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The History of Statutory Interpretation: A Study in Form and Substance

William S. Blatt
University of Miami School of Law, wblatt@law.miami.edu

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> A history of statutory interpretation has yet to be written, either for the civil or the common law.[1]

Max Radin's observation of 1942 remains true today. Although the process of statutory interpretation has received considerable attention, its history has not. Courts and commentators generally view the field as ahistorical, consisting of a few timeless rules.[2]

Perhaps this lack of appreciation is related to the modern consciousness of the tension between form and substance. Formal justice is associated with rules that are based on ascertainable facts, restrain official arbitrariness, and provide certainty. Substantive justice is associated with standards that direct courts to assess a particular fact situation in terms of the overall objectives of the legal order. In the modern consciousness, neither form nor substance emerges completely triumphant. Jurists shift from one mode to another depending on the facts before them.[3]

The choice of form and substance is confronted whenever a court encounters a statute. In the realm of statutory interpretation, formal

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* B.A., 1978, Dartmouth College; J.D., 1982, Harvard University; member of the New York and Washington, D.C. Bars. The author is associated with the firm of Morgan, Lewis & Bockius.

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[1] Radin, A Short Way with Statutes, 56 Harv. L. Rev. 388, 424 (1942) [hereinafter cited as Radin, Short Way].

[2] For instance, the plain meaning rule, disavowed in 1940, United States v. American Trucking Ass'n, 310 U.S. 532, 543–45 (1940), has reappeared in recent opinions of the federal courts. See, e.g., Globe Seaways, Inc. v. Panama Canal Co., 509 F.2d 969, 971 (5th Cir. 1975); see Murphy, Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts, 75 Colum. L. Rev. 1299 (1975). Likewise, the maxim *expressio unius est exlusio alterius* ("mention of one thing implies exclusion of another thing") periodically disappears and reappears. See Posner, Statutory Interpretation—in the Classroom and in the Courtroom, 50 U. Chi. L. Rev. 800, 813 (1983) [hereinafter cited as Posner, Statutory Interpretation].

[3] See Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685, 1701 (1976).

justice is associated with following the letter of the statute and substantive justice with its "spirit." Conscious of this stark choice,[4] modern thinkers see no historical pattern in statutory interpretation: Throughout time, courts have either followed the statute or they have not.

Nonetheless, the manner in which courts approach statutes has developed over time. To appreciate that development, one must remember that the modern consciousness is just that: a product of a particular era. The choice between formal rules and substantive standards has not always been so stark as it is today. Throughout history, the choice has been perceived differently.

With that understanding, we can study the history of statutory interpretation. To focus this history, this Article will trace a single maxim: the "equity of a statute." Utilized by courts of law and equity alike,[5] the equity of a statute has been variously equated with liberality, broad construction, legislative intent, judicial legislation, analogical reasoning, and statutory purpose.[6] Accordingly, this history will focus on cases that invoke the doctrine by name, interpret "equitably," resort to the "equity," "reason," or "spirit" of statutes, or which have otherwise been associated with the doctrine.

The history of the equity of a statute is the history of statutory interpretation in microcosm. Lacking an established meaning, the doctrine adopts its meaning from the surrounding legal universe. In particular, the fluctuations in the meaning of the equity of a statute illuminate two different levels in legal thought. The higher, more abstract level involves the relationship between common and statutory law. When confronted by a statute, a court must initially decide whether to handle the statute as it would the common law or to treat it differently. On this plane, common and statutory law may be regarded either as essentially similar authorities, susceptible to the same methods of judicial reasoning, or as intrinsically different materials requiring disparate techniques. The lower, less abstract level is en-

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[4] See, e.g., Easterbrook, Forward: The Court and the Economic System, 98 Harv. L. Rev. 1, 14–15 (1984) (description of two basic styles of statutory interpretation) [hereinafter cited as Easterbrook, Forward].

[5] "The word equity, as used in the phrase 'Equity of a Statute,' is not to be confused with the equitable jurisdiction of the Court of Chancery." Loyd, The Equity of a Statute, 58 U. Pa. L. Rev. 76, 76 (1909).

[6] For authorities noting the breadth of meanings attributed to the equity of a statute, see, e.g., R. Dickerson, The Interpretation and Application of Statutes 213–14 (1975) (comparing 'expansive and contractive sides of the doctrine); G. Endlich, A Commentary on the Interpretation of Statutes 436–50 (1888) (description of four types of equitable construction); see also deSloovére, The Equity and Reason of a Statute, 21 Cornell L.Q. 591, 605 (1936) ("reason of a statute" described as meaning "many different things").

countered once statutory and common law are acknowledged to be different. At this point, jurists must organize the interpretive approaches to statutes, utilizing polarities such as strict and liberal interpretation or intent and plain meaning. Naturally, developments on these two levels have been interrelated.

For purposes of this Article, the story of the equity of a statute in America will be divided into five overlapping parts. These parts do not represent rigidly drawn time frames but systems of thought, associated with, but not limited to, particular eras. The Article will start with the relatively diffuse Blackstonian universe of the late eighteenth century in which equity, coupled with law, operated as a grand principle applicable to common and statutory law alike.[7] Equity was not, however, consistently embodied in a single rule of interpretation.

The Blackstonian structure was modified during the preclassical period of the early nineteenth century. The Blackstonian principles of law and equity were replaced by technicality and liberality and the interpretive rules were organized along the poles of strict and liberal interpretation.

Next came the classical period of the mid-to-late nineteenth century, during which equity fell from preeminence and into disfavor. The classical movement focused its attention on judicial legitimacy and on legislative intent. This in turn sparked interest in the tension between literal and nonliteral interpretation. By the late classical era, common and statutory law were polarized in the extreme.

The twentieth century witnessed movements which dismantled the highly structured late nineteenth-century universe and resurrected the equity of a statute. First, the Progressives paved the way for use of the doctrine as an antecedent of analogical interpretation. Second, the Legal Realists used it to argue against the determinacy of the old order. Third, the post-Realists, and the legal process school in particular, awarded equitable construction a fixed place in a loose system based upon statutory purpose.

Finally, the contemporary period is witnessing critical shifts in the way courts regard statutes. Legislative purpose, long the guide to statutory construction, is losing ground to approaches which harken

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[7] For descriptions of pre-18th century views of the equity of a statute, see T. Plucknett, A Concise History of the Common Law (1929); T. Plucknett, Statutes & Their Interpretation in the First Half of the Fourteenth Century (1922); S. Thorne, A Discourse upon the Exposicion & Understanding of Statutes (1942); Marcin, *Epieikeia*; Equitable Lawmaking in the Construction of Statutes, 10 Conn. L. Rev. 377 (1978); Thorne, The Equity of a Statute and Heydon's Case, 31 Ill. L. Rev. 202 (1936).

back to classical and preclassical periods. Jurists are once again using rhetoric reminiscent of preclassical liberality and classical intent.

I. THE BLACKSTONIAN VISION: EQUITY OF A STATUTE IN AN UNDIFFERENTIATED LEGAL UNIVERSE

Compared to its successors, the late eighteenth century legal universe was loosely organized. The distance between common and statutory law was minimized by the use of transcending metaphors applicable to common and statutory law alike. Blackstone's *Commentaries* contained the most complete elaboration of these metaphors. Blackstone believed that all judicial decisionmaking involved the interplay between law and equity. In discussing the "Nature of Laws in General," he described equity:

> [It] is thus defined by Grotius, "the correction of that, wherein the law (by reason of its universality) is deficient." For since in laws all cases cannot be foreseen or expressed, it is necessary, that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of excepting those circumstances, which (had they been foreseen) the legislator himself would have excepted.[8]

So understood, equity was not peculiarly applicable to the written law enacted by Parliament or to the unwritten law discovered by common law judges. Rather, it was a counterprinciple to law itself.

> Equity thus depending, essentially, upon the particular circumstances of each individual case, there can be no established rules and fixed precepts of equity laid down, without destroying it's [sic] very essence, and reducing it to a positive law. And, on the other hand, the liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge. And law, without equity, tho' hard and disagreeable, is much more desirable for the public good, than equity without law; which would make every judge a legislator, and introduce most infinite confusion; as there would then be almost as many different rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind.[9]

The overarching interplay between law and equity was also evidenced in Blackstone's description of the "Laws of England," where, after setting down the written and unwritten laws, he concluded: "These are the several grounds of the laws of England: over and above which,

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[8] 1 W. Blackstone, Commentaries *61.

[9] Id. at *61-62.

equity is also frequently called in to assist, to moderate, and to explain . . . ."[10]

Though roughly parallel to form and substance, law and equity to Blackstone contained little of the tension present in the modern choice. Blackstone apparently did not see law and equity as incompatible, or if he did, was not troubled by their incompatibility. This was because he was preoccupied by a concern peculiar to his times: the division of justice in England between courts of law and equity. At the time he wrote, the dual court system was the subject of intense criticism because the result in a particular case depended upon the forum in which the case was brought. Blackstone responded to this criticism by emphasizing the essential unity of law and equity: although the two fora differed procedurally, they employed one and the same decisionmaking process.[11] In thus rationalizing the English system, Blackstone simply did not focus on the larger choice between form and substance.

Blackstone's notion of equity as an overarching technique found its way into America, persisting into the nineteenth century. Like Blackstone, American jurists appealed to Grotius' definition of equity as "the correction of that wherein the law (by reason of its universiality) is deficient."[12] Several early American cases went further and asserted the essential similarity of common and statutory law by demanding of statutes the same reasonableness required of the common law. The South Carolina Superior Court in *Ham v. M'Claws & Wife,*[13] said, "It is clear, that statutes passed against the plain and obvious principles of common right, and common reason, are absolutely null and void."[14] And in *Bowman v. Middleton,*[15] the same court struck down a statute as "against the common right."[16]

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[10] Id. at *91-92.

[11] See Holdsworth, Blackstone's Treatment of Equity, 43 Harv. L. Rev. 1, 7–8 (1929); Kennedy, The Structure of Blackstone's Commentaries, 28 Buffalo L. Rev. 209, 249–55 (1979).

[12] Shelby v. Guy, 24 U.S. (11 Wheat.) 361, 368–69 (1826); E. Smith, Commentaries on Statute and Constitutional Law 817–18 (Albany 1848) (reliance on notion of equity as "correction of the law").

[13] 1 S.C.L. (1 Bay) 93 (1789).

[14] Id. at 98.

[15] 1 S.C.L. (1 Bay) 252 (1792).

[16] Id. at 254; see also Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 607 (1869) (acknowledgement that a Court might not follow a statute in "the scarcely supposable case where a statute sets at nought the plainest precepts of morality and social obligation"). For a brief arguing that statutes cannot violate the common right, see A. Hamilton, draft brief, 1 The Law Practice of Alexander Hamilton 383 (J. Goebel ed. 1964) ("No statute shall be construed so as to be inconvenient or against reason . . . [w]hen Statutes contradict the essential policy and maxims of the common law the common law shall be preferred . . ."). For a discussion of the

The legal universe of the late eighteenth century was also unorganized in that its rules of interpretation, including the equity of a statute, were not highly systematized. Despite its stature as a universal principle, equity was not consistently embodied in any single rule of interpretation. Blackstone associated it with several scattered, discrete rules, applicable in differing circumstances. First, in his formulation of "equity" as the "reason and spirit" of the law, "equity" was a "sign" of legislative intent, to be applied when statutory language was ambiguous:

> [T]he most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the *reason* and *spirit* of it; or the cause which moved the legislator to enact it. For when this reason ceases, the law itself ought likewise to cease with it.[17]

Later, in its incarnation as the rule in *Heydon's Case*,[18] equitable interpretation became to Blackstone a principle peculiarly applicable to remedial statutes:

> There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy: that is, how the common law stood at the making of the act; what the mischief was, for which the common law did not provide; and what remedy the parliament hath provided to cure this mischief. And it is the business of the judges so to construe the act, as to suppress the mischief and advance the remedy.[19]

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use of *Dr. Bonham's Case* in America, see Plucknett, *Bonham's Case* and Judicial Review, 40 Harv. L. Rev. 30, 61–68 (1926) [hereinafter cited as Plucknett, *Bonham's Case*].

[17] 1 W. Blackstone, supra note 8, at *61.

[18] 3 Co. Rep. 7a, 76 Eng. Rep. 637 (Ex. 1584). In Heydon's Case, the Court of the Exchequer said:

> [F]or the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law,) four things are to be discerned and considered:—
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> 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 and appointed to cure the disease of the commonwealth.
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> And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.

Id. at 7b, 76 Eng. Rep. at 638. The second step of this formula is known as the "mischief rule." See infra text accompanying note 68.

[19] 1 W. Blackstone, supra note 8, at *87.

Finally, as the principle of *Dr. Bonham's Case,*[20] equity was for Blackstone a means of avoiding unreasonable results. "[W]here some collateral matter arises out of the general words, and happens to be unreasonable; there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity . . . ."[21]

II. THE PRECLASSICAL PERIOD

A. *Organization of the Law Along the Poles of Technicality and Liberality: Equity as Liberality*

The nineteenth century witnessed two overlapping movements which reoriented the way courts approached statutes and hence the meaning of the equity of a statute. The first, which I will call "preclassical," emerging early and persisting late into the century, was triggered by a shift in the fundamental polarity underlying law: the replacement of the Blackstonian duality of law and equity with technicality and liberality. Technicality was identified with professional techniques of reasoning and the old rules of pleading; liberality with intuitive justice, modern law, and magnanimity.[22] The polar opposition of technicality to liberality pervaded the law[23] and early nineteenth-century thought generally.[24]

Like law and equity, technicality and liberality roughly paralleled the choice between form and substance. Indeed, because they were in tension, liberality and technicality more closely approximated form and substance than did law and equity. Whereas equity and law usually worked together in complimentary fashion to produce justice, technicality and liberality were mutually exclusive.

Yet, the modern consciousness respecting form and substance was still absent. Like Blackstone, preclassical jurists did not perceive the tragic choice between form and substance: Liberality was clearly

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[20] College of Physician's (Dr. Bonham's) Case, 2 Brownl. 255, 123 Eng. Rep. 928 (C.P. 1609). *Dr. Bonham's Case* struck down on grounds of reasonableness a statute conferring on the London College of Physicians the right to sanction physicians practicing medicine in London without its certification.

