Daniel A. Farber
and Philip P. Frickey

LAW AND PUBLIC CHOICE

A Critical Introduction

FOUR

Statutory Interpretation

The Supreme Court is best known as a constitutional tribunal. But the Court has another crucial function. Important statutes like the Sherman Antitrust Act or the 1964 Civil Rights Act do not interpret themselves. The Court frequently must decide the tough questions arising under these statutes, often setting national policy on issues such as corporate mergers or affirmative action. As the role of statutes in American law has grown, statutory interpretation has become an increasingly crucial part of the Court's workload. Today, federal statutes protect the environment, regulate safety in the workplace, prohibit employment discrimination, and ban insider trading—and the courts have played a key role in implementing each of these statutes. And yet, statutory interpretation has never received scholarly (let alone, public) attention equal to its practical importance. Instead, legal scholars typically have focused on constitutional law or nonstatutory areas like tort law.

To a nonlawyer, statutory interpretation may seem like a pretty easy exercise: just read the statute and do what it says. Yet interpreting a statute is often a dauntingly difficult task. The language of the applicable section of the statute may simply be unclear, or worse yet, we may be unable to determine just which provision is the most relevant to the issue at hand. The legislative history may give us clues about the intentions of the legislators, but these clues may be unclear if not misleading. The general purpose of the statute may suggest an answer different than a literal reading of the language, which itself may not jibe with the legislative history. Moreover, at least some interpretations suggested by these sources may seem absurd or obsolescent in light of the broader legal landscape.

Trying to decide on the best interpretation of the statute in light of all these considerations calls for the highest level of judicial ability. No general theory of interpretation can hope to make statutory interpretation an easy job, but an interpretative theory might at least help determine just what considerations are relevant to interpretation and give some guidance about their relative weights. For many years, however, legal scholars wrote about statutory interpretation only in the context of specific statutes, without making serious consideration of the more general issues.

Public choice has helped revitalize scholarship about statutory interpreta-

tion.[1] Justice Antonin Scalia and Judge Frank Easterbrook have led a vigorous campaign against the conventional method of interpreting statutes. Traditionally, courts have seen statutory interpretation largely as a search for the legislature's intent. To find out what the legislature intended, judges have considered both a statute's language and its legislative history—a legal term that encompasses hearings, the reports of congressional committees, and floor debates.[2] Scalia, Easterbrook, and other pubic choice scholars have argued that the whole idea of legislative intent should be scrapped.

On the whole, we believe these scholars have been too impatient with conventional legal doctrines. We do think, however, that public choice theory can illuminate the task of statutory interpretation. In the first half of this chapter, we will critique the attacks on existing judicial methods. We will then explore some more promising applications of public choice theory.

I. Legislative Intent

Justice Antonin Scalia and Judge Frank Easterbrook have led the assault on the concept and utility of legislative intent. We will present a composite overview of their major lines of argument rather than exploring their individual positions in detail.[3]

1. Much of this recent scholarship is collected in W. ESKRIDGE & P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY ch. 7 (1988).

2. For a historical overview of methods of statutory interpretation from Blackstone to the present, see Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799 (1985).

3. In presenting their position, we have relied upon Pittston Coal Group v. Sebben, 109 S. Ct. 414 (1988) (Scalia, J.); Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp., 108 S. Ct. 1350 (1988) (Scalia, J.); Sable Communications v. FCC, 109 S. Ct. 2829, 2840 (1989) (Scalia, J., concurring); Jett v. Dallas Independent School District, 109 S. Ct. 2702, 2724 (1989) (Scalia, J., concurring in part and concurring in the judgment); Green v. Bock Laundry Machine Co., 109 S. Ct. 1981, 1994–95 (1989) (Scalia, J., concurring in the judgment); United States v. Stuart, 109 S. Ct. 1183, 1193–97 (1989) (Scalia, J., concurring in the judgment); Blanchard v. Bergeron, 109 S. Ct. 939, 946–47 (1989) (Scalia, J., concurring in part and concurring in the judgment); United States v. Taylor, 108 S. Ct. 2413, 2423–24 (1988) (Scalia, J., concurring in part); INS v. Cardoza-Fonseca, 480 U.S. 421, 452–53 (1987) (Scalia, J., concurring in the judgment); Citicorp Indus. Credit, Inc. v. Brock, 483 U.S. 27, 40 (1987) (Scalia, J., concurring); Hirschey v. Federal Energy Regulatory Commission, 777 F.2d 1, 7–8 (1985) (Scalia, J., concurring); Address by Judge Antonin Scalia on Use of Legislative History (delivered at various law schools in 1985–86), discussed in Farber & Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 442–60 (1988); JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 170–75 (R. Katzmann ed. 1988) (summarizing comments by Justice Scalia); *Hearings on the Nomination of Judge Antonin Scalia, To Be Associate Justice of the Supreme Court of the United States Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 65–68, 74, 75, 105–7 (1986); Premier Elect. Const. Co. v. NECA, Inc., 814 F.2d 358, 365 (7th Cir. 1987) (Easterbrook, J.); Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y. 59 (1988); Easterbrook, *Statutes' Domain*, 50 U.

If one were writing on a clean slate, Scalia and Easterbrook suggest, the traditional focus on the intentions of the legislature should be rejected. Instead, they say, interpretation should be based upon the meaning of the statutory words to a normal reader of the English language.

To begin with, these judges ask, how can legislative intent be found? How can we know the views of hundreds of legislators? How likely is it that legislators familiarize themselves with (and correct errors in) legislative history, which is often produced by congressional staff rather than legislators? Isn't reliance on legislative history an open invitation to plant strategic remarks designed to skew interpretation of the statute? Are judges institutionally well situated and skilled enough to make these kinds of inquiries?

Moreover, the argument continues, even if legislative intent can sometimes be discerned, it should carry no interpretive weight. Ours is a government of laws, not of persons, so law should be based on the objective import of statutory language rather than the unenacted intent of legislators. Once enacted, a statute becomes the domain of the executive officers and judges charged with its enforcement and application, rather than remaining somehow tethered to the unenacted intentions of legislators. Furthermore, giving effect to unenacted legislative intentions undermines the constitutional requirement that each bill pass both Houses. The difficult process of amending a bill to change its meaning should not be undermined by allowing manufactured legislative history to serve as a functional equivalent. Finally, judicial resort to legislative history also undermines the veto power of the President. How could a President become aware of, evaluate, and decide whether to veto a congressional intention that isn't expressed in statutory language? Only confusion, then, can be expected if judges stray outside the "four corners" of the document in their search for statutory meaning.

Not surprisingly, in their judicial opinions, Scalia and Easterbrook have been less radical than in their scholarly commentary. Their opinions do stress, however, that "clear" statutory language should not be impeached by legislative history. For example, in a case in which he agreed with the majority's construction of a statute but refused to endorse its use of legislative history, Justice Scalia wrote: "Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent."[4]

CHI. L. REV. 533 (1983). In a recent opinion, Judge Easterbrook seems to have softened his position somewhat, by conceding that legislative history can be used to explain ambiguous language or even to show "that a text 'plain' at first reading has a strikingly different meaning." *In re* Sinclair, 870 F.2d 1340, 1344–45 (7th Cir. 1989). For more discussion of the Scalia/Easterbrook approach, see Eskridge, *The New Textualism,* 37 UCLA L. REV. 621 (1990).

4. INS v. Cardoza-Fonseca, 480 U.S. 421, 452–53 (1987) (Scalia, J., concurring in the judgment). More recently, Justice Scalia stated: "The text is so unambiguous on these points that it

The Scalia-Easterbrook argument is based on a dichotomy between clear statutory language and "unenacted" (and therefore legally impotent) legislative intent. Most judges have been less doctrinaire on this score. In numerous cases, courts have discarded the most "natural" reading of statutory language, often because of a statute's historical setting and legislative history.[5] Even seemingly crystal-clear statutory language does not always prevail. For example, courts do not hesitate to correct inadvertent errors in statutes, such as omitted words.[6] The are also reluctant to follow statutory language when the result would be absurd or contrary to a statute's obvious purpose.[7]

---

must be assumed that what the Members of the House and the Senators thought they were voting for, and what the President thought he was approving when he signed the bill, was what the text plainly said, rather than what a few Representatives, or even a Committee Report, said it said. Where we are not prepared to be governed by what the legislative history says—to take, as it were, the bad with the good—we should not look at legislative history at all. This text is eminently clear, and we should leave it at that.

