out, are among the very few writers in this area to attempt a definition of law.

Better philosophers than I have attempted to define law. I do not believe, however, that an understanding of statutory interpretation requires a doctorate in philosophy (if it does, we are all in serious trouble). Nor do I think Justice Scalia is on the right track in focusing on a constitutional concept of what is law. The reason is simple: I know of no constitutional provision or even statute which defines "law." For present purposes, however, law is easy to define. At least to those of us trained in the common law (and who also practice


66. Unless the statute is hopelessly ambiguous, to expand a bit, Scalia believes that if controlling (or significant) effect is given to legislative history, law is not being made by the legislature, but by the individual legislators (or even staffers). See, e.g., Greer v. Bock Laundry Mach. Co., 490 U.S. 504, 527-28 (Scalia, J., concurring).

67. Eskridge & Frickey, Statutory Interpretation, supra note 5, at 334.

68. It wouldn't be hard to find them.

69. Many states and the federal government have so-called "dictionary acts" (e.g., 1 U.S.C. § 1 (1988)) which define commonly used statutory terms such as "person." These are rarely consulted. A few states actually have legislation which attempts to tell courts how to go about the business of interpretation. These also are routinely ignored, and courts, perhaps not surprisingly, have even found them unconstitutional. See Reynolds, supra note 42, at 162-63.
law, that is, those who must give real answers to real problems), another way of saying this is to expand on Holmes' notion that law is merely a prediction of what judges will do. That statement is not simply empty positivist rhetoric. A statute is merely words until lawyers in practice (or judges in court) translate the words into real life. As one scholar wrote recently: "Law is a process of decision making by authoritative decision makers, and the results of that process are the only 'law' in any pragmatic sense."

V. A LAWYER'S APPROACH

Theory is fine, of course, and an academic certainly should not disparage it, but any method of statutory interpretation must recognize that most interpretative decisions are not made by the Supreme Court or even by state appellate courts. Rather, they are made by lawyers and by trial judges. Most statutes are applied by lawyers advising clients. All of the following questions require serious efforts to interpret a statute: May I deduct that loss? Was it a loss? In what place must I register my security interest in your car? Can an individual file for a Chapter 7 bankruptcy? Will a merger between those companies violate the Clayton Act? (and so on). When disputes do arise, most are settled by lawyers and their clients without any legal action. The vast majority of disputes resolved by the judiciary never leave the trial court.

The relevance of this for interpretive purposes cannot be overstated. Whatever theory may suggest, an effective method of construing statutes must consider the needs of the practicing bar and of the trial courts.

70. To plagiarize from a current popular ad.
71. Scalia would not necessarily be confounded by this argument. He might contend that, at the time the Constitution was adopted, the meaning of the statute was limited to its express language and that the framers understood that the Constitution would be interpreted accordingly. As far as I know, however, he has never made such an argument, and, indeed, it would be a difficult one to make because the Mischief Rule referred to supra at note 8 was still very much in vogue in England at the time the Constitution was adopted. See Eskridge, supra note 28, at 408 n.267.
73. Harold G. Maier, Baseball and Chicken Salad: A Realistic Look at Choice of Law, 44 Vand. L. Rev. 827, 841 (1991). Maier was writing about choice of law, an area that has seen more than its fair share of mystifying metaphysics. Maier based his definition on the works of a great conflicts scholar, Walter Wheeler Cook. See id. at n.85.
74. This, of course, has been merely a hypothetical question for over a decade.
Think about what lawyers turn to to find out what the law is. The first place of inquiry for most lawyers on most problems is a treatise: Collier for bankruptcy matters, White and Summers for the U.C.C., or Loss and Seligman for securities. Now think about what those treatises do that makes them so useful: They place the law in context. Those treatises analyze the law in terms of text, legislative history, and precedent and they apply that analysis to problems that exist today.

The standard treatises today, in other words, are chock-full of examples of "nautilism" or "practical" interpretation. Or to put it differently, the community that must understand the statute derives that understanding from certain common sources. The wise interpreter cannot ignore them.

Listen to Judge Posner's description of the Sherman Act:

Lawyers and judges do not begin their analyses of a challenged competitive practice by comparing the practice with the language of the act and then, only if they have satisfied themselves that there is some relationship, proceed to analyze the case law. They start with the case law and may never return to the statutory language . . . . Even in dealing with statutes that have not generated a body of case law a judge usually begins not with the language of the statute but with some conception of its subject matter and the likely purpose . . . .

That description certainly rings true.

VI. CONCLUSION

Statutory interpretation is not a game or an arid academic exercise. Appellate judges must be aware of how lawyers and trial judges reach decisions. Interpretive decisions have serious consequences for real people. Any method of interpreting legislation must recognize that fact. Interpretation, therefore, must be both predictable and readily available.

75. Legislative history is useful not just to give the context leading to the adoption of the law, but also to show how it works in relation to other laws. Tax legislation is the best known exemplar. See generally Bradford L. Ferguson, et al., Reexamining the Nature and Role of Tax Legislative History in Light of the Changing Realities of the Process, 67 Taxes 804 (1989). Justice Scalia, however, objected recently to reliance by the majority on a statement on a tax matter made in debate in Congress. Begier v. IRS, 496 U.S. 53, 67-70 (1990) (Scalia, J., concurring).

76. Posner, supra note 11, at 278.