[21] 1 W. Blackstone, supra note 8, at *91.

[22] See, e.g., 4 J. Kent, Commentaries lect. LIV, at *6–8, lect. LVI, at *116, lect. LVII, at *158 (discussion of liberality and technicality in real-property law); cf. Conaughty v. Nichols, 42 N.Y. 83, 85–86 (1870) (court gives effect to "liberal" system of pleading under which deficiencies in "technical" language are not fatal).

[23] For a more extensive discussion of liberality and technicality, see Mensch, The History of Mainstream Legal Thought, in The Politics of Law 18, 21–22 (D. Kairys ed. 1982) ; D. Kennedy, C.L.T., 426–47 (unpublished manuscript on file at Harvard Law School Library).

[24] See P. Miller, The Life of the Mind in America from the Revolution to the Civil War 143–55 (1965).

the superior approach, incorporating the best of both. Also like Blackstone, these jurists missed the problem of form and substance because they were preoccupied by a particular historical problem: the existence of archaic English law in America. When preclassical jurists spoke of technicality, they had in mind rules inherited from England which were so arcane as not to provide certainty or restraint.[25] In such circumstances, liberality provided an easy choice.

As in the Blackstonian system, the existence of a transcending polarity meant that similar reasoning applied to common and statutory law. In the preclassical system, common and statutory law alike could be read liberally or technically. And, in the preclassical system, the equity of a statute became associated with the grand principle of liberality. For example, in *White v. Carpenter*,[26] a New York judge observed:

> My judgment must be borne down by the force and weight of authority before I can attach to statut[ory] provisions a harsher operation or more unbending severity than to common law principles; or deny to legislative enactments the liberal, benign and equitable construction which will give to them the attributes of a nursing mother, equally with the rules and principles of the common law.[27]

B. *Organization of the Rules of Interpretation Along the Poles of Strict and Liberal: Equity as Liberal Construction*

The technicality/liberality duality was not only present on the higher level of legal abstraction, standing above the distinction between common and statutory law, but was also replicated at the lower, interpretive level, where it emerged as the choice between "liberal" and "strict" interpretation. At the lower level, the duality more closely resembled the difficult choice between form and substance. Archaic English law did not pose much of a problem for statutory interpretation: by the nineteenth century, statutes were, by and large, written in America and well-fitted to contemporary circumstances. Consequently, literalism was no straw man—it sometimes represented certainty and restraint. The dilemma of form and substance emerged; courts were faced with a hard choice between incompatible goods.

The treatises of the period reveal the development of strict and

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[25] Cf. Commission on Practice and Pleadings, First Report 140–44 (Albany 1848) ("[S]o unfit has [the technical system of pleading] been found, that in instances almost numberless, the legislature and courts have departed from it.").

[26] 2 Paige Ch. 217 (N.Y. Ch. 1830).

[27] Id. at 229.

liberal categories. While Blackstone noted in passing that penal statutes shall be construed strictly[28] and that remedial and antifraud statutes should be construed liberally,[29] he did not view the choice between strict and liberal interpretation as exhaustive. By 1851, however, Bouvier did, dividing all interpretation into strict and liberal.[30] Throughout the remainder of the nineteenth century, the list of statutes given strict or liberal construction by courts lengthened considerably. Strict interpretation was given to penal statutes,[31] statutes imposing taxes,[32] statutes exempting from taxes,[33] statutes against the common right,[34] statutes of limitations,[35] statutes interfering with legitimate industries,[36] statutes creating liability,[37] statutes granting power,[38] and statutes in derogation of the common law,[39] among others. Liberal construction was granted statutes exempting property from execution,[40] some statutes of limitations,[41] and remedial statutes.[42]

The increased importance of the choice between strict and liberal interpretation changed the meaning of "equity of a statute." Generally, the interpretive rules identified by Blackstone with the equity of a statute, such as equity and the mischief rule, were absorbed into liberal interpretation,[43] the type accorded remedial statutes. How-

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28 1 W. Blackstone, supra note 8, at *88.

29 Id. at *88–89.

30 1 J. Bouvier, Institutes of American Law 40–43 (Philadelphia 1851).

31 Tiffany v. National Bank, 85 U.S. (18 Wall.) 409, 410 (1873); J. Sutherland, Statutes and Statutory Construction § 349, at 438 (1891).

32 J. Sutherland, supra note 31, § 361, at 457.

33 Id. § 364, at 463.

34 Id. § 366, at 466; cf. *Ex parte* Morgan, 20 F. 298, 307 (W.D. Ark. 1883) (strict construction of statutes in restraint of liberty).

35 J. Sutherland, supra note 31, § 368, at 468.

36 Id. § 370, at 471.

37 The Steamboat Ohio v. Stunt, 10 Ohio St. 582, 587–88 (1856); J. Sutherland, supra note 31, § 371, at 472.

38 Minturn v. Larue, 64 U.S. (23 How.) 435, 436 (1859); J. Sutherland, supra note 31, § 378, at 485.

39 People v. Buster, 11 Cal. 215, 221 (1858); J. Sutherland, supra note 31, § 400, at 510.

40 J. Sutherland, supra note 31, § 422, at 542.

41 Id. §§ 424–426, at 544–49.

42 Cullerton v. Mead, 22 Cal. 96, 98 (1863). Remedial statutes encompassed those for "convenience of suitors," for "public convenience" in criminal prosecutions, for right of appeal, for protection of officers, for prevention of fraud, for withdrawal of penalties, for extension of the franchise, and for compensation for money taken. J. Sutherland, supra note 31, §§ 409–413, at 522–24.

43 E.g., Simonton v. Barrell, 21 Wend. 362, 364 (N.Y. 1839) (cases interpreting remedial acts described as employing "equity"); Schuylkill Navigation Co. v. Loose, 19 Pa. 15, 18 (1852) ("Acts that give a remedy for a wrong done are to be taken equitably."); see Davis v. Tarwater, 13 Ark. 52, 58 (1852) (mischief rule equated with liberal construction).

ever, one rule identified by Blackstone with the equity of a statute could not be absorbed into liberal interpretation. The rule of *Dr. Bonham's Case* and its contemporary equivalent, the maxim that statutes against the common right were void, restricted statutes and were consequently aligned with strict construction. In so becoming, they lost their affiliation with the equity of a statute. In *Melody v. Reab,*[44] for instance, the Massachusetts Supreme Court reasoned that statutes against the common right were to be treated like penal statutes, i.e., they were "not to be extended by equitable principles."[45] Similarly, in *Shelby v. Guy,*[46] the United States Supreme Court acknowledged that statutes against the common right did not generally receive equitable construction.[47]

III. THE CLASSICAL PERIOD

Later in the nineteenth century and continuing into the early twentieth, a second movement appeared. Jurists constructed the so-called "classical" order, in which contracts, property, and torts were organized into the distinct categories familiar to us. Intent played a critical role in this order. Concerned about their legitimacy, courts began justifying their role by referring to the will of others. In private law, this meant expanding the scope of private property, enforcing the will of the parties to a contract, and limiting liability to situations in which an actor was at fault.[48]

A. *The Rise of Legislative Intent: Equity Becomes Identified with Reasoning Techniques Peculiar to Statutes*

With respect to statutes, early classical thinkers settled on legislative intent, which joined the preclassical dichotomy of technicality and liberality as a second, independent organizing principle for statutory interpretation. Like other early classical doctrines, legislative intent offered a middle ground between judicial activism and complete

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[44] 4 Mass. 471 (1808).

[45] Id. at 473 (1808).

[46] 24 U.S. (11 Wheat.) 361 (1826).

[47] Id. at 368–69.

[48] See, e.g., T. Parsons, The Law of Contracts (Boston 1855); see also M. Horwitz, The Transformation of American Law, 1780–1860, at 201–07 (1977) (development of "will theory" of contracts and mid-century emergence of rule permitting parties to contract out of common law duties); id. at 85–99 (triumph of negligence standard); Vandevelde, The New Property of the Nineteenth Century: The Development of the Modern Concept of Property, 29 Buffalo L. Rev. 325, 343, 352 (1980) (mid-century emergence of protection for trademarks and trade secrets); Note, Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort, 93 Harv. L. Rev. 1510, 1522–28 (1980) (integration of rules of master-servant law into contract law).

deference to the will of others, between unabashed paternalism and unconditional nonintervention. The rise of intent was evident in Kent's *Commentaries*. Whereas Blackstone concluded his account of statutory interpretation by praising equity, Kent ended his by lauding intent:

> There are a number of other rules, of minor importance, relative to the construction of statutes, and it will be sufficient to observe, generally, that the great object of the maxims of interpretation is, to discover the true intention of the law; and whenever that intention can be indubitably ascertained, and it be not a violation of constitutional right, the courts are bound to obey it, whatever may be their opinion of its wisdom or policy.[49]

The ascendancy of legislative intent was evident in judicial opinions of Kent's time.[50] Cases were replete with maxims such as:

> A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute, is not within the statute, unless it be within the intention of the makers.[51]

Emphasis on the search for legislative intent sharpened the distinction between statutory and common law. When statutes were involved, courts felt constrained to divining legislative intent; when statutes were not involved, they saw a wider range of options.

The rise of a concept limited to statutory law transformed the equity of a statute. Generally, equity lost quality as a broad principal with identical application throughout the law and became associated with narrower methods of reasoning. With regard to statutes, equity became a means of ascertaining legislative intent. Typical judicial pronouncements of this period included: "[M]any cases, not expressly named, may be comprehended within the equity of a statute; the letter of which may be enlarged or restrained, according to the true intent of the makers of the law;"[52] and "[a] thing within the *letter* of a statute, is not within the law, unless it be within the *intention* of the makers; and . . . a statute ought, sometimes, to have such equitable construction as is contrary to the letter."[53] Similarly, intent was equated with

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[49] 1 J. Kent, supra note 22, lect. XX, at *468.

[50] E.g., Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 662 (1829) ("Every technical rule, as to the construction or force of particular terms, must yield to the clear expression of the paramount will of the legislature.").

[51] People v. Utica Ins. Co., 15 Johns. 358, 381 (N.Y. 1818).

[52] Whitney v. Whitney, 14 Mass. 88, 92–93 (1817).

[53] Bridgeport v. Hubbel, 5 Conn. 237, 244 (1824); see Hersha v. Brenneman, 6 Serg. & Rawle 2, 3 (Pa. 1820) (equity described as having intended certain results); A. Hamilton, supra note 16, at 392, 396 ("[T]o form a right judgment whether a case be within the equity of a

two of Blackstone's alternative formulations of the equity doctrine[54]—recourse to "reason and spirit"[55] and examination of the underlying mischief that the statute was intended to remedy.[56]

But one variety of equitable interpretation was not equated with intent. Overtly intention thwarting, the rule in *Dr. Bonham's Case*—that the common reason controls statutes—could not be incorporated into the canons of statutory interpretation. Unfashionable as a method of statutory construction,[57] it was classified as a constitutional[58] or common law precept.[59]

B. *Heightened Consciousness of the Tension Between Literal and Nonliteral Interpretation*

The early classical emphasis on legislative intent resulted in a heightened awareness of the tension between literal and nonliteral interpretation. Agreeing that their ultimate goal was to follow legislative intent, courts had to consider how to ascertain intent, and, in so doing, had to choose between form and substance. The tension between literal and nonliteral interpretation formed the basis for a reorganization of the rules of statutory interpretation. Blackstone did not focus on this tension. His five signs to be considered in interpreting the will of the legislature were arranged in a hierarchy: "words," "context," "subject matter," "effects and consequence," and "reason and spirit."[60] In nineteenth-century America, however, Blackstone's signs were wrenched apart and set in opposition. In Tucker's *Commentaries,*[61] for instance, the first two were pulled apart from the remaining three and embellished with a number of subrules governing the interpretation of language.[62] Likewise, in *Ryegate v. Town of*

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statute, it is a good way to suppose the law maker present, and that you asked him the question—did you intend to comprehend this case?").

54 1 W. Blackstone, supra note 8, at *61, *87.

55 See, e.g., United States v. Freeman, 44 U.S. (3 How.) 556, 564–65 (1845); Lloyd v. Urison, 2 N.J.L. 212, 217–18 (1807).

56 See Winslow v. Kimball, 25 Me. 493, 495 (1846); Richmondville Mfg. Co. v. Prall, 9 Conn. 487, 495 (1833).

57 See Plucknett, *Bonham's Case,* supra note 16, at 68.

58 See 1 H. St. G. Tucker, Blackstone's Commentaries 91 n.20 (Philadelphia 1803) (ban on statutes against reason discussed in context of constitutional law); 1 J. Kent, supra note 22, lect. XX, at *420 (*Dr. Bonham's Case* used as a prelude for discussion of constitutional law); see also id. at *448–49 (*Dr. Bonham's Case* not applicable to America because of its constitutional system); Plucknett, *Bonham's Case,* supra note 16, at 67–68 ("written state constitutions" made *Bonham* rule unnecessary).

59 See 1 Z. Swift, A Digest of the Laws of the State of Connecticut 3 (New Haven 1823).

60 1 W. Blackstone, supra note 8, at *59–61.

61 H. St. G. Tucker, Commentaries on the Laws of Virginia (Winchester 1836).

62 1 id. at 12–15.

Wardsboro,[63] "context," "subject matter," "effects and consequence," and "reason and spirit" were lumped together in opposition to the letter of the statute.[64]

1. The Intent Resolution: Equity as Intent

Thus, in the nineteenth century, the tension between literal and nonliteral interpretation gradually assumed paramount importance. Courts sought to resolve this tension in one of three ways. The earliest, reaching maturity around 1830 and continuing into the early twentieth century, utilized a nonliteral interpretation if consistent with legislative intent. This intent resolution was expressed in the maxim: Intent prevails over the letter.

> [S]tatutes are not to be taken according to their very words, but their provisions may be extended beyond, or restrained within the words, according to the sense and meaning of the legislature apparent from the whole of the statute, or from other statutes enacted before and after the one in question.[65]

Courts relying on this approach were favorably disposed toward equity. Intent was equated with "equity,"[66] "reason and spirit,"[67] and the mischief rule.[68]

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[63] 30 Vt. 746 (1858).