"It should not be thought that, simply because adverting to the legislative history produces the same result we would reach anyway, no harm is done. By perpetuating the view that legislative history *can* alter the meaning of even a clear statutory provision, we produce a legal culture in which the following statement could be made—taken from a portion of the floor debate alluded to in the Court's opinion: 'Mr. DENNIS . . . . "I have an amendment here in my hand which could be offered, but if we can make up some legislative history which would do the same thing, I am willing to do it." ' 120 CONG. REC. 41795 (1974). We should not make the equivalency between making legislative history and making an amendment so plausible. It should not be possible, or at least should not be easy, to be sure of obtaining a particular result in this Court without making the result apparent on the face of the bill which both Houses consider and vote upon, which the President approves, and which, if it becomes law, the people must obey. I think we have an obligation to conduct our exegesis in a fashion which fosters that democratic process." United States v. Taylor, 108 S. Ct. 2413, 2424 (1988) (Scalia, J., concurring in part). *See also* Citicorp Indus. Credit, Inc. v. Brock, 483 U.S. 27, 40 (1987) (Scalia, J., concurring) (plain meaning of statute controls notwithstanding any legislative purpose inconsistent with it). A related idea, which Justice Scalia has worked into an opinion for a majority of the Supreme Court, is that statutory language may operate more broadly or narrowly than matters focused upon in the legislative history. *See* Pittston Coal Group v. Sebben, 109 S. Ct. 414, 420–21 (1988) ("It is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history"). Justice Scalia has also written a majority opinion dealing with something of a converse situation, in which comments in the legislative history do not link up to any provision in the bill. See Puerto Rico Department of Consumer Affairs v. ISLA Petroleum Corp., 485 U.S. 495, 501 (1988) ("While we have frequently said that pre-emption analysis requires ascertaining congressional intent, . . . we have never meant that to signify congressional intent in a vacuum, unrelated to the giving of meaning to an enacted statutory text. . . . [U]nenacted approvals, beliefs, and desires are not laws").

5. Church of the Holy Trinity v. United States, 143 U.S. 457 (1892), is the case most frequently cited for this proposition.

6. For a recent example, see United States v. Colon-Ortiz, 866 F.2d 6, 10–11 (1st Cir. 1989).

7. The Supreme Court waffles on this point. *Compare, e.g.*, Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986) *and* Church of the Holy Trinity v. United States, 143 U.S. 457 (1892) (both deviating from plain meaning of statutory language to reach an interpretation more

When statutory language is ambiguous, the Scalia-Easterbrook arguments misfire. The idea of "government by laws" is irrelevant, because the judge's problem is precisely that she doesn't know what the "laws" require. Similarly, those who enact statutes are on notice that more than one interpretation is possible. Since legislative history is available to Congress and the President, they can intelligently appraise a bill's legal effects when casting their votes. Hence, the Constitution's procedural requirements are satisfied.[8]

The Scalia-Easterbrook argument essentially assumes that statutes have a legal meaning *before* the process of statutory interpretation. This makes anything "added" in the process of construction an illicit change in the preexisting meaning, as if the legislative history were being used to amend the statutory language. But an ambiguous statute lacks any clear preexisting meaning. In any legal setting in which its meaning becomes relevant, that meaning is necessarily the result of the interpretative process. As Judge Posner has said, "We cannot escape interpretation."[9]

Public choice, with its emphasis on the purposeful nature of legislators' conduct, also suggests that the "four corners" rule would have undesirable practical consequences. Today, Congress can legislate with confidence that courts will attend to the legislative intent. If the Scalia-Easterbrook approach is adopted, Congress can be expected to respond to a less hospitable judicial environment, with several resulting social costs.

A four corners rule raises the costs of drafting legislation by increasing the penalties for ambiguities. Congress will have to invest additional resources in drafting to eliminate some of these ambiguities. Realistically, however, even careful drafting cannot eliminate all ambiguities. As anyone who has ever done any drafting can attest, perfect clarity is a chimera. Since some ambiguity is inevitable, Congress will then be forced to devote additional

consistent with apparent statutory purpose and also more harmonious with overall legal landscape) *with* United States v. Locke, 471 U.S. 84 (1985) *and* Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982) (refusing to deviate from plain meaning). The issue is discussed at length in Public Citizen v. United States Dept. of Justice, 109 S. Ct. 2558 (1989). An important concurring opinion in *Public Citizen* argues for a narrower application of the "absurd result" rule. *See id.* at 2574–75 (Kennedy, J., concurring). *See generally* Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982).

8. Moreover, consulting legislative history does not improperly expand the power of legislators at the expense of judges and administrators, as Scalia and Easterbrook contend. It is true that courts and agencies rather than legislators are in charge of implementing the statute. Their practices must be consistent, however, with the meaning of the statute, and it is precisely that meaning which is at issue.

9. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 193 (1986–87). Judge Posner's views are explained more fully in chapters 9 and 10 of a forthcoming book, THE PROBLEMS OF JURISPRUDENCE.

resources to monitoring administrative agencies and pressuring them to interpret ambiguous statutes in conformity with legislative intent.[10] Because courts will more often contravene legislative intent, Congress will be required to pass more corrective laws. Finally, by increasing the need for detailed, unambiguous drafting, as well as the risk that legislation will be applied in unintended ways, a four corners rule would tend to discourage major reform legislation. This is not necessarily desirable even from the view of conservatives, since one effect would be to freeze current regulatory schemes in place.

The four corners approach suffers from another flaw. It assumes that statutory language can be interpreted in a vacuum. Often, however, statutory language is maddeningly elusive. As Justice Scalia admits, legislative history and other indicia of legislative intent can provide a simple way of answering otherwise intractable questions of statutory construction.[11]

Courts long ago realized the need to resolve ambiguous contract language with evidence about how the agreement was drafted.[12] If contract law is to serve the practical economic needs of society, courts cannot afford to be too rigid in interpreting contracts. Similarly, the Scalia-Easterbrook approach to statutory interpretation would only serve to hinder the practical business of government.

Even apart from its practical flaws, the four corners rule should be rejected for more fundamental reasons. As Judge Easterbrook has said on other occasions, in construing statutes a large part of the judicial role is to act as "honest agents of the political branches," engaged in "faithfully executing decisions made by others."[13] Literalism is not an attractive strategy for a faithful agent. Consider a staff member who receives an ambiguous presidential order. The staff member can adopt two methods of interpretation. The first is to take into account what the President said at lunch about what he had in mind. The second is to pick the interpretation of the language that would seem most plausible to the "reasonable citizen" who knew nothing about the President's actual desires. An honest and faithful agent of the Pres-

10. *See* R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 292–93 (1985). Justice Scalia points out that the four corners rule is in use in England. *See* Scalia speech, *supra* note 3, at 1–2. The costs discussed in the text are much lower in a parliamentary system, particularly an effectively unicameral one with strict party discipline. For instance, passing corrective legislation is much easier.

11. Scalia speech, *supra* note 3, at 18. Justice Scalia also points out that extensive research into legislative history can be time-consuming and expensive. *Id.* at 14–15. We agree that this is a problem. Our response would be to deemphasize the use of materials other than committee reports, which are much more accessible and compact than other sources of legislative history.

12. *See* E. FARNSWORTH, CONTRACTS § 7.12 (1982).

13. Easterbrook, *Foreword: The Supreme Court and the Economic System*, 98 HARV. L. REV. 4, 60 (1984).

ident surely would not apply Scalia's four corners approach. Indeed, this approach would be far more appealing to an obstructive bureaucrat eager to sabotage a Presidential program than to a loyal staff member.

This example also suggests another objection to the four corners rule. The President's legitimacy derives from his election by the people. If a staff member knowingly interprets an ambiguous directive contrary to the President's actual intent, then the action he takes does not truly stem from the President's choice, and hence cannot claim legitimacy as a decision by the people's delegate. The unelected staff member is simply taking advantage of poor drafting to implement a policy that is only fortuitously related to any actual decision by the President. Thus, knowingly ignoring the intent of the elected drafter strains the chain of legitimacy from the electorate to the drafter and then to the implementor. Similarly, when a court ignores congressional intent in implementing a statute, it weakens the legitimacy of the statute by detaching the implementation from the actual purposes of the electorate's representatives.[14]

What, then, of unambiguous statutory language? Scalia contends that if legislative intent were crucial, we would allow it to override even clear statutory language. While overriding clear language is not unheard of, it is certainly exceptional.[15] Courts generally won't use legislative history to trump statutory language that seems plain on its face, at least when the plain meaning is not absurd. This approach is consistent with regard for legislative intent. Because unambiguous language is very strong evidence of intent, it should normally outweigh less reliable evidence such as legislative history.[16] In the long run, if courts were to make a frequent practice of going against clear statutory language, Congress would lose its best tool for communicating its intentions. Thus, a presumptive "plain language" rule, which limits the use of legislative history when the statutory language is clear, can actually serve to implement legislative intent. Similarly, in contract law, judges seek to implement the intentions of the parties, but judges are also reluctant to consider oral testimony about what the parties intended when the contract language is clear.[17] In both fields of law, a "plain meaning" approach sometimes frustrates the drafter's intent, but in the long run may implement that intent more often and more efficiently.

14. *See* Smith, *Law Without Mind*, 88 MICH. L. REV. 104 (1989).

15. On the current status of the "plain meaning" rule, see Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 199 (1982); Note, *supra* note 7.

16. *See* Kay, *Original Intentions, Standard Meanings, and the Legal Character of the Constitution*, 6 CONST. COMM. 39, 45–47 (1989).

17. For an informative discussion of this area of contract law, see Goetz & Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CALIF. L. REV. 261 (1985).

Since legislatures have many members, they may sometimes lack a collective preference even regarding issues which have been directly considered. As we saw in chapter 2, this may happen with some frequency, although the incoherence of legislative preferences should not be exaggerated. Moreover, the issue before the court may not even have been foreseen by the legislators. Thus it is a mistake to make a shibboleth of legislative intent. But where an ascertainable legislative intention does exist, it should not be ignored.[18]

II. Legislative History

If legislative intent is important, how is it to be found? The language of the statute is obviously the starting point. Another time-honored source of legislative intent is the legislative history of the statute.[19] Statements made in the official committee reports on a bill, or by the sponsor of the bill during debates, are given particular weight by the courts.

Justice Scalia has roundly attacked the routine judicial consideration of legislative history.[20] His assault on legislative history is premised on a jaundiced view of its creation. He portrays legislative history as the product of legislators at their worst—promoting private interest deals, or strategically posturing to mislead judges, or abdicating all responsibility to their unelected staffs (who presumably either slant legislative history in their own self-interest or randomly run amok). The relationship between this jaundiced vision of the legislative process and the assumptions of public choice theory is obvious.

The Scalia attack began in *Hirschey v. FERC*,[21] which involved a federal statute governing the payment of attorney's fees by the government. When other portions of the statute were changed, the House committee report noted that courts disagreed about the interpretation of certain statutory language. The committee report then endorsed one of the competing

18. By legislative intent, we mean the collective purpose revealed by the public record. Sometimes these public statements may screen less creditable desires to aid special interests. We agree with Jonathan Macey that courts should attend to the public purpose, not the legislators' hidden agenda. *See* Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

19. *See, e.g.*, W. ESKRIDGE & P. FRICKEY, *supra* note 1, at 709–60. In recent manuscripts, William Eskridge and Nicholas Zeppos explore the proper use of legislative history in depth. See Eskridge, *Legislative History Values*, 66 CHI.-KENT L. REV. •• (1990) (Forthcoming); Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295 (1990).

20. He has similarly attacked the use of Senate confirmation materials in construing treaties. *See* United States v. Stuart, 109 S. Ct. 647 (1989). For a powerful attack on Scalia's misuse of precedent in this regard, *see* Vagts, *Senate Materials and Treaty Interpretation: Some Research Hints for the Supreme Court*, 83 AM. J. INT'L LAW 546 (1989).

21. 777 F.2d 1 (D.C. Cir. 1985).

interpretations of this language (which was reenacted without change). Then-Judge Scalia was unimpressed:

> I frankly doubt that it is ever reasonable to assume that the details, as opposed to the broad outlines of purpose, set forth in a committee report come to the attention of, much less are approved by, the house which enacts the committee's bill. And I think it time for courts to become concerned about the fact that routine deference to the detail of committee reports, and the predictable expansion in that detail which routine deference has produced, are converting a system of judicial construction into a system of committee-staff prescription.[22]

This is a rather stark judicial impeachment of the legislative process. Scalia was in effect asserting that legislators have abdicated important responsibilities to their staffs—who routinely connive to subvert the judicial function by planting their own political desires into committee reports, hoping that their distortions will blossom later in judicial opinions.

To support these assertions, Scalia attached a footnote presenting an anecdote from the Senate floor.[23] This footnote contains the *only* evidence Scalia has ever given for his position about "committee-staff prescription." From his footnote, it would appear that Senator Dole, the committee chair who was managing floor consideration of a tax bill, made damaging admissions under sharp fire from Senator Armstrong: that Dole had not even read the entire committee report, much less written any of it; that the report was prepared wholly by staff; and that senators, including committee members, had little opportunity to object to the report's contents. From this footnote, it would appear that a serious breakdown of legislative responsibility had occurred.

The exchange between Armstrong and Dole was actually far more benign than Scalia's presentation suggests. Indeed, what Scalia portrayed as a gross malfunction of the legislative process turns out to have been, in Senator Armstrong's own evaluation, an admirable performance. The entirety of the colloquy demonstrates that even in the context of a complex tax bill, the committee reports were prepared responsibly and with careful attention to the views of the committee members. For example, after replying affirmatively to Armstrong's question about whether the committee report should guide interpretation of the statute, Dole said that interpretation should also be guided by the floor debate on certain compliance provisions. (Thus, Dole, Armstrong, and everyone else understood that senators had other methods of creating legislative history, and of decreasing the authoritativeness of a committee report.) After reporting that he had "worked

22. *Id.* at 8 (Scalia, J., concurring) (footnote omitted).
23. *Id.* at 7 n.1.

carefully with the staff as they worked" on the report, Dole continued: "As I recall, during the July 4 recess week there were about five different working groups of staff from both parties, the joint committee, and the Treasury working on different provisions." The committee report was based on the legislative hearings (including statements at the hearings by the legislators), was prepared with the assistance of legislators, and was reviewed by members of the committee. Needless to say, these remarks rebut the suggestion that low-level, irresponsible staff concocted the report.

The Armstrong-Dole colloquy does confirm that staff draft committee reports, that legislators do not formally ratify language in reports, and that at least one senator hoped courts would not treat language in reports as equivalent to statutory language. The colloquy provides no support, however, for Scalia's claim of "committee-staff prescription."

Scalia's views on legislative history have received mixed reactions. During his confirmation hearing for the Supreme Court, Senator Charles Grassley criticized the *Hirschey* footnote, Senator Paul Simon seemed dubious, while Senator Howell Hefflin seemed somewhat supportive.[24] More enthusiastic have been several other Reagan appointees to the federal appellate bench, such as Judges James Buckley and Kenneth Starr.[25] Judge Alex Kozinski has embraced the Scalia viewpoint with particular enthusiasm:

> The fact of the matter is that legislative history can be cited to support almost any proposition, and frequently is. . . . Reports are usually written by staff or lobbyists, not legislators; few if any legislators read the reports; they are not voted on by the committee whose views they supposedly represent, much less by the full Senate or House of Representatives; they cannot be amended or modified on the floor by legislators who may disagree with the

24. *See Hearings on the Nomination of Judge Antonin Scalia, supra* note 3, at 65–68, 74, 75, 105–7.

25. For Buckley's views, see Overseas Education Assoc. v. FLRA, 876 F.2d 960, 974–76 (D.C. Cir. 1989) (Buckley, J., joined by Starr, J., concurring); International Brotherhood of Electrical Workers v. NLRB, 814 F.2d 697, 715–20 (D.C. Cir. 1987) (Buckley, J., concurring). Judge Starr's views are found in Ayuda, Inc. v. Attorney General, 848 F.2d 1297, 1299 & n.7 (D.C. Cir. 1988); American Mining Congress v. U.S. EPA, 824 F.2d 1177, 1190–92 (D.C. Cir. 1987); Natural Resources Defense Council v. EPA, 822 F.2d 104, 113 (D.C. Cir. 1987); Federal Election Comm'n v. Rose, 806 F.2d 1081, 1090 (D.C. Cir. 1986); International Brotherhood of Teamsters v. ICC, 801 F.2d 1423, 1428 n.4 (D.C. Cir. 1986); Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371. In American Civil Liberties Union v. FCC, 823 F.2d 1554 (D.C. Cir. 1987), Judge Starr stated that "[w]e in the judiciary have become shamelessly profligate and unthinking in our use of legislative history." *Id.* at 1583 (Starr, J., dissenting in part). For instances in which federal judges appointed by other presidents have remarked favorably upon at least some of the elements of the Scalia approach, see International Brotherhood of Electrical Workers v. NLRB, 814 F.2d 697, 712–13 (D.C. Cir. 1987); Abourezk v. Reagan, 785 F.2d 1043, 1054 n.1 (D.C. Cir. 1986); Riddle v. Secretary of HHS, 817 F.2d 1238, 1247–48 (6th Cir. 1987) (Engel, J., dissenting).