[64] Id. at 749.

[65] Holbrook v. Holbrook, 18 Mass. (1 Pick.) 248, 254 (1822); Brown v. Wright, 13 N.J.L. 240, 242 (1832) ("[I]f from a view of the whole law, . . . the evident intention is different from the literal import of the terms employed to express it . . ., that intention should prevail, for that in fact is the will of the legislature.") (citing United States v. Fisher, 6 U.S. (2 Cranch) 358, 399 (1805)); see Lionberger v. Rouse, 76 U.S. (9 Wall.) 468, 475 (1869) ("It is a universal rule in the exposition of statutes that the intent of the law, if it can be clearly ascertained, shall prevail over the letter . . . ."); see also Chesapeake & Ohio Canal Co. v. Baltimore & O.R.R., 4 G. & J. 1, 157 (Md. 1832) ("If the question could now be put to the . . . legislature . . . whether they had . . . any such intention, it cannot be doubted what the answer would be."); Commonwealth v. Cambridge, 37 Mass. (20 Pick.) 267, 271 (1838) ("[A] strict literal construction of the statute would be opposed to the intention of the legislature, and the true meaning of the act . . . .").

[66] E.g., Haglin & Pope v. Rogers, 37 Ark. 491, 494–95 (1881); Glover v. Baker, 76 N.H. 393, 403, 419–20, 83 A. 916, 924 (1912); State v. People's Nat'l Bank, 75 N.H. 27, 31, 70 A. 542, 544 (1908); Hoguet v. Wallace, 28 N.J. 523, 525–26 (1860); Eshleman's Appeal, 24 Smith 42, 47 (N.Y. 1873).

[67] E.g., Doles v. Hilton, 48 Ark. 305, 307–09, 3 S.W. 193, 194–95 (1887); Carrigan v. Stillwell, 99 Me. 434, 437 (1905); *In re* Meyer, 209 N.Y. 386, 389, 103 N.E. 713, 714 (1913); Chandler v. Northrop, 24 Barb. 129, 133 (N.Y. App. Div. 1857); State v. Baltimore & O.R.R., 61 W. Va. 367, 369, 56 S.E. 518, 519 (1907).

[68] E.g., Gran v. Houston, 45 Neb. 813, 825, 64 N.W. 245, 248 (1895); T. Sedgwick, A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law 235–36 (New York 1857).

2. The Plain Meaning Resolution: Equity as Judicial Legislation

The second judicial resolution of the tension between literal and nonliteral interpretation, appearing somewhat later in the century, was to follow statutory language if clear.[69] This resolution—that a court should follow unambiguous statutory language, regardless of the consequences—eventually became known as the plain meaning rule. The plain meaning rule had a scientific air and echoed the so-called objective theories in contracts and torts. Like other "objective theories," the plain meaning rule constituted an intermediate term between subjective intent of others—in this case the legislature—and the equally subjective whim of the judiciary. Courts adopting this approach emphasized their duty to follow the will of the legislature under the principle of separation of powers.

The plain meaning rule emerged slowly. The idea that the language of the statute controlled unless ambiguous was incompletely articulated by Blackstone. His five signs of legislative intent were not so organized. His first and third signs ("words" and "subject matter") were expressed without qualification,[70] while his second and fifth signs ("context" and "reason and spirit") applied only if the words were "dubious,"[71] and his fourth sign ("effects and consequence") applied only if the words were absurd or bore no meaning.[72]

Mentioned periodically in the early nineteenth century,[73] the plain meaning rule gained stature with the American publication of the English Treatise, *A General Treatise on Statutes* by Sir Fortunatus Dwarris.[74] By the 1850's even courts ultimately going beyond the words of the statute felt compelled to commence their analysis by mentioning the plain meaning rule[75] and in 1857, Theodore Sedgwick used plain meaning as the starting point of the first American treatise

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69 United States v. Warner, 28 F. Cas. 404, 407 (C.C.D. Ohio 1848) (No. 16,643); United States v. Ragsdale, 27 F. Cas. 684, 686 (C.C.D. Ark. 1847) (No. 16,113).

70 1 W. Blackstone, supra note 8, at *59–60.

71 Id. at *60–61.

72 Id. at *60.

73 See, e.g., United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 96 (1820) ("The case must be a strong one indeed, [to] justify a Court in departing from the plain meaning of words . . . ."); United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805) (where "the meaning of the legislation be plain . . . it must be obeyed"); Putnam v. Longley, 28 Mass. (11 Pick.) 487, 490 (1831) ("[W]here the language is clear, and where of course the intent is manifest, the Court is not at liberty to be governed by considerations of inconvenience."); Thaxter v. Jones, 4 Mass. 570, 574 (1808) ("[T]he language of the statute . . . is explicit, and no doubt can arise in its construction.").

74 F. Dwarris, A General Treatise on Statutes (London 1830).

75 See, e.g., Ragland v. The Justices, 10 Ga. 65, 70 (1851) ("If the meaning was wholly free from doubt, no interpretation would be admissible, for any construction variant from the clear meaning of a Statute, would be judicial legislation."); Scaggs v. Baltimore & Wash. R.R., 10

on statutory interpretation.[76]

Advocates of the plain meaning rule severely limited the scope of equitable construction, condemning it as judicial legislation:

> The power of extending the meaning of a statute beyond its words, and deciding by the equity, and not the language, approaches so near the power of legislation, that a wise judiciary will exercise it with reluctance and only in extraordinary cases.
>
> The legislature has prescribed certain arbitrary rules . . . . It is not our province to inquire whether they are wise or unwise, whether they operate equitably and beneficially or the reverse, but whether each particular case comes within any of the rules established.[77]

Accordingly, under the plain meaning rule, the equity of a statute played no role in interpreting unambiguous statutes;[78] recourse was made to equity only if no plain meaning was evident. "[I]f the intention of the legislature be doubtful and not clear, a construction will be put upon the statute that renders it most consonant to equity and least inconvenient."[79]

3. The Absurdity Rule Resolution: Equity as a Narrower of Statutes

The third resolution, emerging during the late classical period, compromised between the other two. It afforded room to nonliteral interpretation without abandoning the deference implicit in adherence to language. Under the third approach, the court looked first to the language of the statute but "[i]f a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurd-

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Md. 268, 277 (1856) ("The words of the act are first to be resorted to, and if these are plain in their import they ought to be followed.).

[76] T. Sedgwick, supra note 68, at 231–32, 306–11.

[77] Monson v. Chester, 39 Mass. (22 Pick.) 385, 387–89 (1839); see also United States v. Freeman, 44 U.S. (3 How.) 556, 565 (1845) ("equitable construction of statutes" equated with construction "beyond the just application of adjudicated cases"); Collins v. Carman, 5 Md. 503, 532 (1854) ("If the law makes no exception the courts can make none, whether they be courts of law or equity.").

[78] See, e.g., Bennett v. Worthington, 24 Ark. 487, 494 (1866) ("The correct rule, . . . is, that where the will of the legislature is clearly expressed, the courts should adhere to the literal expression of the enactment, without regard to consequences, and that every construction derived from a consideration of its reason and spirit should be discarded."); Hyatt v. Taylor, 42 N.Y. 258, 262 (1869) ("Much has been loosely said of the duty of courts to give an equitable construction to statutes according to their 'spirit,' but there is no sufficient warrant for an appeal from legislative to judicial discretion on such mere ground of convenience."); Davidson v. McCandlish & Son, 69 Pa. 169, 172–73 (1871) (claim dismissed as "not within the letter of the act, but only its equity").

[79] Thomas' Election, 198 Pa. 546, 550, 48 A. 489, 490 (1901); see Mundt v. Sheboygan & F. du L. R.R., 31 Wis. 451, 457–58 (1872).

ity."[80] This approach, known as the "golden rule" in England,[81] was adopted by only a minority of American courts. In America, the golden rule was most often described as a presumption against absurdity.[82]

Under the absurdity resolution, equitable interpretation was solely a narrower of statutes. Utilized when following plain meaning would lead to an absurd result,[83] the equity of a statute functioned only to remove cases from otherwise applicable statutes. The anonymous Note *On Construing Statutes by Equity*[84] was the first authority explicitly limiting equitable construction in this manner. That Note distinguished between equity that enlarged the scope of a statute and equity that restricted a statute, defending the latter because:

> All men, knowing what it is they do contemplate, are apt to use words which are large enough to embrace it; but all men, being unconscious necessarily of what they do not contemplate, are liable to employ general words that (literally taken) have a sense more comprehensive than is suited to their present design.[85]

Restrictive equity surfaced in several opinions in the second half of the nineteenth century.[86] In the famous *Church of the Holy Trinity v. United States,*[87] holding a statute prohibiting the employment of

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80 Church of the Holy Trinity v. United States, 143 U.S. 457, 460 (1892).

81 Corry, Administrative Law and the Interpretation of Statutes, 1 U. Toronto L.J. 286, 299 (1935); see generally id. at 286–300 (history of "golden rule" in England).

82 See Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 607, 609 (1869); Hasson v. City of Chester, 67 W. Va. 278, 282–83, 67 S.E. 731, 733–34 (1910); J. Bishop, Commentaries on the Written Laws § 82, at 65–66 (1882); H. Black, Handbook on the Construction and Interpretation of the Laws §§ 46–49, 100–07 (1896); G. Endlich, supra note 6, §§ 245–266, at 324–54; J. Sutherland, supra note 31, § 332, at 419.

83 Equity was equated with the presumption against absurdity, see State v. Comptoir National D'Escompte de Paris, 51 La. Ann. 1272, 1281, 26 So. 91, 95 (1899) (" '[I]t is legitimate, if two constructions are fairly possible, to adopt that one which equity would favor.' ") (quoting Washington & I.R.R. v. Coeur D'Alene Ry. & Navigation, 160 U.S. 77, 101 (1895)); De Paige v. Douglas, 234 Mo. 78, 89, 136 S.W. 345, 348 (1911) (" 'When ambiguities or faults of expression render the meaning of the law doubtful, that interpretation should be preferred which is most consonant to equity . . . .' ") (quoting Edward Coke); Thomas' Election, 198 Pa. 546, 550, 48 A. 489, 490 (1901); Turbett Twp. Overseers v. Port Royal Borough Overseers, 33 Pa. Super. 520, 524 (1907); Hasson v. City of Chester, 67 W. Va. 278, 281–83, 67 S.E. 731, 733 (1910); and the absurdity rule proper, see, e.g., People *ex rel.* Twenty-Third St. R.R. v. Commissioners of Taxes, 95 N.Y. 554, 557–59 (1884).

84 3 Q.L.J. 150 (1858).

85 Id. at 152.

86 See, e.g., Smiley v. Sampson, 1 Neb. 56, 84–88, aff'd, 80 U.S. (13 Wall.) 91 (1871); Pettit v. Fretz's Exec., 33 Pa. 118, 120–21 (1859); see also H. Black, supra note 82, §§ 29–30, at 66 ("[C]ourts have power to declare that a case which falls within the letter of a statute is not governed by the statute, because it is not within the spirit and reason of the law and the plain intention of the legislature.").

87 143 U.S. 457 (1892).

foreigners inapplicable to a contract between a church and its parson, the United States Supreme Court split in half the common maxim when it declared "that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers,"[88] without conceding that spirit could be used to widen the scope of a statute. In *Perry v. Strawbridge*,[89] the Supreme Court of Missouri relied upon a similar maxim in holding that a husband who murdered his wife could not inherit from her estate under an intestacy statute.[90]

C. *Extreme Polarization of Common and Statutory Law: The Decline of Equity*

Thus, in the nineteenth century, two sets of principles for interpreting statutes had emerged. One was based on the classical notion of legislative intent and organized interpretive rules along the tension between literal and nonliteral interpretation, ultimately settling on intent, plain meaning, or the "golden rule." The other utilized the preclassical duality of technicality and liberality and divided its interpretive rules along the choice between strict or liberal interpretation.

On the lower, interpretive level, the rules underlying these schemes were compatible. Courts felt comfortable invoking both literal/nonliteral and strict/liberal rhetoric in a single opinion. The strict/liberal dichotomy was used with both intent and plain meaning resolutions. When courts chose intent over letter, the remedial purpose for the statute provided additional reason for interpreting it in accordance with equity;[91] when they operated within the plain meaning regime, the rule that remedial statutes are construed broadly was invoked where ambiguity existed. As one court said: "It being a remedial statute and its construction in doubt, we think we are at liberty to construe it liberally for the advancement of the remedy and supression of the mischief aimed at by the legislature."[92]

Despite such integrations at the level of the rules of interpretation, preclassical and classical modes were fundamentally incompatible on the abstract level of the relationship of statutory and common

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[88] Id. at 459. Compare this with the original formulation of the rule, supra text accompanying note 51.

[89] 209 Mo. 621, 108 S.W. 641 (1908).

[90] Id. at 638–39, 108 S.W. 645–46 (citing H. Black, supra note 82).

[91] See, e.g., Haglin & Pope v. Rogers, 37 Ark. 491, 496 (1881); Maysville & L.R.R. v. Herrick, 76 Ky. (13 Bush) 122, 125 (1877).