> views expressed therein. Committee reports that contradict statutory language or purport to explicate the meaning or applicability of particular statutory provisions can short-circuit the legislative process, leading to results never approved by Congress or the President. Of course, all this goes doubly for floor statements by individual legislators.[26]

Scalia himself, now as a Justice, has forcefully expressed continued skepticism about legislative history.[27]

In our view, Justice Scalia and his followers have indulged in some doubtful factual assumptions. For example, Judge Kozinski's statement that "few if any legislators read the reports" is mere unsupported assertion, if not flatly incorrect. To the contrary, it may well be that legislators outside the committee and their staffs primarily focus on the report, not the bill itself.[28] Moreover, because legislation today often involves numerous conflicting interest groups,[29] the possibility of "pulling a fast one" in the legislative history is somewhat remote. What one group smuggles into the history, other groups have an incentive to find and counter. Thus, competition between interest groups helps keep the system honest.

The critique that staff rather than legislators draft committee reports rings a bit hollow when coming from the federal judiciary, where law clerks routinely draft opinions. In both institutions, the important question is whether public officials have abdicated their decisionmaking responsibilities to staff. When Scalia's own example of committee report abuse is placed in proper context, it does not support his fear of "committee-staff prescription." No doubt, congressional staff sometimes exceed their appropriate role.[30] What

26. Wallace v. Christensen, 802 F.2d 1539, 1559–60 (9th Cir. 1986) (Kozinski, J., concurring in the judgment). In addition, see Kozinski, *Hunt for Laws' 'True' Meaning Subverts Justice*, Wall St. J., Jan. 31, 1989, at A14.

27. *See* cases cited in note 3, *supra*.

28. For example, Eric Redman, a former Senate aide, noted that committee reports provide information to courts and the executive branch about legislative intent. He then stated that "[w]ithin the Senate itself, reports are important chiefly because many Senators read nothing else before deciding how to vote on a particular bill. A good report, therefore, does more than explain—it also persuades." E. REDMAN, THE DANCE OF LEGISLATION 140 (1973). For additional background on the role of committee reports in Congress, see JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY, *supra* note 3, at 106–8, 172–75; W. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 104–6, 269–71 (3d ed. 1989). When administrative agencies interpret statutes, there may be additional reasons to encourage them to rely on committee reports. *See* Strauss, *Legislative Theory and the Rule of Law*, 89 COLUM. L. REV. 427, 438 (1989).

29. *See* M. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 122 (2d ed. 1989).

30. *See generally* M. MALBIN, UNELECTED REPRESENTATIVES: CONGRESSIONAL STAFF AND THE FUTURE OF REPRESENTATIVE GOVERNMENT (1980) (discussing tension between democratic theory and reality of large staff role). For an overview of political science studies about

that role should be is, however, surely the primary concern of the legislative rather than the judicial branch. In short, Scalia and others have not demonstrated pervasive abuse of legislative history by legislators or congressional staff. They have also failed to show that change in judicial use of legislative history will necessarily "reform" congressional processes.

Admittedly, legislative history does require careful handling. Legislative history is not some simple transmission of legislative intent, but this is hardly news to legislation scholars. The real problem is how to sort the wheat from the chaff. This problem has received serious attention from advocates of more traditional approaches to legislative interpretation.

In his classic writings about "the legal process," the late Henry Hart developed a thoughtful "tentative restatement of the law" of legislative history usage. He suggested that courts carefully evaluate the contextual relevance, competence, and probative value of legislative history.[31] The probative value of the legislative history depends upon how much light it sheds upon the overall purposes of the statute.[32] Thus, "[e]vidence in the internal legislative history of a statute concerning a specific application envisaged by individual legislators should be given weight only to the extent that the application envisaged fits rationally with other indicia of general purpose."[33] According to Professor Hart, this approach "should go a long way to take care of the manipulation problem."[34]

Judge Henry Friendly, who is commonly considered to have been one of the ablest federal judges ever to sit, took a similar position. He contended that if the committee reports are clear and consistent with the statutory language, a court "does pretty well to read the statute to mean what the few legislators having the greatest concern with it [*i.e.*, the committee] said it meant to them."[35] Friendly, too, thought courts capable of identifying cate-

---

legislative staff, see Hammond, *Legislative Staffs,* in HANDBOOK OF LEGISLATIVE RESEARCH 273–319 (1985).

31. *See* H. HART & A. SACKS, THE LEGAL PROCESS 1284–86 (tent. ed. 1958). These materials indicate that "one of the editors" developed the tentative restatement, *id.* at 1284. F. NEWMAN & S. SURREY, LEGISLATION—CASES AND MATERIALS 669–71 (1955), attributes this work to Hart.

32. This is consistent with the general approach to statutory interpretation adopted in the Hart and Sacks materials, under which the interpreter attributes an organizing purpose to the statute. *See* H. HART & A. SACKS, *supra* note 31, at 1410–17 (summary of their approach). *Cf.* Martin v. Comm'r of Internal Revenue, 783 F.2d 81, 83 (7th Cir. 1986) (Posner, J.): "As for the general danger that a committee report might not reflect the understanding of a majority of the members of Congress—might, indeed, not even be known to them, [citing the Scalia concurrence in *Hirschey*]—it is enough to say that we do not rest our decision entirely on the legislative history, nor use it to reach a result inconsistent with the language of the statute and with the purpose that can be inferred from that language without recourse to legislative history."

33. H. HART & A. SACKS, *supra* note 31, at 1285–86.

34. *Id.* at 1286.

35. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes,* in H. FRIENDLY, BENCHMARKS 216 (1967).

gories of reliable legislative history and suggested that courts go slow in interfering with the conduct of committees and legislative sponsors.[36]

In sum, American public law has quite properly recognized that statutory meaning is greatly colored by statutory context. Legislative history is part of that context, and some aspects of it—frequently, for example, a committee report—will often represent the most intelligent exposition available of what the statute is all about. Legislative history should not be either the starting point or the end of the interpretive process, but it is a legitimate part of that process. In short, as Senator Orrin Hatch (an ideological ally of Scalia's) has said, "We all know that legislative history, like the law itself, can be misused. But it can also provide reliable context for the text of the law."[37]

We find nothing in the new attack led by Scalia to justify jettisoning this traditional approach. To the extent that the specific findings of public choice theory—rather than simply its general rejection of the public interest theory of legislation—have anything to say regarding Scalia's suggestions, they probably cut against him. Political scientists have long stressed the influence of committees on legislative outcomes.[38] Traditionally, committee power was attributed to the committee's roles as legislative "gatekeeper" and "policy incubator," to its expertise and agenda control, and to reciprocal deference among committees. Recently, public choice scholars have suggested that another critical element is often the existence of an ex post committee veto.[39] Even though the committee's proposal can be modified on the floor of the legislature, the committee can still control the final outcome if (1) a conference committee on the bill is necessary because it did not pass both houses of Congress in identical form, and (2) the standing committee essentially populates and controls the conference committee. Both contingencies apparently occur for nearly all major bills in Congress. The ex

36. "There is, of course, the fear that the 'intention' expressed even in committee reports and sponsors' statements may have been manufactured—perhaps, indeed, placed there for the very reason that it was known that the language could *not* be placed in the act itself. But is it not going too far to ask the courts to police such abdication of legislative responsibility?

This problem is quite different from the smuggling of 'intention' into hearing materials, which the legislators cannot prevent. The Justices [have] protested against undue reliance on such materials." *Id.* at 216 n.114.

37. Hatch, *Legislative History: Tool of Construction or Destruction,* 11 HARV. J.L. & PUB. POL'Y 43, 45 (1988).

38. For an overview of the political science literature, see Eulau & McCluggage, *Standing Committees in Legislatures,* in HANDBOOK OF LEGISLATIVE RESEARCH, *supra* note 30, at 395–470.