[92] Mundt v. Sheboygan & F. du L. R.R., 31 Wis. 451, 460 (1872); see McNair v. Williams, 28 Ark. 200, 206–07 (1873) (quoting F. Dwarris, A General Treatise on Statutes 562, 614, 667 (Potter ed. Albany 1871)); T. Sedgwick, supra note 68, at 311–12.

law. Courts argued violently over whether to assign primacy to liberality or plain meaning. For instance, in deciding whether a statute permitting the assignment of indentured servants on the consent of the apprentice "or" his parent should be read to require the permission of both, the court in *Commonwealth ex rel. Stephenson v. Vanlear*[93] split as much over the proper attitude to be taken toward statutes as it did over result. Justice Brackenridge, in dissent, relied on "liberality" rhetoric. He favored a "liberal" construction that would look to the "reason" of the law and require consent of both apprentice and parent.[94] The two other judges, in opting for plain meaning, rejected this rhetoric. Chief Justice Tilghman, writing for the majority, said that the language should prevail even when contrary to the probable intent: "The law would have been better, if it had been *and* instead of *or,* and very probably it was so intended. But I dare not take the liberty of altering what is written."[95] Justice Yeats, also dissenting, went further:

> It is said here, that *or* must be construed *and,* the consent of the parent being necessary. But this appears to me, to be the assumption of an unwarrantable liberty over the expressions of the legislature, by changing its provisions. Such a deviation could only be warranted, in a clear case, to effectuate the plain meaning of a law.[96]

Another opinion expressing violent disagreement over the choice between liberality and plain meaning was *Strawbridge v. Mann,*[97] where a majority of the Georgia Supreme Court relied upon equitable construction,[98] but the author of the opinion felt compelled to express his personal preference for using plain meaning to reach the same result.[99]

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93 1 Serg. & Rawle 248 (Pa. 1815).

94 Id. at 253 (Brackenridge, J., dissenting).

95 Id. at 250.

96 Id. at 251–52 (Yeates, J., dissenting).

97 17 Ga. 454 (1855). *Mann* interpreted a statute limiting the time for execution of judgment to seven years.

98 This Statute . . . is one of those to which this Court has applied the principle of *equitable* interpretation. That principle is one which makes a Statute include a case which, though not within the words of the Statute, is within the mischief aimed at by the Statute; or exclude a case, which though within the the words, is not within the mischief.

Id. at 456.

99 Id. at 458–59. The author wrote:

> But as a general thing, with respect to Acts of our own Legislature, I should feel myself rigorously bound down to the words. The words of those Acts are, what the great majority of the people of the State shape their actions by. It is the words only, that are published to them—and when, after they have followed the

Such split decisions disappeared in the late classical period. In the midst of a furious systematization of the rules of statutory interpretation,[100] courts ceased believing in methods of reasoning capable of bridging the gap between statutory and common law. This cession may have been related to the fact that liberality no longer afforded an easy resolution to the problem of form and substance. By the late nineteenth century, technical English rules had largely been eliminated.[101] Technicality could no longer be used as a straw man; to have any content, it would have had to have represented "form," with the corresponding advantages of certainty and restraint. In that context, to frame judicial inquiry around the decision between liberality and technicality would simply be to organize it around an inevitable, tragic choice.

Courts decided not to frame their inquiry around this choice, but instead focused on the problem of judicial authority. They sought to legitimize judicial authority by separating law from politics. They performed this separation by distinguishing between public and private spheres; public was associated with politics while private became identified with law. Evidenced in numerous treatises published late in the century,[102] the growth of the public/private distinction was linked to the wrenching apart of common and statutory law. Common law became identified with private orderings;[103] statutory law, with public intervention into those orderings.[104]

The classical reordering proved so successful that alternative

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words of the law, they are told by the Courts that they have not followed the law, they feel, that for them, the law has been turned into a snare.

100 Treatises and jurisprudential works on statutory interpretation proliferated during this period. See supra note 82. Nor was the interest in statutory interpretation limited to these works. Contract and constitutional law scholars consciously modeled their theories of interpretation after those developed for statutes. See, e.g., T. Cooley, Treatise on the Constitutional Limitations which Rest upon the Legislative Power of the States of the American Union 69–101 (6th ed. 1890) (importing rules of statutory construction into interpretation of state constitutions).

101 See, e.g., 1848 N.Y. Laws c. 379 (commonly known as the "Field Code"); see Commission on Practice and Pleadings, First Report 73–74 (Albany 1848).

102 See, e.g., J. Bishop, The Doctrines of the Law of Contracts (1878); J. Hare, The Law of Contracts (1887); J. Perry, A Treatise on the Law of Trusts and Trustees (1871); J. Pomeroy, A Treatise on Equity Jurisprudence (1881); F. Wharton, A Treatise on the Conflict of Laws or Private International Law (1872); see also Horwitz, The History of the Public/Private Distinction, 130 U. Pa. L. Rev. 1423, 1423–26 (1982) (describing the growth of the public/private distinction). See generally G. Gilmore, The Ages of American Law 68–98 (1977) (description of the Age of Anxiety); Mensch, supra note 23, at 23–26 (discussion of classical distinction between private and public law).

103 Private law consisted of commercial law, contracts, property, torts, and trusts and estates. See Horwitz, supra note 102, at 1424.

104 Public law consisted of constitutional, criminal, and regulatory law. Id.

modes of thought became inconceivable. The notion of reasoning techniques, such as liberality, which were applicable to both common and statutory law, became meaningless. The fall of liberality was evident in two developments. One was the rise to prominence of the maxim: Statutes in derogation of the common law are to be narrowly construed. That maxim was only imperfectly formulated before the mid-nineteenth century.[105] In the passage popularly credited as its first appearance,[106] Kent said:

> Statutes are . . . to be construed in reference to the principles of the common law; for it is not to be presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely required. . . . It was observed by the judges, in the case of *Stowell v. Zouch,* that it was good for the expositors of a statute to approach as near as they could to the reason of the common law; and the resolution of the barons of the exchequer, in *Heydon's* case was to this effect.[107]

This passage probably meant nothing more than the principle that statutes should be read to accord with the common reason, a principle often equated with *Stowell v. Zouch*.[108] "The maxim statutes in derogation of the common law are to be narrowly construed was not so phrased until 1854, and was not popular until late century."[109] The very formulation of that maxim revealed a fundamental shift in attitude. Statutes were no longer part of the same fabric as the common law but were antagonistic to it. Derived from different sources, they comprised an alien body of law.

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105 See, e.g., Brown v. Barry, 3 U.S. (3 Dall.) 365, 367 (1797); see also Pound, The Common Law and Legislation, 21 Harv. L. Rev. 383, 400–01 & n.4 (1908) (collecting earlier versions of the maxim) [hereinafter cited as Pound, Common Law].

106 Pound, Common Law, supra note 105, at 400 n.4.

107 1 J. Kent, supra note 22, lect. XX, at *464 (footnotes omitted).

108 1 Plowd. 353, 365, 75 Eng. Rep. 536, 554 (K.B. 1797).

This is evident when one compares Kent with his contemporary, Nathaniel Dane. Dane, too, made statements like "[s]tatutes are to be expounded by the rules and reasons of the common law," 6 N. Dane, Digest of American Law 588 (Boston 1824); "[t]he common law is to be regarded in the construction of statutes," id. at 598; "an obscure statute ought to be construed according to the rules of the common law," id. at 589; and "[t]he principles of the common law govern in the construction of private statutes," id. at 590. Sometimes these statements were used to narrow statutes contrary to the common law. See id. at 589 ("Statutes are not presumed to alter the common law otherwise than is clearly expressed. . . ."); id. at 597 ("[A] statute shall not have an equitable, liberal, or enlarged construction, so as to take away a common law remedy . . . .") at other times they broadened the statute. Id. at 587 ("When a statute creates a new right, without prescribing a remedy, the common law will furnish an adequate remedy to give effect to the statut[ory] right."). Thus, their net effect was neutral. Id. at 598 ("The common law is to be regarded in the construction of statutes. This is a good general rule; but it embraces too many considerations to be of much use.").

109 Pound, Common Law, supra note 105, at 401–02.

A second development demonstrating the collapse of any bridge between common and statutory law—and of liberality in particular—was the fate of the California Civil Code. When proposed in the 1860's, its advocates saw no difference in the elaboration of statutory and common law. David Dudley Field, the author of the Code, thought it could be read broadly and at the same time as an extension of the common law:

> [I]f there be any rule of the common law not mentioned in the Code, it will continue to exist as it was before; while if a new case arises, not forseen and therefore not provided for, it will be decided, as it would now be decided, by analogy to a rule expressed in the Code, or to a rule omitted, and therefore still existing outside of the Code, or by the dictates of natural justice.[110]

As adopted in 1872, the Code embodied Field's vision. Section 4 required the Code to be "liberally construed with a view to effect its objects and to promote justice,"[111] while section 5 required that its provisions, "so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments."[112]

By the 1880's, however, the notion of a single approach to common law and statutes had lost meaning. Lawyers could no longer conceive of a liberally construed Code that simultaneously continued the common law. Professor Pomeroy was the first to criticize the interpretive section of the Code.[113] He saw "antagonism, conflict and contradiction . . . between the special and particular rules derived by judicial decision from the doctrines formulated in the code, and those contained in decisions based solely upon the authority of common law and equity doctrines and rules still left in operation outside of the code."[114] He claimed that:

> The common law as a form of jurisprudence possesses certain peculiar excellencies, acknowledged by all able jurists to belong to it in the highest degree, which constitute its essential characteris-

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110 D. Field, The Code of New York, in 1 Speeches, Arguments and Miscellaneous Papers of David Dudley Field 338, 347 (A. Sprague ed. 1884); see id. at 329.

111 Cal. Civ. Code § 4 (West 1982).

112 Cal. Civ. Code § 5 (West 1982). See generally Englard, *Li v. Yellow Cab Co.*—A Belated and Inglorious Centennial of the California Civil Code, 65 Calif. L. Rev. 1, 12–18 (1977) (description of the history of the interpretation of the California Civil Code); Harrison, The First Half-Century of the California Civil Code, 10 Calif. L. Rev. 185, 188–93 (1922) (discussion of judicial interpretation of the Code); Van Alstyne, The California Civil Code, in Calif. Civ. Code Ann. 1, 29–36 (West 1954) ("Judicial Development of the Civil Code").

113 Pomeroy, The True Method of Interpreting the Civil Code (pts. 1–8), 3 W. Coast Rep. 585, 657, 691, 717; 4 W. Coast Rep. 1, 49, 109, 145 (1884).

114 Pomeroy, supra note 113, 4 W. Coast Rep., at 148.

> tics, and which render it, in those respects, superior to any other form of municipal law in its adaptability to the needs of a progressive society . . . . The distinguishing element of the common law, and one of its highest excellencies, is its elasticity, its power of natural growth and orderly expansion. Its doctrines, however formulated, are not limited to any fixed, existing condition of facts, but they may, by virtue of their own inherent power, be extended to new facts and circumstances, as these are constantly arising in the intercourse of men and transactions of life.[115]

In contrast, "[t]he peculiarity of statutes . . . is their rigidity. Statutory rules once enacted cannot be readily modified and expanded by the courts so as to cover new facts and relations not included within their expressed terms."[116] As embodied in the Code they were "incomplete, imperfect, and partial."[117] Read literally, the Code would "become a mass of uncertainties, inconsistencies, and contradictions."[118] It "substituted new and unknown words and phrases in the place of those legal terms and expressions which have hitherto been generally employed by writers and judges, which are familiar to the profession, and the meaning of which are fixed and certain."[119] For instance, it was "almost impossible to conceive that the authors of the code intended to have the common law rules in full operation in all instances of lapsed legacies, and to change them only in some instances of lapsed devises."[120] Likewise, the section on fraud was poorly drawn because it ignored the distinction between law and equity.[121] Such sections would "give the courts great difficulty in . . . interpretation, unless the judges are willing to boldly legislate, and add language to it which cannot possibly be found in it."[122] Pomeroy felt that the only way to avoid such a result was to rely heavily on the common law. Code provisions should "be regarded as simply declaratory of the previous common law and equitable doctrines and rules, except where the intent to depart from those doctrines and rules clearly appears from the unequivocal language of the text."[123]

Pomeroy's views were adopted by the California Supreme Court in *Sharon v. Sharon:*[124]

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115 Id. at 110.
116 Id. at 110–11.
117 Id. at 114.
118 Pomeroy, supra note 113, 3 W. Coast Rep. at 585.
119 Id. at 659.
120 Id. at 590.
121 Pomeroy, supra note 113, 4 W. Coast Rep. at 2.
122 Pomeroy, supra note 113, 3 W. Coast Rep. at 589.
123 Pomeroy, supra note 113, 4 W. Coast Rep. at 152.
124 75 Cal. 1, 16 P. 345 (1888).

> The common law underlies all our legislation, and furnishes the rule of decision except in so far as the statutes have changed the common law. When the common law is departed from by a provision of the code, effect is to be given to the provision to the extent—and only to the extent—of the departure.[125]

After *Sharon,* the California Code lost its flavor and became "immersed in the sea of common law."[126]

The extreme polarization of common and statutory law contributed to the demise of the equity of a statute. Advocates of plain meaning were most hostile to the doctrine. Dwarris had disdain for it,[127] and although Sedgwick reluctantly gave equitable interpretation a place in his system,[128] later proponents of plain meaning did not.[129]

But the attack on equitable construction was not confined to proponents of plain meaning. The term "equity," as distinct from terms such as "spirit" and "reason," connoted a principle with general application throughout the law. While such a notion was meaningful to lawyers familiar with "liberality," it was useless to those who looked solely to legislative intent. Therefore, courts using the intent approach began to discard "equity" for terms like "general purpose"[130] and "policy of law."[131] Similarly, authorities relying on the golden rule—that statutes should be construed to avoid absurdity—shied away from "equity of a statute" in favor of "reason" and "spirit."[132] Henry Black, for instance, after observing that courts had disavowed the power to use expansive equitable interpretation,[133] defended the use of spirit only as a narrower of statutes:

> [A] statute . . . should be construed according to its spirit and reason . . . .
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> . . . [And] the courts have power to declare that a case which

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125 Id. at 28, 16 P. at 357.

126 Englard, supra note 112, at 15.

127 He stated: "It is too general a ground to put cases upon statutes where things shall be taken by equity . . . ," F. Dwarris, supra note 74, at 720–21, and " 'there is always danger in giving effect to what is called the equity of a statute; it is much safer and better to rely on and abide by the plain words,' " id. at 721 (quoting Lord Tenterden). Dwarris also condemned judges for abrogating to themselves "the lofty privilege of correcting abuses and introducing improvements" in the laws, id. at 792, and attacked "*equitable interference*" on their part, id. at 793.