39. *See* Shepsle & Weingast, *The Institutional Foundations of Committee Power,* 81 AM. POL. SCI. REV. 85, 85 (1987). *See also* Baron & Ferejohn, *The Power to Propose,* in MODELS OF STRATEGIC CHOICE IN POLITICS (P. Ordeshook ed. 1989) (alternative explanation of committee power); Smith, *An Essay on Sequence, Position, Goals, and Committee Power,* 13 LEGIS. STUD. Q. 151 (1988); *Why Are Congressional Committees Powerful?,* 81 AM. POL. SCI. REV. 929–45 (1987).

post veto strengthens the committee's gatekeeping and proposal powers. For example, it makes little sense to use a discharge petition to dislodge a bill from committee if that committee's members will control the conference committee down the road. In the House, the committee also has the power to counter floor amendments with "perfecting" amendments, which allow the committee to protect itself against being "rolled."[40]

Although recent public choice scholarship has not addressed committee reports as such,[41] it does indicate that a coherent understanding of a statute must carefully attend to the work of the relevant committees. That work will be reflected, albeit imperfectly, in its report, which legislators and staff are likely to read far more carefully than the bill itself. Thus, recent public choice scholarship (like the long-standing views of political scientists) supports the traditional American public law presumption that "very likely most [members of Congress] knew only of the general purpose [of a bill], relied for the details on members who sat on the committees particularly concerned, and were quite willing to adopt these committees' will on subordinate points as their own."[42]

A fundamental finding of public choice—that legislative outcomes often are the result of "structure-induced equilibrium"—does counsel some caution in using legislative history as an interpretive source. Because legislative equilibrium can result from a combination of different legislative structures and rules, one bit or fragment of legislative history may have little to do with the final product. But when a fundamental aspect of legislative history, like a committee report, is unimpeached by other sources and is consistent with the apparent political equilibrium, it should be an important interpretive source.

40. Weingast, *Floor Behavior in the U.S. Congress: Committee Power Under the Open Rule*, 83 AM. POL. SCI. REV. 795 (1989).

41. Morris Fiorina has suggested that congressional committees may sometimes constitute handfuls of "unrepresentative members," and that courts "in reconstructing legislative intent may rely too heavily on the committee reports" prepared by such members and their staffs. Fiorina, *Legislator Uncertainty, Legislative Control, and the Delegation of Legislative Power*, 2 J.L. ECON. & ORG. 33, 49 & n.22 (1986). *See also* Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988) (problem of cycling majorities is not that "anything can happen," but that what does happen may be the result of agenda control and committee bias). We agree with Fiorina that committees may sometimes be unrepresentative of the legislative body as a whole, and that this may sometimes be reflected in committee reports. *But see* Krehbiel, *Are Congressional Committees Composed of Preference Outliers?*, 84 AM. POL. SCI. REV. 149 (1990). This is one of the many reasons why courts should not treat committee reports as sacrosanct. It does not, however, justify Justice Scalia's suggestion that we ignore such reports or systematically devalue them as compared to other aspects of legislative history. Courts will have great difficulty identifying "unrepresentative" committee reports in all but the baldest circumstances; in those instances, the reports ought to be considered less weighty.

42. Friendly, *supra* note 35, at 216. *See also* Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1, 24–27 (1988).

That judges *can* make effective use of legislative history does not ensure that they always will do so successfully. The Court's opinions sometimes seemingly do misuse legislative history, exalting it as more important than the statute itself. Judicial opinions also sometimes appear more mechanical than reflective.[43] The Supreme Court's standard statutory opinion brooks little uncertainty: it argues with a straight face that all relevant sources of meaning unambiguously point in the same direction, while the dissenting Justices argue with equal conviction that the opposite meaning is just as clearly indicated.

These wrongheaded opinion-drafting techniques may occasionally mislead lower court judges or perhaps even the Justices themselves about the appropriate methodology of statutory interpretation. In addition, they are surely subject to criticism from members of Congress. The remedy is not, however, the replacement of some wooden rules with others (like Scalia's four corners rule). Rather, the appropriate reform is to draft opinions that candidly reflect the complexities of statutory interpretation.

III. Ambiguous Language and Rational Choice

Although we do not argue that legislative intent should always be controlling in statutory construction, we do believe that it plays a central role. Consequently, it is useful to develop a better model of intent-based interpretation.

Judge Posner's "communication" theory of legislation is a useful starting point. Posner argues that in construing legislation, judges are attempting to decode communications from their legislative superiors. Making a military analogy, he suggests that the judge is like a military officer who is attempting to follow obscure directions from headquarters.[44] Thus, in Posner's view, the task of the judge is to ascertain the most likely intention of the drafters.

The idea of a statute as an unclear communication can be easily modeled. The ambiguous statute has a number of interpretations (each of which is unambiguous), but the judge is unsure of which interpretation was intended. This is simply an instance of the general problem of decoding a "noisy" signal. The general question is this: if you have received a message that has more than one possible interpretation, which one should you adopt? Posner's answer would seem to be that you should always adopt the most probable interpretation.

This is not the best method of decoding a signal. Suppose, for example,

43. Consider Joseph Vining's view of the opinions produced by the current Supreme Court: "They are too much things of patchwork, things which seem, on their face, to express more the institutional process of their making than the thinking, feeling, and reasoning of the author and those persuaded with him." Vining, *Justice, Bureaucracy, and Legal Method,* 80 MICH. L. REV. 248, 251 (1981).

44. Posner, *supra* note 9, at 189–90.

that there are two possible interpretations, with one having a probability of 51% and the other 49%. One is slightly more probable than the other, and in the absence of any other information would be chosen. But suppose that we also know that the consequences are much different. Then we should take those consequences into account in choosing between risky alternatives, just as in buying a lottery ticket, we should consider not only the odds of winning but also the size of the prize in relation to the cost.[45] For example, in interpreting a partner's bid in bridge, a player would take into account not only how likely the partner is to have various possible hands, but also the consequences of adopting each interpretation: some mistakes may be much more costly than others.

To return to the military analogy, suppose that because of radio static the platoon leader is unsure whether he has been ordered to attack or retreat. The order sounded a little more like "attack," but the effect of an attack might be to wipe out his unit, while a retreat would seem more sensible. A responsible officer would not, we think, decide which course to take without considering the consequences. Within the constraints of his orders, the officer does bear the responsibility for the consequences of his decision. On the other hand, if the order had been clear, the officer would presumably have to obey even if the consequences seemed undesirable.

In effect, the judge is betting on the legislature's actual intention, and must take into account both the odds of being right and the consequences of being wrong. We might think of the various interpretations as being like different locations on a faded treasure map. The treasure seeker has some information about the location of the treasure, which he can translate into a list of probabilities. He also knows that the value of the treasure may depend on the location. If the treasure is in deep water, its economic value may be lowered by the expense of retrieving it. All things considered, which location is the most promising?

45. *See* Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065, 1066–71 (1968). As a general matter, decision theory indicates that the rational choice under uncertainty is to maximize the expected value of the utility of the outcome. *See* M. SHUBIK, GAME THEORY IN THE SOCIAL SCIENCES: CONCEPTS AND SOLUTIONS 417–24 (1987); E. STOKEY & R. ZECKHAUSER, A PRIMER FOR POLICY ANALYSIS 237–54 (1978). Here, the outcomes are that the chosen interpretation either upholds or violates the actual legislative intent. If judges value fidelity to legislative intent, the judicial payoff must be higher when the interpretation is actually correct, but the exact way in which the payoff should be modeled as a function of outcomes and correctness is unclear. In the text, we assume that the judge's payoff is zero when she chooses the wrong alternative, and that when she is correct the payoff varies depending on the alternative in question. This has the advantage that the judge will never choose an interpretation which is known to be directly opposed to legislative intent. For another method of modeling the costs of incorrect interpretations, see Rizzo & Arnold, *An Economic Framework for Statutory Interpretation*, 50 LAW & CONTEMP. PROBS. 165 (1987).

Decision theory suggests the following approach: multiply the probability of a given location by the economic value the treasure would have in that location. For example, if one location has a 75% chance of having the treasure, with a $100,000 profit if the treasure is there, then the "expected value" of that location is $75,000. (If you were lucky enough to have a lottery ticket with a 75% chance of paying $100, in the long run you would expect to win three-quarters of the time, making on average $75.) Another location might have only a 25% probability of being correct, but might also be much cheaper to explore. If the treasure is in the second location, the finder might earn a $400,000 profit. The expected value of exploring the second location is $100,000 (25% of $400,000). The second location is a better bet even though the probability is lower. You win less often this way, but bigger.

This model of statutory interpretation places a very high importance on correctly identifying original intent. No matter what benefits an interpretation might produce, these benefits count for nothing unless the interpretation is true to the actual original intent.[46] In case of a tie in likelihood, however, the judge picks the most beneficial interpretation of the statute, which seems reasonable.[47] In intermediate cases, the outcome is determined both by the likelihood that an interpretation corresponds with the drafter's intent and by the consequences of adopting the interpretation. With a new statute, these two factors may overlap, since the judge can reasonably presume that the drafters shared his assessments of the statute's consequences. For an older statute, however, this presumption may be quite unrealistic. It is simply unrealistic for judges to presume that the drafters of a century-old statute had any particular view on policy issues that have arisen in the meantime.

By letting the judge consider some of the consequences of an interpretation, this model allows some degree of judicial flexibility.[48] How much flexibility depends on how we define the "payoff." We could include the full social effects of adopting an interpretation, so the judge would consider the same range of consequences that a legislature would consider. On the other hand, the payoff could be defined much more narrowly to include only

46. There is a strong normative argument for this result. *See* Redish, *Federal Common Law, Political Legitimacy, and the Interpretative Process: An "Institutionalist" Perspective,* 83 NW. U.L. REV. 761, 768, 784–85, 801 (1989).

47. For an example of something like this situation, see Standard Office Bldg. Corp. v. United States, 819 F.2d 1371, 1379 (7th Cir. 1987) (Posner, J.).

48. The model also has the advantage of greater candor, since, as Judge Posner points out, the legislative intent is often unknown and decision must actually turn on other factors. We agree with him that judicial opinions more candidly acknowledging this would be desirable. *See* Posner, *The Decline of Law as an Autonomous Discipline: 1962–1987,* 100 HARV. L. REV. 761, 777–78 (1987).

"legal process" costs of various kinds, such as litigation expenses or impact on the implementation of other statutes.[49]

Anyway, no matter how the payoff is defined, under this model the court will never disobey a clear directive from the legislature. The judge's actual decision is always constrained by the "probability factor," which brings into play whatever is known about the legislature's actual intentions. Thus, the model introduces a certain degree of flexibility while maintaining the principle that the legislature's will is supreme.[50]

This elementary model has at least heuristic value. It captures some—but we hasten to emphasize, not all—of the complex judgments that must be made in interpreting statutes. While building on Judge Posner's useful communication model of statutory construction, it gives more realistic insight into statutory interpretations, and ties statutory construction to the general problem of decoding unclear messages. When deciding between various interpretations of an unclear message, both the probability of a given interpretation and its consequences should be considered.

This model also reveals why statutory interpretation is such a complex process. The basic reason is that several distinct goals are involved. Giving effect to the legislature's intent is a goal with roots in basic democratic theory (as we saw in our earlier discussion of the relevance of legislative history). Another part of democratic theory, however, emphasizes the importance of the statutory language, both because of its unique formal status as the outcome of the legislative process and because of its special role in giving notice to citizens about the demands of the legal system. Finally, as the "noisy signal" model suggests, the judge also needs to consider the effect of a given interpretation on other public policies. When a judge is lucky, all of these norms will point toward the same decision in a given case. Often, however, they will have conflicting implications, and deciding on the right

49. An intermediate possibility would be for judges to consider broadly shared substantive values. *See* Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989). For an important effort to elaborate a coherent set of public values for use in interpreting statutes, see Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989). For a critique of Sunstein, see Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685 (1988).

50. This model could be usefully elaborated in several directions. It would be interesting to couple this model of judicial interpretation to various models of legislation, so as to determine how rational legislators would respond to the model. Another option would be to construct a Bayesian analysis in which legislative history modifies a prior estimate of probability based solely on statutory language. The whole topic of judicial interpretation has received very little attention from formal modelers. We can imagine (but have not attempted to construct) more elaborate models of cooperative games between judges and legislatures, or perhaps the application of communication theory to the problem. We encourage those with greater technical expertise to pursue these options.

interpretation will require an exercise of the judge's "practical reason." As legal pragmatists, we do not believe that legal theory can eliminate the need for judicial exercise of practical reason. Theory can, however, help illuminate and clarify the judge's task.

IV. Statutory Evolution

Even when a statute is drafted clearly, later events may raise questions about the viability of the original legislative intent. After a statute is passed, various unexpected events may take place. Public opinion may turn against the view of public policy underlying the statute. Changes in social conditions may frustrate the statute's ability to accomplish its original purpose. Or judicial precedents may misconstrue the statute. The degree to which courts should consider these later events is one of the most vexing problems in the theory of statutory interpretation. Public choice helps clarify the relevance of postenactment events.

Let us begin with the problem of the outmoded legislative policy. Statutes are difficult to pass, but they are also hard to amend or repeal. Consequently, a statute may stay on the books indefinitely even though it has become out of step with current public policy. If a court believes that a statute is obsolete, enforcing the legislative command may be rather distasteful. Yet, if the legislative intent is clear, the court may feel obligated to implement that intent.

There are accepted methods for dealing with statutory obsolescence, but only under certain limited circumstances. If later legislation on the same subject reflects more palatable views of public policy, the court can declare that the earlier statute has suffered a repeal by implication. Alternatively, if the statute touches upon some constitutionally sensitive area like gender discrimination, the age of the statute may be relevant to its constitutionality.[51] Usually, however, neither of these accepted approaches is applicable.

A somewhat radical solution to the problem of the outmoded statute is to declare the statute defunct. In support of this approach, Dean Guido Calabresi argues that the legitimacy of an old statute rests only on the facts "it has gone unrepealed; and it once commanded a majoritarian basis."[52] The first fact, he observes, is equally true of old common law decisions, while the second fact lacks significance if majority support for the statute has evaporated. Hence, Calabresi says, an old statute is no more (though also no less) entitled to the court's respect than an old judicial precedent.

Public choice theory illuminates a fundamental flaw in this argument. Calabresi treats inertia as simply an incidental aspect of the political system,

51. These conventional approaches are discussed in W. ESKRIDGE & P. FRICKEY, *supra* note 1, at 870–80.

52. G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 101–2 (1982); *see also* Mississippi Univ. for Women v. Hogan, 458 U.S. 717, 725, 730 n.16 (1982).

as if an ideal democratic system would instantly reflect changes of majority sentiment. On the contrary, the agenda rules and institutional structures that create legislative inertia are themselves crucial to the workings of legislatures. Without them, legislatures would be plagued by instability and could not function as deliberative bodies. In a real sense, the system is *designed* so that laws will outlive the political coalitions that enacted them.[53] Thus, it would be a mistake to adopt the rule that courts need not enforce a statute if the latest Gallup poll shows that it has lost majority support. Calabresi is not this simplistic, for he would allow courts to update statutes only when they are patently out of sync with the overall "legal landscape," as well as having lost majority support.[54] But the judgment Calabresi would have courts undertake is a slippery one, and the burden of legislative inertia that he would have courts reallocate is not simply an impediment to needed law reform. Rather, it is a vital attribute of the legislative process. It would be a mistake, then, to consider old statutes as equivalent to old precedents.

This is not to say, however, that courts must always ignore postenactment developments. An argument to the contrary can be based on the presumed intent of the enacting legislators themselves. Allowing courts to consider some kinds of later events may advance the goals of enacting legislators. These legislators would presumably endorse a rule allowing judges to consider such events; such a rule can be considered an "implied term" in the statute, much like the implied terms courts read into contracts and other legal documents. As we shall see, this argument is valid in some contexts. It cannot, however, save Calabresi's theory.

Consider a possible rule under which statutory directives could be nullified by courts if they are contrary to the judges' view of public policy and have lost majority support. Such a rule would not be favored by enacting legislators because it would substantially decrease the value of legislation to its supporters. Knowing that majority coalitions are unstable, the members of the coalition have good reason to want their legislation to survive the coalition itself.[55] Allowing courts to nullify statutes that have lost majority support would bring courts into conflict not only with the statutes themselves but also with the legislature's own "meta-intent" about how courts should apply statutes.

Changes in majority opinion are not the only reasons why a court might hesitate to follow a statute's original meaning. Other intervening events may also make the "original intent" seem questionable. The perspective of the

53. The importance of legal stability receives particular stress in *The Federalist No. 62*. See also *The Federalist Nos. 10 & 71*.

54. *See* G. CALABRESI, *supra* note 52, at 163–66.

55. *See* McCubbins, Noll, & Weingast, *Administrative Procedures as Instruments of Social Control*, 3 J.L. ECON. & ORG. 243 (1987).

enacting legislator again gives useful guidance. As courts have recognized in analogous situations, rational individuals would favor a rule that allowed a court to disregard their directives because of some kinds of "changed circumstances."

Several legal analogies exist. In contract law, for example, it is well established that performance of a contract is excused if it becomes impractical or if changed circumstances frustrate the basic purpose of the contract.[56] Similarly, under the cy pres doctrine, provisions of a trust may be nullified or rewritten by a court when changed circumstances prevent the original provisions from attaining the donor's goals.[57] To a literalist, these doctrines might seem to involve judicial disobedience to the directions of the contracting parties or the donor. But this criticism is misguided, because the rules are in fact those that rational parties would choose, and the actual parties have not manifested any specific inconsistent intentions. For the same reason, a statutory cy pres doctrine would only superficially conflict with legislative intent.[58] For example, technological change might render a statute passed for safety reasons an actual source of increased danger. Under such circumstances, serious doubt exists about whether the enacting legislators would intend it to apply, so disregarding the statute should not be considered improper. Like individuals entering into contracts, legislators who enact statutes could benefit from a cy pres rule, which would give courts some flexibility in dealing with unforeseen circumstances. If the cy pres doctrine is one that rational legislators themselves would favor, courts can properly claim to be implementing rather than frustrating the legislators' design.