128 T. Sedgwick, supra note 68, at 362–63.

129 See, e.g., G. Endlich, supra note 6, § 325, at 446–47; J. Sutherland, supra note 31, §§ 413–414, at 524–30.

130 See, e.g., State v. O'Neil, 147 Iowa 513, 518, 126 N.W. 454, 455 (1910).

131 See Tompkins v. First Nat'l Bank, 18 N.Y.S. 234, 236 (1892).

132 See Church of the Holy Trinity v. United States, 143 U.S. 457, 459–61 (1892), where the Supreme Court relied on "reason and spirit" without mentioning "equity."

133 H. Black, supra note 82, § 28, at 63–65.

> falls within the letter of a statute is not governed by the statute, because it is not within the spirit and reason of the law and the plain intention of the legislature.[134]

The bias against "equity" was also evident in *Perry v. Strawbridge*.[135] Though well aware of the famous *Riggs v. Palmer*,[136] where the New York Court of Appeals had reached the same result by reliance on equity,[137] Judge Graves tried to make his decision more palatable by rejecting "equity" in favor of "spirit and reason."[138] Likewise, those relying on liberal construction drew upon "equity" less frequently.[139]

Thus, the overwhelming opinion of late classical lawyers was that the equity of a statute was dead.[140] The treatises announced that it was no longer to be followed. Endlich devoted thirteen pages to demonstrating how the doctrine "would not be tolerated now,"[141] had "fallen into discredit,"[142] and was "a beacon to be avoided."[143] Sutherland described it as a historical doctrine whose "underlying principle is obsolete."[144] Henry Black took a similar approach: "The power to make such constructions is now disavowed by the courts."[145] Even brief accounts of the rules of interpretation made certain to mention that the equity of a statute was no longer followed.[146] Case law con-

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134 Id. §§ 29–30, at 66.

135 209 Mo. 621, 108 S.W. 641 (1908).

136 115 N.Y. 506, 22 N.E. 188 (1889) (cited in *Perry*, 209 Mo. at 633–35, 108 S.W. at 644).

137 115 N.Y. at 510–11, 22 N.E. at 189. Both *Perry* and *Riggs* considered whether a murderer could inherit from his victim.

138 209 Mo. at 636–41, 108 S.W. at 645–46.

139 Compare T. Sedgwick, supra note 68, 362–64 (equity of a statute equated with liberal construction), with H. Black, supra note 82, §§ 29–30, at 66, 67 (liberal construction equated with "spirit and reason"), and J. Sutherland, supra note 31, §§ 412–415, at 524–31 (liberal construction distinguished from equitable construction). The rule in Heydon's Case, 3 Co. Rep. 7a, 76 Eng. Rep. 637 (1584), was not attacked during this period. H. Black, supra note 82, § 91, at 286. G. Endlich, supra note 6, at §§ 27, 35, 103, 135, 337, 466; see T. Sedgwick, supra note 68, 235–36; J. Sutherland, supra note 31, § 162, at 217 n.3, § 207, at 274 n.1, § 300, at 383 n.3.

140 The demise of "equitable interpretation" in the 1880's coincided with a renunciation of the common law power of courts to declare criminal statutes obsolete from desuetude. See Bonfield, The Abrogation of Penal Statutes by Nonenforcement, 49 Iowa L. Rev. 389, 428–29 (1964) (renunciation of desuetude in Pennsylvania and Iowa in the 1880's).

141 G. Endlich, supra note 6, § 323, at 443.

142 Id. § 325, at 446.

143 Id. § 328, at 449.

144 J. Sutherland, supra note 31, § 414, at 529. See id. § 413, at 525 (equitable interpretations described as "relics of ancient hermeneutics which do not survive entire").

145 H. Black, supra note 82, § 28, at 57.

146 See Rood, Interpretation of Statutes, 8 Mod. Am. L. 423, 433 (1914). For another example, in the third edition of F. Lieber, Legal and Political Hermeneutics (St. Louis 1880) (1st ed. Boston 1839), William Hammond added a six page supplemental note criticizing equitable interpretion, a doctrine not discussed in the original. Id. at 283–89.

curred in this judgment.[147] For instance, *Encking v. Simmons*[148] announced that the doctrine of equitable construction, "if it ever existed, was long since exploded."[149]

IV. THE TWENTIETH-CENTURY REVIVAL OF EQUITY

Despite the declarations of classical jurists, the equity of a statute was not really dead. Although discredited, it was ultimately revived in three twentieth-century movements.

A. *The Progressives and Their Successors: Equity as Analogical Interpretation*

The earliest impulse toward a revival came from legal reformers known as the Progressives—men such as Ernst Freund, John Chipman Gray, and Roscoe Pound. The Progressives held two views with respect to statutory interpretation. First, they believed in the unitary nature of common law elaboration and statutory interpretation:

> The judge must legislate, and selective interpretation is legislation . . . . The spectre of judicial usurpation conjured up in the minds of those who dread judicial legislation in every form, and would like to restrict the courts to purely administrative functions, will never vanish. Selective interpretation is a necessity of every system in which the judiciary is clothed with any authority.[150]

In the same vein, Ernst Freund noted that legislative intent was often

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147 See, e.g., State v. O'Neil, 147 Iowa 513, 518, 126 N.W. 454, 455 (1910) ("The term 'equity of a statute' has fallen into disuse."); Perry v. Strawbridge, 209 Mo. 621, 638, 108 S.W. 641, 645 (1908) ("[T]he old idea of equitable construction of statutes is no longer recognized by the courts . . . ."); State *ex rel.* Woodside v. Woodside, 112 Mo. App. 451, 453, 87 S.W. 8, 9 (1905) ("[T]he doctrine of equitable interpretation has been abandoned."); State *ex rel.* Graham v. Bratton, 90 Neb. 382, 385, 133 N.W. 429, 431 (1911) ("[I]t is not within our power to set aside or amend by construction an act of the legislature which is free from all ambiguity and clear and explicit in its terms, simply because to do so would appear to be equitable."); Tompkins v. First Nat'l Bank, 18 N.Y.S. 234, 236 (1892) ("[T]here is no more dangerous rule than that of equitable construction . . . . [T]he tendency in these days has been to abandon the so-called equitable construction." (citation omitted)); Saville v. Virginia Ry. & Power, 114 Va. 444, 452, 76 S.E. 954, 957 (1913) ("We hear a great deal about the spirit of the law, but the duty of this court is not to make law, but to construe it."); Walker v. City of Spokane, 62 Wash. 312, 318, 113 P. 775, 777 (1911) ("[W]hile equitable construction may be tolerated in remedial statutes, it should always be resorted to with great caution, and never extended to mere arbitrary regulations of matters of public policy."); Mellen Lumber Co. v. Industrial Comm'n, 154 Wis. 114, 119, 142 N.W. 187, 189 (1913) ("It was at one time urged that the courts might mitigate the rigor of harsh statutes by adopting a rule of equitable construction . . . . It never obtained in this state, nor to any considerable extent in this country.").

148 28 Wis. 272 (1871).

149 Id. at 276.

150 Spencer, Genuine and Spurious Interpretation (A Note on Pound's "Courts and Legislation"), 25 Green Bag 504, 507 (1913).

"a fiction" and that the legislature itself "is fully aware that any but the most explicit language is subject to the judicial power of interpretation."[151] John Chipman Gray believed the difference between common and statutory law to be exaggerated. "[S]tatutes do not interpret themselves; their meaning is declared by the courts, and it is with the meaning declared by the courts, and no other meaning, that they are imposed on the community as Law."[152] Second, the Progressives believed that the classical system of statutory interpretation was unfairly biased against legislation. Roscoe Pound, for one, decried "the indifference, if not contempt, with which [legislation] is regarded by courts and lawyers"[153] and demonstrated how the maxim "statutes in derogation of the common law should be strictly construed" manifested that hostility.[154]

In place of the traditional, antilegislative approach to statutes, the Progressives offered analogical interpretation—statutes were to be treated as active principles from which courts could reason by analogy. Pound put analogical interpretation at the top of his list of possible interpretive devices.[155] Appealing to the European practice of interpreting codes analogically, Freund urged American courts "in cases of genuine ambiguity" to "use the power of interpretation consciously and deliberately to promote sound law and sound principles of legislation . . . [t]o be frankly and vigorously used as a legitimate instrument of legal development and of balancing legislative inadvertance by judicial deliberation."[156]

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151 Freund, Interpretation of Statutes, 65 U. Pa. L. Rev. 207, 231 (1917).

152 J.C. Gray, The Nature and Sources of the Law § 366, at 162 (1909) (emphasis omitted); see Note, Statutory Principles in the Common Law, 30 Harv. L. Rev. 742, 744 (1917).

153 Pound, Common Law, supra note 105, at 383.

154 Id. at 386–87. Pound argued that the maxim

> assumes that legislation is something to be deprecated. As no statute of any consequence dealing with any relation of private law can be anything but in derogation of the common law, the social reformer and the legal reformer, under this doctrine, must always face the situation that the legislative act which represents the fruit of their labors will find no sympathy in those who apply it, will be construed strictly, and will be made to interfere with the *status quo* as little as possible.

Id. at 387. See supra, note 109.

155 Pound, Common Law, supra note 105, at 385. Pound saw analogical interpretation as the way of the future: "[T]he course of legal development upon which we have entered already must [eventually] lead us to adopt the method of [analogical interpretation]." Id. at 386.

156 Freund, supra note 151, at 231.

The idea of analogical interpretation surfaced in Supreme Court opinions. In Gooch v. Oregon Short Line R.R., 258 U.S. 22, 24 (1922), Justice Holmes wrote:

> For although courts sometimes have been slow to extend the effect of statutes modifying the common law beyond the direct operation of the words, it is obvious that a statute may indicate a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind.

In light of their discontentment with the classical order, the progressives might have been expected to seize immediately upon the doctrine of equitable interpretation as an alternative to that regime. Yet this did not occur—the Progressives generally distrusted equitable interpretation. Pound criticized the doctrine by attributing to it an objective "to make, unmake, or remake [the law], and not merely to discover" what the legislature intended.[157]

Two beliefs explain the Progressives' distrust of equity. The first was their view of history, which attributed equitable interpretation to a prelegislative era. Pound thought equitable interpretation was "made necessary in formative periods by the paucity of principles, feebleness of legislation, and rigidity of rules characteristic of archaic law. . . . As legislation becomes stronger and more frequent, examples of this type of so-called interpretation will finally become less common."[158] Gray agreed: "[W]hen legislation is rare, and can be procured with difficulty, the judges will allow themselves a freedom in interpreting statutes which they will not exercise when any ambiguous or defective statute can easily be remodelled by the Legislature."[159] Thus the equity of a statute was wholly irrelevant to an age where, as in the early twentieth century, legislation was frequently and easily revised.[160] A second belief contributing to the Progressives' rejection of equitable interpretation was their perception that the doctrine acted only to narrow statutes. The most familiar incarnation of that doctrine was as part of the "golden rule." Freund, for example, grouped equitable interpretation and the approaches of *Church of the Holy Trinity v. United States*[161] and *Riggs v. Palmer*[162] under the heading of "restrictive interpretation," the reading of exceptions into statutes.[163] As a narrower of statutes, the equity of a statute represented the very tendency the progressives condemned—the tendency of judges to undercut legislation.

By 1934, however, proponents of analogical interpretation em-

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157 Pound, Spurious Interpretation, 7 Colum. L. Rev. 379, 382 (1907) (criticism of Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889) (discussed at text accompanying supra notes 135–138). But see Drake, The Sociological Interpretation of Law, 16 Mich. L. Rev. 599, 605–06 (1918) (equity of statute used as basis for the sociological method of interpretation of law).

158 Pound, Spurious Interpretation, supra note 157, at 382.

159 Gray, supra note 152, § 385, at 172–73.

160 Cf. Pound, The Decadence of Equity, 5 Colum. L. Rev. 20, 24 (1905) ("Although we may believe, on whatever grounds, in a resurrection of equity in the remote future, the present is a period of law.").

161 143 U.S. 457 (1892); see supra notes 86–88 and accompanying text.

162 115 N.Y. 506, 22 N.E. 188 (1889). See supra notes 143–148 and accompanying text.

163 Freund, supra note 151, at 221–24; see Pound, Spurious Interpretation, supra note 157.

braced the equity of a statute as a legitimate tool for statutory interpretation. Leading the way in this shift was James Landis. Like the Progressives, he believed that courts should use statutes the same way they use common law precedents.[164] He did not, however, share the Progressives' perception of history and of the equity of a statute. Landis associated equitable interpretation with the age of statutes[165] and believed its decline was not logical necessity but historical accident.[166] Indeed, Landis thought history demonstrated that equitable interpretation was essential to statutory interpretation. "Obviously there is something intrinsic in the attitude toward legislation that was once phrased by reference to the equity of the statute, that cannot be exorcised from the law."[167] This belief, coupled with his trust of the contemporary judiciary,[168] permitted Landis to offer the equity of a statute as a tool to interpret statutes. Following Landis, William Page and Jerome Frank drew upon the equity of a statute as an antecedent for analogical interpretation,[169] as did subsequent courts.[170]

B. *The Legal Realists: Equity as An Example of the Vacuity of Legal Concepts*

In the 1930's and 1940's the so-called "Legal Realists"[171] subjected the classical order to criticisms far more reaching than those offered by the Progressives. Whereas the Progressives merely criticized selected classical rules as antilegislative, the Realists cast doubt upon the entire classical edifice. They attacked conceptualism in every form[172] and in particular questioned the legitimacy of the cornerstone of classical thought: the public/private distinction. Felix

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164 Landis, Statutes and the Sources of Law, in Harvard Legal Essays 213, 236 (1934) ("Instead of treating statutory materials in an isolated fashion, care and imagination in handling them, such as is customary in dealing with judicial precedents, may produce fruitful results.").

165 Id. at 235 n.10 ("The real fact is . . . that the concern of the judges from the fourteenth to the sixteenth century is with statutes rather than 'common law.' ").

166 See id. at 217–18.

167 Id. at 219.

168 Id. at 233 ("Grammatical interpretation is giving way to functional construction. The distrust of legislative intervention is subsiding with the important advances made in the mechanics of law-making.").