A recent case prompted an intriguing debate about the effect of changed circumstances on statutory directives. *K Mart Corp. v. Cartier, Inc.*[59] involved an obscure customs regulation governing the importation of trademarked goods. The Tariff Act prohibits importation of such goods if the

56. *See* U.C.C. § 2–615; E. FARNSWORTH, CONTRACTS, §§ 9.1, 9.6, 9.7. Also, there are growing arguments in favor of allowing judicial modification of long-term contracts in light of changed circumstances. *See* Hillman, *Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law*, 1987 DUKE L.J. 1.

57. According to section 399 of the *Second Restatement of Trusts:* "If property is given in trust to be applied to a particular charitable purpose, and it becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor."

58. Although the concept of statutory cy pres has not found explicit recognition in American law, cases can be found that seem to reach somewhat similar results. *See* Li v. Yellow Cab Co., 12 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226 (1975); Selders v. Armentrout, 190 Neb. 275, 207 N.W.2d 686 (1973) (both cases "interpreting" provisions in state tort statutes out of existence).

59. 486 U.S. 281 (1988).

trademark is owned by an American citizen or corporation. The case involved "gray market" goods, that is, goods bearing American trademarks but imported without the consent of the trademark holder. The Customs Service's regulation allowed gray market goods to be imported under certain circumstances. One of these regulatory exceptions allowed importation when the American owner had authorized the use of the trademark (but not the importation). Justice Kennedy's opinion for the Court rather brusquely held this exception to be inconsistent with the plain statutory language.

For present purposes, the more interesting discussion is contained in the separate opinions of Justices Brennan and Scalia, each of whom represented a faction of four Justices. Justice Brennan all but conceded that the plain language of the statute was against him. He argued, however, that trademark law had changed radically in the fifty years since the statute was passed. When Congress imposed the import restriction, he suggested, trademarks served only to identify the origin of goods, and any attempt to license a trademark could nullify it. Hence, legislators could not have imagined how the statute would apply in a world in which trademarks are readily transferable property interests. Justice Brennan drew an analogy to a nineteenth-century statute requiring ovens to be inspected for their propensity to spew flames; such a statute, he maintained, need not be applied to microwave or electric ovens.[60]

Justice Scalia vigorously attacked Brennan's analysis. While he agreed that a microwave might not really be an "oven," he could see no reason to exempt electric ovens from flame testing.[61] More generally, he argued that courts should not "rewrite the United States Code to accord with the unenacted purposes of Congresses long since called home." Rather, it is "the prerogative of each currently elected Congress to allow those laws which change has rendered nugatory to die an unobserved death if it no longer thinks their purposes worthwhile; and to allow those laws whose effects have been expanded by change to remain alive if it favors the new effects."[62]

Justice Scalia's argument has several flaws. First, Congress does not have the luxury of "allowing statutes to die an unobserved death"; rather, it must engage in active euthanasia. As Justice Scalia himself has noted, the fact that a statute has not been repealed often reflects nothing more than inertia.[63] So the fact that a statute has survived does not necessarily mean that Congress believes it has current social value. In *K Mart*, Scalia's argument is particularly weak because Congress might well have assumed that the customs

60. *Id.* at 312–17.

61. *Id.* at 324 n.2.

62. *Id.* at 325.

63. *See, e.g.*, Johnson v. Transportation Agency, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting) ("vindication by congressional inaction is a canard").

regulations were valid, making legislative action to update the statute unnecessary. The very existence of the regulations could well have led Congress to believe that no amendment to the statute was needed to bring it in line with modern conditions.

Second, Justice Scalia's reference to rewriting statutes to accord with the "unenacted purposes" of past Congresses is puzzling, since it is precisely the enacted purpose of the statute whose application was in question. Brennan's argument in *K Mart* is that Congress had actually never made any decision about how to apply the statute to assignable trademarks, because such things did not exist at the time of enactment. Such an argument respects rather than flouts the legislature's prerogatives.

Third, Justice Scalia's reference to "ambiguity" is question-begging. If we doubt that a reasonable speaker in a particular context would mean an order to be applied in a certain situation, then the order cannot be considered wholly unambiguous. Of course, as Justice Scalia suggests, the legislature could have included an express provision about unforeseen circumstances. It is a commonplace in private law, however, that courts serve a useful function by providing "off the rack" terms that most people would agree to, since by doing so courts reduce the cost and difficulty of negotiating contracts. A similar rationale would support the use of "off the rack" statutory terms.

Thus, Justice Scalia is on weak ground in arguing for a complete rejection of the Brennan approach. He is on stronger ground, however, when he suggests that the approach should only be used cautiously. Between its passage and the time a statute is construed by the Supreme Court, some societal change will always occur because of the inevitable delays of litigation. If applied too broadly, the Brennan rule could give judges carte blanche to rewrite statutes, which enacting legislators would certainly find objectionable. As Justice Scalia suggests, statutory cy pres must ordinarily be limited to cases in which "(1) it is clear that the alleged changed circumstances were unknown to, and unenvisioned by, the enacting legislature, and (2) it is clear that they cause the challenged application of the statute to exceed its original purpose."[64] A similar analysis should apply, of course, when a statute's application falls short of its intended purpose.

Sometimes, the changed circumstances consist of actions by the judges themselves. Courts have been known to misapprehend the legislative intent, sometimes egregiously. Once the mistake has been made, however, respect for precedent makes the court reluctant to overturn its prior decision.[65] The result may be that judges in later cases will continue to interpret the statute in violation of a clear legislative directive. At first blush, this seems improper.

64. 486 U.S. at 325.

65. The Court strongly endorsed the importance of precedent in statutory cases in a recent, highly publicized case, Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989).

Since the court is not authorized to amend the statute, how can a previous erroneous decision suspend the court's continuing obligation to obey the legislature's command?

Several writers have recently argued that following an erroneous statutory precedent is questionable because it upsets the original legislative bargain.[66] As Judge Easterbrook says, "If courts become instruments by which packages are undone, laws will be harder to pass. Bargains must be kept to be believed."[67] As a general matter, this observation is quite correct. It may not have as much force, however, when the issue is whether courts should enforce the "statutory bargain" even at the cost of overruling precedent.

It is important to recall that we are considering the rule legislators would approve at the time of enactment. At that time, legislators know that judges may make serious mistakes but do not know the direction of the mistakes. Supporters of the legislation have no way of knowing whether future judicial mistakes will favor them (giving them more than the original "bargain") or injure them (giving them less than they bargained for). This is not to say that legislators would be indifferent to the possibility of serious judicial errors. It does mean, however, that their interest in having the statute honored is somewhat offset by the possibility that honest mistakes might redound to their benefit. Legislators must also weigh the potentially serious social costs of legal instability, which would result if courts frequently overruled their past decisions.[68] Sometimes the balance will weigh in favor of stare decisis;

66. *See* Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401 (1988) (arguing that the doctrine of stare decisis is undesirable because it only shields error from correction); Rees, *Cathedrals Without Walls: A View from the Outside*, 61 TEX. L. REV. 347, 373–78 (1982). At the opposite extreme is the view that statutory precedents should *never* be overruled. *See* Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177 (1989). For a discussion avoiding both extremes, see Eskridge, *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988).

67. Easterbrook, *supra* note 13, at 9. The idea of viewing statutes as legislative deals entered the economics literature in Landes & Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J.L. & ECON. 875 (1976).

68. Although judicial error as such may not be objectionable to enacting legislators, they may have more subtle reasons to be concerned about prospective uncertainty in judicial interpretations. If the enacting legislators are risk averse, they may have some reluctance to gamble on the direction of judicial error. There also may be social costs associated with uncertainty about how statutes will be construed, such as increased litigation and difficulty in planning transactions. Jettisoning stare decisis, however, would do relatively little to reduce these various uncertainty costs. On the other hand, a rule allowing ready judicial correction of prior mistaken opinions creates a variety of deadweight social costs. In general, then, enacting legislators would prefer that courts give weight to stare decisis in statutory cases, even at the expense of fidelity to the original legislative deal.

Professor Marshall suggests that legislators may have varying views about the desirability of stare decisis, depending on how they feel about the renewed lobbying effort by the losing side. Marshall, *supra* note 66, at 199–200. Since they have no way of knowing ex ante which side this will be, they should be indifferent on this score at the time of enactment. Marshall essen-

in other cases, the interest in legal stability may not seem important enough to outweigh fidelity to their original intentions. Like other forms of statutory cy pres, respect for precedent allows the meaning of a statute to evolve over time.