169 See Page, Statutes as Common Law Principles, 1944 Wis. L. Rev. 175, 198–200; Slifka v. Johnson, 161 F.2d 467, 470 (2d Cir. 1947) (opinion per Frank, J.); see also Usatorre v. The Victoria, 172 F.2d 434, 439–43 (2d Cir. 1949) (extended discussion of equitable interpretation) (opinion per Frank, J.).

170 3 J. Sutherland, Statutes and Statutory Construction § 60.05, at 39–40 (F. Horack ed. 1943) (collecting cases identifying equitable interpretation with analogical interpretation).

171 For a description of the Legal Realists, see W. Twining, Karl Llewellyn and the Realist Movement (1973).

172 See K. Llewellyn, Jurisprudence: Realism in Theory and Practice 55–57 (1962); Fuller, American Legal Realism, 82 U. Pa. L. Rev. 429, 443–47 (1934).

Cohen, Morris Cohen, and Robert Hale argued that private law involved the delegation of sovereign power.[173]

The correlative attack with regard to statutes was Max Radin's *Statutory Interpretation*.[174] That article attacked the core of the classical theory of statutory interpretation—the notion of legislative intent. Radin argued that the collective intent of a legislative assembly was undiscoverable[175] and irrelevant to the judiciary's use of statutes, since the legislators' "function is not to impose their will even within limits on their fellow-citizens, but to 'pass statutes,' which is a fairly precise operation."[176] Nor did Radin stop with legislative intent: he attacked the entire maze of classical rules governing statutory construction. The plain meaning rule, which ostensibly foreclosed construction of statutes whose meaning was "plain," actually presumed prior interpretation which had found the meaning "plain."[177] The choice between strict and liberal construction rested on amorphous categories and did not address the question of *how* strictly or liberally a statute should be read.[178] Maxims such as *expressio unius*[179] and *ejusdem generis*[180] lacked foundation in logic and habits of speech.[181] A similarly all-destructive strategy was adopted by Karl Llewellyn, who organized all the canons of statutory construction into two opposing columns to demonstrate their essential manipulability.[182]

The Realists used the equity of a statute to discredit the classical system by demonstrating that the system did that which it most abhorred. If its approach to statutes did not essentially differ from equitable construction, the classical system was a failure. For instance, Frank Horack argued that equitable interpretation was

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173 F. Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809, 815–17 (1935); M. Cohen, Property and Sovereignty, 13 Cornell L.Q. 8, 11–14 (1927); M. Cohen, The Basis of Contract, 46 Harv. L. Rev. 553, 585–92 (1933); see Hale, Force and the State: A Comparision of "Political" and "Economic" Compulsion, 35 Colum. L. Rev. 149, 149–50 (1935); see also Horwitz, supra note 102, at 1426 (description of Legal Realist attack on public/private distinction).

174 43 Harv. L. Rev. 863 (1930) [hereinafter cited as Radin, Statutory Interpretation].

175 Id. at 870–71.

176 Id. at 871.

177 Id. at 869.

178 Id. at 879–81.

179 *Expressio unius est exclusio alterius* means the expression of one thing implies the exclusion of another. Black's Law Dictionary 521 (5th ed. 1979).

180 *Ejusdem generis* means that general words following an enumeration of specific things are limited to things in the classes specifically mentioned. Id. at 464.

181 Radin, Statutory Interpretation, supra note 174, at 873–75.

182 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, 401–06 (1950); see Posner, Statutory Interpretation, supra note 2, at 806.

> no more than a different form of expressing a search for the intent of the legislature. . . .
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> . . . .
>
> The purpose of showing the similarity or identity between equitable interpretation and interpretation according to the intent of the legislature has not been so much for the purpose of showing the harmless character of the former, though that is apparently its character, as it has been to show the unrestrained character of the latter. To say that the one allows uncontrolled judicial exercise of legislative power and the other makes the court servient to legislative intention places emphasis upon words and not facts. . . . [T]he title does not alter the process, which is not so much the searching for the intention of the legislators as it is administration of the legislator's rule by the court, according to a semi-intuitive sense of justice which will make the abstract rule amenable to the juristic needs of the community.[183]

Earl Crawford took the same position:

> [T]he courts still follow the same process [as they did in Blackstone's era] in the interpretation of statutes, although they may generally disapprove [of] the doctrine of equitable construction. . . . It would, therefore, seem that the doctrine of equitable construction is no more susceptible to fatal criticism than many of the other rules or principles of construction. Even though by name the doctrine may be refused application, actually it is still used.
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> . . . [T]he entire legislative process is influenced by considerations of justice and reason. Justice and reason constitute the great general legislative intent in every piece of legislation.[184]

C. *The Post-Realist Legal Process School: Equity as a Mediator Between Classical Formalism and Judicial Legislation*

Having discredited the classical legal system, the Realists sought to propose a meaningful alternative. In so doing, they were caught in a dilemma. On the one hand, they rejected classical doctrine as empty conceptualism. On the other hand, they still believed that law differed from politics. To solve their dilemma, they adopted a middle position—referring to concepts which were neither rigid nor arbitrary, such as "neutral principles"[185] and "reasoned elaboration."[186]

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183 Horack, Statutory Interpretation—Light from Plowden's Reports, 19 Ky. L.J. 211, 224–25 (1931); see also 3 J. Sutherland, supra note 170, at 137 (equity of a statute "has made a definite impression upon American jurisprudence").

184 E. Crawford, The Construction of Statutes 298–99 (1940).

185 See Wechsler, Toward Neutral Principals of Constitutional Law, 73 Harv. L. Rev. 1 (1959).

186 See H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Applica-

With regard to statutes, the post-Realist problem was to avoid rigid rules while deferring to the legislature. To do so, the post-Realists affirmed a loose distinction between common and statutory law and seized upon a variety of mediating metaphors which were simultaneously nonmechanical and apolitical. The "equity of a statute" with its various manifestations provided a rich source of mediators.

Appropriately, the first scholar to begin the reconstruction of statutory interpretation was the one who had played the leading role in the destruction of the old order—Max Radin. In *A Short Way with Statutes* he backed away from his earlier critique, admitting, "[M]y statements were undoubtedly somewhat too sweeping."[187] While not abandoning his prior position, he now admitted that statutes were fundamentally different from the common law:

> Is [the] difference in the way in which the court feels constrained by the sources from which it derives its law, a fundamental difference, or is it merely a difference of technique in the manner in which the court seeks to rid itself of constraint? It seems more likely to be fundamental. Not only would open disregard of a statute be an almost unthinkable act of defiance, but continuous and demonstrable evasion of the statute would endanger the position of the courts in our system. The people would be little concerned if the common law is transformed into a wholly different system—the civil law, for example. They might resent a systematic indifference to principles of natural justice, but would find it difficult to show that these principles had been disregarded. But they would undoubtedly react vigorously against systematic refusal of a court to obey constitutional statutes and they would find it relatively easy to make their resentment effective. It is idle, therefore, to regard statutes as merely one source of law for the court, coordinate with common-law tradition and with natural justice, for the statute has a stronger constraining effect on the judge than have the other elements.[188]

He then proposed an approach to statutes which did not require probing into subjective "intent"[189] but still deferred to the legislature. This was to interpret statutes in accord with their objective "purpose."

> A statute [should be understood] as an instruction to administrators and courts to accomplish a definite result, usually the securing or maintaining of recognized social, political, or economic val-

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tion of Law (tent. ed. 1958); see also Kennedy, Legal Formality, 2 J. Legal Stud. 351, 395–98 (1973) (description of "Third Way" between substantive rationality and rule application).

187 Radin, Short Way, supra note 1, at 410.

188 Id. at 396–97.

189 Id. at 406.

> ues. . . . [W]e may call the statute a ground design, or a plan in which the character and size of a structure are indicated, and in which details are given only so far as they are necessary to assure the erection of the desired structure.[190]

Radin also backed away from his other criticisms. Even if not binding, the traditional rules were useful guides. Legislative materials, for example, were "neither irrelevant nor incompetent, but . . . are in no sense controlling."[191] Likewise, the canons of interpretation were transformed from rules into suggestions.

> [W]hat room is there for the standard "canons of interpretations," for *ejusdem generis, expressio unius,* and the entire coterie or band of phrases and tags and shibboleths which are so wearisomely familiar? I should be tempted to deny that they have ever resolved an honest doubt, if a general negative were provable. Certainly it is hard to find an instance in which they did more than invest with the appropriate symbolic uniform a conclusion that should have been quite as respectable in the ordinary civilian clothes of sober common sense.
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> Evidently, "canons of interpretation" cannot always be rejected. There are statutes whose purpose is exhausted in the statute itself. . . . All that [they] envisage[] is clarity. And if *ejusdem generis* can make it clear, by all means let us use it.[192]

Weakening the classical system, however, left Radin without a positive principle to guide courts toward legislative purpose. In search of such a principle, he settled upon the mischief rule of *Heydon's Case,*[193] adapted to meet contemporary circumstances.[194] "[T]he court today explores the mischief in order to discover, first, the nature of the structure which the administrators are to erect and, second, how much of the existing social structure is to be saved in the process."[195] That "rule" was sufficiently loose as not to be subject to the Realist critique of rules but guided the court in a way which would defer to the legislature. While not decreeing that statutes in derogation of the common law be narrowly construed, the rule directed courts to look to the common law. While not leading judges on a vain search for legislative intent, it told them to examine the mischief and remedy of the law. In short, it resolved the traditional dilemma between form and substance.[196]

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190 Id. at 407.

191 Id. at 410–11.

192 Id. at 423.

193 3 Co. Rep. 7a, 76 Eng. Rep. 637 (1584); see supra note 18 and accompanying text.

194 Radin, Short Way, supra note 1, at 388–89, 421–22.

195 Id. at 421.

196 See id. at 405, 420.

Radin's approach gained widespread acceptance among academics in the 1940's and 1950's. Felix Frankfurter, too, focused on statutory purpose:

> Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government. That aim, that policy is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute, as read in the light of other external manifestations of purpose.[197]

Sharing Radin's ambivalent attitude towards the canons of interpretation,[198] he too rejected the classical system, which he associated with English law, and offered *Heydon's Case* as a more realistic approach:

> Th[e] current English rules of construction are simple. They are too simple. If the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded. The rigidity of English courts in interpreting language merely by reading it disregards the fact that enactments are, as it were, organisms which exist in their environment. One wonders whether English judges are confined psychologically as they purport to be legally. The judges deem themselves limited to reading the words of a statute. But can they really escape placing the words in context of their minds, which after all are not automata applying legal logic but repositories of all sorts of assumptions and impressions? Such a modest if not mechanical view of the task of construction disregards legal history. In earlier centuries the judges recognized that the exercise of their judicial function to understand and apply legislative policy is not to be hindered by artificial canons and limitations. The well known resolutions in *Heydon's Case,* have the flavor of Elizabethan English but they express the substance of a current volume of U.S. Reports as to the considerations relevant to statutory interpretation.[199]

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197 Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 538–39 (1947).

198 Insofar as canons of construction are generalizations of experience, they all have worth. In the abstract, they rarely arouse controversy. Difficulties emerge when canons compete in soliciting judgment, because they conflict rather than converge. For the demands of judgment underlying the art of interpretation, there is no vade-mecum.

> But even generalized restatements from time to time may not be wholly wasteful. Out of them may come a sharper rephrasing of the conscious factors of interpretation; new instances may make them more vivid but also disclose more clearly their limitations. Thereby we may avoid rigidities which, while they afford more precise formulas, do so at the price of cramping the life of law.

Id. at 544–45.

199 Id. at 541 (footnote omitted). Similar post-Realist formulations were offered by Karl Llewellyn and Jerome Frank. Llewellyn praised the "Grand Style" of interpretation which had predominated from 1820–1850, Llewellyn, supra note 182, at 396, 400, and his draft of the

The pinnacle post-Realist work was Hart and Sacks' *The Legal Process*.[200] In that set of materials, the task begun by Radin reached its fullest elaboration. Conceiving of law both as a single system and as divided among the branches of government, Hart and Sacks believed in a separation of powers based on institutional competence rather than on mechanical formulae.[201] With respect to statutes, they believed in tailored decisionmaking which focused on the particularities of the case and the policies underlying the rules rather than blind adherence to traditional maxims.[202] The classical canons were converted from controlling rules into discretionary factors. Legislative intent was replaced by statutory purpose,[203] discernible through discretionary use of legislative and postenactment history.[204] The plain meaning rule[205] was replaced with the use of words as "guides" and "limits" in the attribution of purpose.[206] Rules of strict construction[207] were replaced with policies of "clear statement."[208]

Hart and Sacks prescribed a technique to guide courts through these admonitions. First, they proposed a presumption reminiscent of the rule of common reason: the court "should assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably."[209] Next, they employed the rule of *Heydon's Case*:

> The court should then proceed to do, in substance, just what Lord Coke said it should do in *Heydon's Case*. The gist of this approach

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Uniform Commercial Code required liberal interpretation in accordance with its purpose. U.C.C. § 1-102(1) (1978). Jerome Frank affirmed a diminished distinction between common and statutory law:

> When judges modify a common-law rule, by expansion or contraction, they continue [the] process of legislation. They do so also when they apply such a rule to a set of facts of a kind to which that rule has not previously been applied. That holds true when the rule was enacted by the legislature. For, in so doing, they interpret the statute—and interpretation is inescapably a kind of legislation. To be sure, as, in such circumstances, legislative legislation and judicial legislation interact, the latter should be more restricted than when judges interpret common law rules.

Frank, Words and Music: Some Remarks on Statutory Interpretation, 47 Colum. L. Rev. 1259, 1269 (1947) (footnotes omitted).

200 H. Hart & A. Sacks, supra note 186.

201 See id. at 180–83 (quoting Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 489–91 (1954)).

202 See H. Hart & A. Sacks, supra note 186, at 185–86.

203 Id. at 1410, 1413–14.

204 Id. at 1415–16.

205 See id. at 1148–78.

206 See id. at 1411–12.

207 Id. at 1229–41.

208 Id. at 1412–13.

209 Id. at 1415.

> is to infer purpose by comparing the new law with the old. Why would reasonable men, confronted with the law as it was, have enacted this new law to replace it? Answering this question, as Lord Coke said, calls for a close look at the "mischief" thought to inhere in the old law and at "the true reason of the remedy" provided by the statute for it.[210]

Hart and Sacks' views are now dominant. Since the Second World War, courts have invoked the "equity of a statute"[211] and the rule of *Heydon's Case*[212] with increasing frequency. The latest academic representative of their approach is James Willard Hurst. By making a historical comparison, Hurst aptly encapsulates the legal process rhetoric. He praises it as "pragmatic" and "deferential," because its

> emphasis is on coming to a specific focus on a given statute in its full-dimensioned particularity of policy, rather than emphasizing material or values not immediately connected to that enactment. Courts now seem usually to strive to grasp the distinctive message of statutory words, taken in their own context, with reference to the documented process that produced that particular act, including legislative history deserving credibility, and policy guides supplied by the legislature's successive development of the given policy area and related areas. The twentieth-century emphasis thus is not on broad, standardized formulas, but on custom-built determinations, fashioned out of materials immediate and special to the legislation at issue.[213]

Hurst contrasts this emphasis with that of the previous century:

> [N]ineteenth-century decisions were likely to treat a statute as an isolated item . . . . From about 1820 to 1890 the growth of common law captured the ambition and imagination of judges and legal writers to the extent that they tended to identify this section as the true law compared with which legislation was marginal, exceptional, and indeed intrusive. They often expressed this attitude in unsympathetic reading of statutes, especially by invoking canons of construction which by their vagueness and diversity enlarged the judges' own freedom of choosing policy.[214]

Hurst finds the classical bias against legislation reflected in "the abstract character of [nineteenth-century] rules of construction [which

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210 Id. at 1415 (citation omitted).

211 As of October 21, 1985, a LEXIS search indicates that after not being cited from 1925–1939, the equity of a statute has been invoked in 13 federal cases.

212 As of October 21, 1985, a LEXIS search indicates that after not being cited from 1925–1942, *Heydon's Case* has been cited in 28 federal cases.

213 J. Hurst, Dealing with Statutes 65 (1982).

214 Id. at 41–42.

made them] likely to veil unacknowledged value preferences which may not stand close examination."[215]

Subsumed in Hearst's comparison is an appeal to "contextualization." Statutory purpose is sufficiently all-embracing to permit examination of all the facts and circumstances of the particular case. This, in turn, improves judicial decisionmaking. Freed from the classical canons, courts reach more accurate decisions, state more candidly the factors which influenced their decisions, and are more responsive to the legislature.

V. CONTEMPORARY ATTITUDES TOWARD STATUTES: REEMERGENCE OF THE PATTERNS REFLECTED IN PRIOR MEANINGS OF EQUITY

In the broadest terms, the history of statutory interpretation contains three basic patterns for coping with the problem of form versus substance. The first, dominant during the Blackstonian and early classical eras, acknowledged the duality at the higher, more abstract level of the relationship between common and statutory law, by using dualities which paralleled form and substance, such as law and equity, or technicality and liberality. Yet, while acknowledging this polarity, Blackstonian and preclassical thinkers did not squarely confront the fundamental choice between form and substance. Peculiar historical concerns—rationalizing the English system of dual courts or eliminating vestiges of English law in America—diverted their attention.

The second pattern, prevalent during the classical era, settled upon one mediating term to resolve the problem of form and substance: intent. Classical courts avoided the choice between form and substance by deferring to the will of others, and, in the case of statutes, the other was the legislature. This resolution, however, simply pushed down the problem of form and substance to the lower level of interpretive rules. In divining legislative intent, courts were again confronted with the choice between form, following the plain meaning of the statute, and substance, deferring to its spirit.

The third pattern, evident in post-Realist writings, followed the classical pattern by settling upon a mediating term, but deviated from that pattern by not pushing down the problem of form and substance to the lower level. The post-Realist mediator, statutory purpose, resolved the choice between form and substance without requiring reconsideration of that choice later in the analysis. Simultaneously nonmechanical and deferential, statutory purpose was sufficiently

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[215] Id. at 64.

loose to permit courts to avoid discussion of the problem of form and substance altogether.

The meaning of the equity of a statute varied with each of these patterns. In the first pattern, it was associated with the substantive side of the acknowledged duality. In the second and third, it was equated with the mediating term and the substance side of any duality reemerging on the lower, interpretive level.

The above three patterns go far towards explaining contemporary views of statutes. Developments in the last twenty years suggest that the field of statutory interpretation is in the midst of transition: that the post-Realist approach, preeminent for the past thirty years, is on the wane, and that the Blackstonian, preclassical, and classical patterns are reemerging in its stead. Thus, all the patterns reflected in the meanings of equity over the past two centuries are present in contemporary discourse.

A. *Decline of the Post-Realist Approach*

1. Apparent Continuity with the Legal Process Approach

At first glance, the legal process approach appears hale and hearty. Indeed, two recent writers on statutes, Richard Posner[216] and Guido Calabresi,[217] both adopt the legal process critique of the classical order, embrace statutory purpose as their governing principle, and extol the virtues of contextualization. They desire to build on the legal process foundations and propose only to refine it by broadening its inquiry into statutory purpose to include new factors.

Posner's critique of the classical canons of interpretation closely parallels that of Hart and Sacks. He finds those canons inaccurate either because they are based upon misunderstandings of judicial behavior and the political process or because they impute omniscience to Congress.[218] Like Hurst, Posner finds that the canons lead to dishonesty and betrayal of the legislative will.

> Vacuous and inconsistent as they mostly are, the canons do not constrain judicial decision making but they do enable a judge to create the appearance that his decisions are constrained. . . . By making statutory interpretation seem mechanical rather than crea-

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216 Posner, Statutory Interpretation, supra note 2; Posner, Economics, Politics, and the Reading of Statutes and the Constitution, 49 U. Chi. L. Rev. 263 (1982) [hereinafter cited as Posner, Reading of Statutes].

217 G. Calabresi, A Common Law for the Age of Statutes (1982); Calabresi, The Nonprimacy of Statutes Act: A Comment, 4 Vt. L. Rev. 247 (1979) [hereinafter cited as Calabresi, Comment].

218 Posner, Statutory Interpretation, supra note 2, at 811.

> tive, the canons conceal, often from the reader of the judicial opinion and sometimes from the writer, the extent to which the judge is making new law in the guise of interpreting a statute or a constitutional provision. . . . The judge who recognizes the degree to which he is free rather than constrained in the interpretation of statutes, and who refuses to make a pretense of constraint by parading the canons of construction in his opinions, is less likely to act wilfully than the judge who either mistakes freedom for constraint or has no compunctions about misrepresenting his will as that of the Congress.[219]

Adopting the legal process critique, Posner sketches an approach with admitted "obvious affinities"[220] with Hart and Sacks, with one modification: courts should consider legislative compromise in ascertaining statutory purpose. "A court should not just assume that a statute's apparent purpose is not its real purpose. But where the lines of compromise are discernible, the judge's duty is to follow them, to implement not the purposes of one group of legislators, but the compromise itself."[221] Insight into the original compromise may be gleaned from the values and attitudes of the period in which the statute was enacted and the legislative attitude regarding judicial interpretation.[222]

Calabresi, too, claims the legal process mantle and tries to squeeze within the Hart and Sacks tradition.[223] Acknowledging that "[i]n a deep sense we are all followers of Henry Hart and know the moves almost by instinct,"[224] Calabresi believes that legal process style interpretation should be the normal judicial attitude towards statutes,[225] and proposes only to widen judicial inquiry to encompass

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219 Id. at 816–17.

220 Id. at 819.

221 Id. at 820 (footnote omitted). Posner distinguishes his proposal from the legal process approach:

> Hart and Sacks appear to be suggesting that the judge should ignore interest groups, popular ignorance and prejudices, and other things that deflect legislators from the single-minded pursuit of the public interest as the judge would conceive it. But to ignore these things runs the risk of attributing to legislation not the purposes reasonably inferable from the legislation itself, but the judge's own conceptions of the public interest.

Id. at 819.

222 Id. at 818.

223 Calabresi depicts himself as restorer rather than revolutionary. G. Calabresi, supra note 217, at 2.

224 Id. at 87. Indeed, Calabresi has been described as a member of a new legal process school. See Weisberg, The Calabresian Judicial Artist: Statutes and the New Legal Process, 35 Stan. L. Rev. 213, 239 (1983).

225 Calabresi agrees with Gerald Gunther that interpretation has "a meaning and function," G. Calabresi, supra note 217, at 19, and says that in the "many situations when the issue of

one more consideration—whether the statute commands majority support and fits into the legal landscape.[226]

In defending his proposal, Calabresi falls back on the legal process rhetoric of contextualization. By permitting courts to acknowledge openly that which already influences their decisions covertly, his alternative constitutes "The Choice for Candor."[227] "[W]e are already doing, badly and in hidden ways, much of what this 'radical' doctrine allows. Indeed, an open use of the proposal may well prove to be less dangerous—less prone to unrestrained judicial activism—than today's use of complex subterfuges."[228] Foremost among these subterfuges is holding a statute unconstitutional simply because it is obsolete.[229] By shifting the grounds of such decisions from rarely amended constitution to easily revised statute, Calabresi hopes to promote accurate, honest, and democratic decisionmaking.

2. The Actual Weakness of the Legal Process Approach

On closer examination, however, the legal process approach is losing appeal. The linchpin of that approach—statutory purpose—is becoming meaningless. Disenchantment with the legislative process has become rampant, and the statutes emerging from that process are viewed as flawed, compromised, and lacking in meaning.

The diagnoses of the ailments of the legislative process vary. One theory is that that process has been taken over by special interest groups. Consequently, statutes can only compromise among competing viewpoints. The Supreme Court describes statutes as constituting "compromise[s] between . . . competing interests"[230] and as compromise "measures" conciliating social and economic conflicts.[231] As such, statutes cannot embody transcendent purposes. Richard Posner and Frank Easterbrook both believe that "many statutes are the prod-

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updating is not present, . . . the proper function for the court is to find out and apply what the legislators wanted, 'free from ulterior purposes,' " id. at 43. See also id. at 132 (mention of "true interpretation").

226 "The first task of courts in all instances remains to look to the landscape, to legal principles. If the statute can be said to fit, that settles the issue. If it does not, the guess, increasingly made at common law, as to majoritarian wishes will inevitably be made." Id. at 113.

227 Id. at 178–81.

228 Id. at 7.

229 See id. at 8–15. Calabresi also argues that judges have manipulated both constitutional law and the rules of statutory interpretation in attempts to update obsolete statutes. Id. at 21–43.

230 Potomac Elec. Power Co. v. Director, Office of Workers' Comp. Programs, 449 U.S. 268, 282 (1980) (referring to workman's compensation statutes).

231 Fullilove v. Klutznick, 448 U.S. 448, 490–91 (1980) (citation omitted). The Court has also described statutes as striking a balance between opposing views. See Bryant v. Yellen, 447 U.S. 352, 375 n.28 (1980); Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 623 (1978).

uct of compromise between opposing groups and . . . a compromise is quite likely not to embody a single consistent purpose."[232]

A second diagnosis focuses on the problem of legislative inertia. Justice Stevens, for instance, describes the Court as "properly concerned" about "the quality of the work product of Congress, and the sheer bulk of new federal legislation."[233] Academic circles, too, perceive a widespread legislative paralysis blocking needed statutory revision. Calabresi observes the "problem of legal obsolescence," which is rooted in the fact that "a statute is hard to revise once it is passed."[234] Grant Gilmore describes legislative inertia, traceable to the massive increase in legislation during the twentieth century, the difficulty of drawing the attention of a crisis-ridden Congress to law reform, and the New Deal style of drafting.[235] Jack Davies sees ill-drafted statutes which have resulted from legislative inability to provide for every possible future contingency.[236]

This loss of faith in the legislative process bodes ill for the legal process approach. Try as they might to frame their proposals as mere modifications of the legal process model, Posner and Calabresi cannot simply adjust that model without faith in its guiding force, statutory purpose. Indeed, this is evident in Posner and Calabresi's failure to circumscribe their proposals—they cannot state how many statutes are compromises or are obsolete. Thus their extenuating circumstances threaten to swallow the legal process rule that statutory purpose governs.

B. *The Emergence of New Approaches to Statutes*

Without statutory purpose, courts must once again grapple with the problem of form and substance. In doing so, they have adopted rhetoric reminiscent of past eras. Although differing in terminology

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232 Posner, Statutory Interpretation, supra note 2, at 819; see Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533, 540–41 (1983) ("[A]lmost all statutes" are compromises, and "[m]ost compromises lack 'spirit.' ").

233 Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 24–25 (1981) (Stevens, J., concurring in part and dissenting in part).

234 G. Calabresi, supra note 217, at 2. Calabresi notes that obsolescence results in "the feeling that . . . laws are governing us that would not and could not be enacted today, and that *some* of these laws not only could not be reenacted but also do not fit, are in some sense inconsistent with, our whole legal landscape." Id.

235 G. Gilmore, supra note 102; see Gilmore, Putting Senator Davies In Context, 4 Vt. L. Rev. 233 (1979).

236 Davies, A Response to Statutory Obsolescence: The Nonprimacy of Statutes Act, 4 Vt. L. Rev. 203, 210–11 (1979). See Note, Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court, 95 Harv. L. Rev. 892 (1982).

and detail, the emerging alternatives echo preclassical and classical patterns of thought.

1. Legislative Compromise and Classical Thought

One response to the renewed problem of form and substance is to defer to the original legislative compromise embodied in statutory language. Under this approach, extrinsic material and policy concerns assume less significance: Material outside the statute becomes suspect for not having passed the scrutiny of a majority of legislators. Resort to policy becomes fruitless since statutes compromise between conflicting policies.