An interesting example of statutory evolution is provided by *Steelworkers v. Weber*[69] and *Johnson v. Transportation Agency*,[70] which involved affirmative action, one of the most divisive issues in American politics. Title VII of the 1964 Civil Rights Act forbids employment discrimination based on race or gender. Under *Weber* and *Johnson*, title VII allows employers to engage in affirmative action in favor of minority groups when a "manifest racial imbalance" is present, provided that the affirmative action plan meets certain standards of reasonableness.[71] Notably, under *Weber*, it is not necessary that the racial imbalance result from even *arguably* illegal conduct by the employer or anyone else.[72] In *Weber*, for example, because blacks were a large percentage of the local population but only a tiny percentage of skilled craftsworkers, the Court upheld a program reserving for blacks half of all openings in a training program.[73]

As now-Chief Justice Rehnquist pointed out in dissent in *Weber*, this highly expansive approach to affirmative action seems at odds with both the plain language and the legislative history of the statute.[74] Section 703(a)(2), for example, prohibits employers from classifying employees "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin."[75] The legislative history demonstrates that Congress was troubled about allowing preferential treatment even as a remedy for illegal discrimination. The Senate floor captains in charge of the bill, for example, said that even if an employer had discriminated in the past, his only "obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed permitted . . . to prefer Negroes for future vacan-

---

tially is assessing costs ex post, where the proper perspective in designing legal rules is usually ex ante. In particular, under the norms of democratic legitimacy, the ex ante preferences of the enacting legislature are what counts, not the desire of their successors to be lobbied or left alone.

69. 443 U.S. 193 (1979).

70. 480 U.S. 616 (1987).

71. *See id.* at 630–42.

72. For an explanation of this aspect of *Weber*, see *id.* at 630.

73. *See Weber*, 443 U.S. at 197–200.

74. Arguments that the statute is ambiguous focus on the use of the word "discriminate" in some provisions, claiming that this term might not be applicable to affirmative action since in that context the use of race to classify persons is not invidious. *See* R. DWORKIN, A MATTER OF PRINCIPLE 318 (1985).

75. 42 U.S.C. § 2000e–2(a)(1). Similar language is found in section (d).

cies."[76] Despite these difficulties, some forms of affirmative action, used to remedy or prevent actual discrimination, might be permissible under the statute. Allowing employers to make free use of racial preferences to remedy imbalance, however, appears to fly in the face of the congressional mandate.[77]

In response to these criticisms, Justice Brennan's majority opinion pointed out that the supporters of the bill intended to improve the economic lot of minority groups. True, but Congress apparently chose to pursue this goal with a policy of color blindness. The Court is not free to displace that congressional decision merely because the Justices think that Congress made the wrong choice of strategy. To return to Posner's military analogy, the Court is in much the same position as a captain who violates a general's order but argues that he didn't really disobey, because his action was a better way of attaining the general's ultimate purpose of winning the war.[78]

The best arguments in favor of *Weber* and *Johnson* rely on postenactment developments. One argument is that informed opinion has shifted on the issue of affirmative action. As we have seen, however, enacting legislators have no reason to want statutory directives to be conditional on the future state of public opinion. Such changes might well be relevant if the meaning of the statute were subject to genuine doubt, but they cannot release the court from compliance with the statutory command. Here, the statutory command seems inconsistent with unrestricted affirmative action.

A second argument is that social conditions changed after the enactment of title VII. Later events unexpectedly showed that discrimination by employers was only one barrier to the congressional goal of giving blacks equal economic opportunities, so broad affirmative action is needed to reach the congressional goal. This argument seems to make unrealistic assumptions about congressional expectations. The 1964 Congress did believe that the Civil Rights Act would help blacks attain economic equality. It would have taken exceptional naïveté, however, to believe that an employment statute

76. 110 CONG. REC. 7213 (1964). As the Rehnquist dissent demonstrates, the record is replete with similar statements in favor of color blindedness. 443 U.S. at 235–51.

77. *See* Meltzer, *The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423 (1980).

78. Justice Brennan's fallback argument was that another provision of the statute introduces some ambiguity. Section 703(j) states that nothing in the statute shall be construed to "require" any employer to give preferential treatment to remedy a racial imbalance. This provision was adopted in response to fears that the statute might not be truly color-blind. Ironically, Justice Brennan argued that this provision affirmatively authorizes preferential treatment. Otherwise, he suggested, Congress would have disclaimed any intent to "require or permit" preferential treatment (rather than just disclaiming any intent to "require" such treatment). Hence, he says, Congress must have meant to allow employers to give preferential treatment. As even those who support the result in *Weber* concede, this argument is weak and in any event inconsistent with Brennan's refusal to adhere to the seemingly plain meaning of the basic prohibitions of title VII.

would immediately overcome the effects of generations of bad schools and poverty. At least, this reality does not seem so clearly unforeseeable as to meet the test for applying statutory cy pres.

The third argument is based on stare decisis.[79] Following *Weber* not a single bill was introduced in Congress to overturn it, and it has now been the law for over ten years.[80] It is true, as Justice Scalia pointed out in his dissent in *Johnson,* that congressional silence may be due to causes other than congressional approval, but the absence of *any* effort to overturn *Weber* seems telling. *Weber* has been the subject of substantial reliance by employers and unions. Even if the Court were to immunize them from damage suits based on past affirmative action plans, abolishing the plans would upset large numbers of career plans, while granting remedies to white male "victims" would wreak havoc with seniority rights and pension plans. More fundamentally, judicial waffling on such a crucial issue could undermine public confidence in the stability of the legal system.

In our view, application of stare decisis to *Weber* is quite legitimate. If the main objection to the broad affirmative action rule of *Weber* is that it contravenes congressional intent, stare decisis is a sufficient answer. For those like Justice Scalia, who believe in addition that affirmative action violates basic requirements of justice, the stare decisis argument understandably is likely to be unpersuasive. These broader questions about affirmative action are, however, outside the scope of this book.

The debate over *Weber* and *Johnson* involves far-reaching questions about the nature of statutory interpretation.[81] These questions have sparked some of the most interesting recent theoretical work on statutory interpretation. In important recent articles, Professors Eskridge and Aleinikoff have argued that the meaning of a statute changes over time, rather than being fixed at the time of enactment.[82] As we have seen, public choice theory

79. *See* Johnson v. Transportation Agency, 480 U.S. at 644 (Stevens, J., concurring). In *Weber* itself, Justice Blackmun argued that prior judicial decisions themselves made it impractical to return to the original legislative understanding. *See Weber,* 443 U.S. at 209–11.

80. *Johnson,* 480 U.S. at 629 n.7. On the subject of legislative silence, see Eskridge, *Interpreting Legislative Inaction,* 87 MICH. L. REV. 67 (1988).

81. The problems in *Weber* and *Johnson* are a good deal more complicated than our brief discussion in the text suggests. For a fuller explication of our somewhat conflicting views, see Farber, *Legislative Supremacy and Statutory Interpretation,* 78 GEO. L.J. 281 (1989); and Eskridge & Frickey, *Statutory Interpretation as Practical Reasoning,* 42 STAN. L. REV. 321 (1990). For reasons explained in these other writings, we both find Justice Blackmun's concurring opinion in *Weber* to be the most persuasive argument for the outcome in that case. *Johnson* clearly extends *Weber* beyond the theory espoused by Blackmun in *Weber,* and we have serious doubts that this wide-ranging validation of affirmative action can be squared with title VII. However, the *Weber* majority opinion is clearly subject to the reading given it in *Johnson,* and the considerations of stare decisis discussed in the text counsel against overruling *Weber.*

82. *See* Aleinikoff, *Updating Statutory Interpretation,* 87 MICH. L. REV. 20 (1988); Eskridge, *Dynamic Statutory Interpretation,* 135 U. PA. L. REV. 1479 (1987).

lends some support to this evolutionary approach. Where the original intent is unclear, rational judges would consider other factors, including current social policy. And even where the original meaning *is* clear, a rational legislator might want judges to take into account some kinds of changed circumstances.

The interpretative process is often obscure. Public choice theory is by no means a panacea, but it does have considerable potential for clarifying statutory interpretation. Like any other theoretical framework, it cannot fully capture the complexity of the legal landscape. What it *can* do is to impose sufficient order on that complexity to allow meaningful analysis. As long as we remember that the map is not the territory and the theory is not the reality, such guidance can be extremely helpful.[83]

83. For a thoughtful endorsement of the combination of practical reason and public choice in statutory interpretation, see Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 160 (1989).