This "legislative compromise" response is evident in judicial decisions and in scholarly articles. Implicit in the literalist tone of decisions refusing to imply private causes of action,[237] this response is fully articulated in several Supreme Court opinions. When confronted by a statute reflecting the "countervailing" purposes of "tempestuous legislative proceedings" in *Mohasco Corp. v. Silver,* the Court announced: "We must respect the compromise embodied in the words chosen by Congress."[238] While sustaining a statute against a due process challenge in another case, the Court noted that the plaintiffs had "lost a political battle," that Congress must be assumed to have intended what it enacted, and that its judgments were to be respected, particularly when drawing lines classifying persons for benefits.[239] The appeal of the legislative compromise rule is not limited to a few Supreme Court opinions. Posner and Easterbrook both affirmatively advocate it[240] and Calabresi and Davies are both swayed by its force.[241]

This "legislative compromise" approach is the intellectual heir to

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237 See, e.g., Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 14–15 (1981) (" '[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.' ") (quoting Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979)); Texas Indus. v. Radcliff Materials, 451 U.S. 630, 639 (1981) (absence of reference to cause of action in legislative history renders unnecessary consideration of factors such as identity of class for whose benefit the statute was enacted, overall legislative scheme, and traditional role of states in providing relief); National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974) (reliance on *expressio unius est exclusio alterius*).

238 447 U.S. 807, 818, 826 (1980). See Note, supra note 236, at 899–907.

239 United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980).

240 See Easterbrook, Statutes' Domain, supra note 232, at 540–44; Posner, Statutory Interpretation, supra note 2, at 819–20.

241 Davies would preserve living compromises by limiting judicial revision to statutes over 20 years of age. Davies, supra note 236, at 226. Although dispensing with a bright line, Calabresi recognizes the need to balance "consistency" in the law against "majoritarian demands for distinctions." Calabresi, Comment, supra note 217, at 253–54.

the classical order. Legislative compromise summons up the aura of deference surrounding terms like legislative intent. Under both approaches, courts do not legislate; they simply implement the decisions of others. Therefore, like legislative intent, legislative compromise is correlated with a renewed interest in the public/private distinction. Indeed, recent scholars draw upon that distinction and extend it by classifying statutes along a public/private continuum.[242]

Also like legislative intent, legislative compromise pushes the problem of form and substance down one level. Once the discussion turns to how to ascertain legislative compromise, judges inevitably disagree as to whether to follow the letter or spirit of the law. A dramatic example of this disagreement is the dispute between Posner and Easterbrook.

Posner espouses "imaginative reconstruction" as the proper means for ascertaining legislative compromise,[243] a position reminiscent of the classical intent resolution to the problem of literal and nonliteral interpretation. "The judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar."[244] In doing so, Posner criticizes "strict constructionism," as overtly political.[245]

In contrast, Easterbrook thinks the best way to ascertain legislative compromise is to impose a duty of "clear statement" upon the legislature: "Unless the statute plainly hands courts the power to create and revise a form of common law, the remainder of the statute should be restricted to cases anticipated by its framers and expressly resolved in the legislative process."[246] This clear statement approach echoes the plain meaning rule. Like that rule, it is defended by reference to the need for deference to the legislature under separation of powers principles. Easterbrook asserts that legislatures do not generally designate a mere purpose—they also designate the means to achieve that purpose and that judicial displacement of that means defeats the original legislative plan.[247]

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242 E.g., Davies, supra note 236, at 204 n.7 (distinction between public and private statutes in proposed act); Easterbrook, Forward, supra note 4, at 15–16; Easterbrook, Statutes' Domain, supra note 232, at 541 n.10; Posner, Reading of Statutes, supra note 216, at 269–72.

243 Posner, Statutory Interpretation, supra note 2, at 817.

244 Id.

245 Posner states: "To construe a statute strictly is to limit its scope and its life span—to make Congress work twice as hard to produce the same effect." Id. at 821–22.

246 Easterbrook, Statutes' Domain, supra note 232, at 544.

247 Id. at 545–47.

2. Judicial Revisionism and Preclassical Thought

The other response to the renewed problem of form and substance is to utilize that duality in judicial decisionmaking. Once primacy is assigned to that duality, all judicial decisionmaking whether it consists of statutory interpretation or common law adjudication, becomes essentially similar. Consequently, courts acknowledging the problem of form and substance are freer to look to outside materials, such as other statutes, the common law, and contemporary morals, in interpreting statutes.

This response, which may be described as judicial revisionism, is evident in judicial opinions. It underlies the implied-right-of-action cases of the 1960's, in which the Supreme Court used common law principles to fashion judicial remedies.[248] It is more pronounced in *Moragne v. States Marine Lines, Inc.*,[249] where, after observing that numerous intervening legislative enactments had made wrongful death remedies part of the common law, the Court permitted a wrongful death action under a statute which had long been read to bar such action.[250] Judicial revisionism is, however, most obvious when courts refuse to follow statutes. *Li v. Yellow Cab Co.*[251] exemplifies such a refusal. In that case, the California Supreme Court held that in enacting the Civil Code the state legislature had intended to adopt contributory negligence, but that the rule of liberal construction, coupled with the Code's character as a continuation of the common law, permitted judicial adoption of comparative negligence pursuant to developing tort theory.[252]

Judicial revisionism has also surfaced in academic writings. Gil-

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[248] See, e.g., Wyandotte Transp. Co. v. United States, 389 U.S. 191, 204 (1967) ("We do not believe that Congress intended to withhold from the Government a remedy that ensures the full effectiveness of the Act."); J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964) ("It is for the federal courts 'to adjust their remedies so as to grant the necessary relief' where federally secured rights are invaded.") (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).

[249] 398 U.S. 375 (1970).

[250] Id. at 393. For an additional discussion of *Moragne*, see Note, The Legitimacy of Civil Law Reasoning in the Common Law: Justice Harlan's Contribution, 82 Yale L.J. 258, 260–63 (1972).

For a recent instance in which the Court looked to other statutes to give meaning to the statute before it, see Smith v. Robinson, 104 S. Ct. 3457 (1984), where the Court looked to the Education of the Handicapped Act, 20 U.S.C. §§ 1400–1441 (1982), to conclude that the plaintiffs before it were not entitled to attorney fees under the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982). In so holding, the Court slipped away from legislative purpose to the requirements of rationality and fidelity to legislative compromise. "[W]e cannot believe that Congress intended to have the careful balance struck in the [Education of the Handicapped Act] upset by reliance on [the Rehabilitation Act]." 104 S. Ct. at 3474.

[251] 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

[252] Id. at 821–22, 532 P.2d at 1238–39, 119 Cal. Rptr. at 870–71.

more believes that "courts, faced with an obsolete statute and a history of legislative inaction, may take matters into their own hands and do whatever justice and good sense may seem to require."[253] Davies would grant courts the power to modify and overrule certain statutes in the way they modify and overrule principles and precedents of the common law.[254] Calabresi would permit courts to update statutes by looking to "the legal landscape," e.g., other statutes and the common law, and by considering majoritarian preferences.[255] Posner and Easterbrook acknowledge something akin to judicial revision in their recognition that the Sherman Act deserves a broad reading.[256]

Judicial revisionism harkens back to Blackstonian and preclassical structures.[257] Like those structures, it posits the existence of techniques of reasoning transcending the distinction between common and statutory law. Striking signposts of its lineage are Calabresi's admiration for the equity of a statute[258] and the California Supreme Court opinion in *Li,* where Field's notion of a liberally construed Code which also continued the common law—dead since the attacks of Pomeroy—was revived after a hundred years.[259]

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253 G. Gilmore, supra note 235, at 97.

254 Davies, supra note 236, at 204 n.7.

255 G. Calabresi, supra note 217, at 121. For an academic urging courts to look beyond the statutes but not fully embracing the revisionist position, see Williams, Statutes as Sources of Law Beyond Their Terms in Common-Law Cases, 50 Geo. Wash. L. Rev. 554 (1982).

256 See Easterbrook, Statutes' Domain, supra note 232, at 544; Posner, Statutory Interpretation, supra note 2, at 818.

257 Calabresi claims adherence to the "ideal" judicial legislative balance present in the late 19th century:

> The principal instruments of this system were the common law courts, for most law was court-made. . . . [T]he law could normally be updated without dramatic breaks through common law adjudication and revision of precedents. Change occurred because the doctrine of *stare decisis* was adhered to in a relatively loose fashion and precedents were not, even nominally, ultimately binding. The changes that did occur tended to be piecemeal and incremental, organic if one wishes, as courts sought to discover and only incidentally to make the ever-changing law.

Calabresi, supra note 217, at 4 (footnotes omitted).

But the late 19th century balance between legislature and judiciary was the product of a very different legal universe than that imagined by Calabresi. The late classical era perceived a vast gulf between common and statutory law, a gulf which Calabresi denies. The true antecedents of Calabresi's approach—antecedents which likewise deny the supremacy of legislative will—lie in Blackstonian and preclassical systems.

258 See G. Calabresi, supra note 217, at 85–86; see also id. at 82, stating:

> Let us suppose that common law courts have the power to treat statutes in precisely the same way that they treat the common law. They can (without resort to constitutions or passive virtues or strained interpretations) alter a written law or some part of it in the same way (and with the same reluctance) in which they can modify or abandon a common law doctrine or even a whole complex set of interrelated doctrines.

259 See supra text accompanying notes 125–26.

The resemblance to preclassical thought does not stop there. Judicial revisionism alleviates the tension between form and substance in a manner reminiscent of preclassical eras by focusing in on a particular, manageable, historical problem—that of obsolete statutes. The choice between form and substance is not so stark when one considers the core cases of "obviously" obsolete statutes, such as those prohibiting the sale of contraceptive devices or severely limiting recovery in workers'-compensation suits.[260]

Also like preclassical approaches, judicial revisionism would organize the rules of interpretation along the division between form and substance. Just as preclassical jurists divided statutes into categories receiving liberal or strict interpretation, so also Calabresi divides all statutes into those deserving revisionist or retentionist biases.[261] As in preclassical times, the problem of form and substance is more difficult at this level, requiring consideration of a broad array of factors such as whether the statute was passed in response to a particular crisis, whether it has continuing support in the general circumstances of enactment, and whether it reorganizes a whole area of law.

CONCLUSION

Thus, the history of statutory interpretation is one of constant but shifting patterns. In summarizing this Article, it is useful to consider how this narrative bears upon common assumptions about legal thought and history. First, it is commonly assumed that formalism is generally adopted by those favoring a free market while substantive arguments are favored by those sympathetic to regulation.[262] The alliances between form and laissez faire and between substance and regulation are, however, at best uneasy ones. As this history has illustrated, proponents of regulation sometimes adopt formal rules, and advocates of laissez faire sometimes embrace informality. Thus, the Progressives of the early twentieth century refused to embrace the equity of the statute despite their attraction to state intervention, while a proponent of the free market such as Richard Posner prefers a looser, nonliteral approach over a "clear statement" rule.

Another common assumption is that legal systems are "tilted" to

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260 It is consequently not surprising that Calabresi's critics often doubt that many statutes qualify as "clearly" obsolete. E.g., Coffin, The Problem of Obsolete Statutes: A New Role for Courts? (Book Review), 91 Yale L.J. 836–37 (1982); Estreicher, Judicial Nullification: Guido Calabresi's Uncommon Law for a Statutory Age (Review Essay), 57 N.Y.U. L. Rev. 1126, 1169 (1982).

261 G. Calabresi, supra note 217, at 133–34.

262 Kennedy, Form and Substance, supra note 3, at 1737–51; Posner, Statutory Interpretation, supra note 2, at 821–22.

achieve particular results.[263] In particular, the classical order is often characterized as biased against legislation.[264] The history of statutory interpretation suggests some basis for this assumption. Discrete rules, though apparently neutral, may not be so when considered in the context of an entire system. For example, the so-called "golden rule," despite its balanced appearance, served solely to narrow statutes.

Closer examination indicates, however, that the classical system did not, as a matter of logical necessity, produce antilegislative results. Viewed systemically, its rules were neutral—each rule had a balancing counterrule. Indeed, this is natural, since as a system of broad application, the classical regime was used both to extend and to restrict statutes. Within the classical system, the intent and plain meaning resolutions balanced one another and were both facially neutral, not distinguishing between exceptions to and extensions of statutes. Nor did the late classical polarization of common and statutory law necessarily reduce the role of statutes. The distance between statutes and the common law could have put the former in an exalted position, read broadly and insulated from judicial interference. Similarly, the preclassical poles of strict and liberal interpretation which survived into the classical era balanced antilegislative and prolegislative canons. Statutes in derogation of the common law were read strictly; remedial statutes were read liberally.[265]

A third common assumption is that certain doctrinal systems are more intellectually honest than others. Thus, classical judges are sometimes described as being less forthright about the factors influencing their opinions than preclassical judges.[266] The history of statutory interpretation casts doubt upon this assumption. Admittedly, the form and substance duality received a primacy in the preclassical era which it subsequently lacked. Yet, even assuming that the form and substance choice is inherent to legal thought and not simply the

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263 See, e.g., Holt, Tilt, 52 Geo. Wash. L. Rev. 280 (1984).

264 See J. Hurst, supra note 213, at 11–12; Pound, Common Law, supra note 105, at 386.

265 The claim of classical "bias" might be comparative—that the legal process approach is more favorably disposed toward legislation than the classical order. Yet, this cannot be the case. Whatever bias existed in the classical rules also existed in the legal process method. The legal process school merely "loosened up" both the pro- and antilegislative classical rules, without altering their tilt. The legal process options of imposing a duty of clear statement or relying on words as guides and limits, were balanced no differently than the classical choice of intent or plain meaning or the preclassical choice of strict or liberal interpretation. Nor did the legal process use of particularistic methods, such as examination of legislative history or consideration of policy, consistently extend statutes.

266 See, e.g., J. Hurst, supra note 213, at 64–65; K. Llewellyn, The Common Law Tradition 64–73 (1960) (comparision of Grand and Formal styles); id. at 382–83 (description of application of those styles to statutes); Posner, Statutory Interpretation, supra note 2, at 816–17.

product of modern consciousness, preclassical doctrine may not have been more forthright than classical theory. In neither system was the duality of form and substance given its "due." The classical order avoided this choice by pointing to legislative intent; the preclassical, by focusing on particular cases in which the problem did not occur.

The failure to focus on the choice between form and substance is not surprising when one recalls the problematic nature of that choice. Human beings naturally flinch when confronted by that which defies logical explanation. After all, not even Moses could look at the face of God.[267]

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[267] Exodus 33:20.