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THE ESSENTIAL FOCUS OF STATUTORY INTERPRETATION

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Professor Dickerson, as chairman of the 1960 AALS Round Table on Legislation, has already indicated the reasons for selecting the topic for discussion: "Judicial Lawmaking in Relation to Statutes." This subject, it may be added, permits us to turn for the first time in three

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decades of the Round Table institution to the central problem concerning judicial assignment of statutory meaning.[1] This problem concerns the place of judicial lawmaking in administration of statutes. A similar problem is presented with respect to lawmaking by administrative agencies in administration of statutes. The latter problem encompasses a wider vista because of the fact that administrative agency lawmaking may occur in adjudicative, legislative, or executive forms of administrative action. The topic for discussion assumes that it may be necessary to distinguish between judicial lawmaking by statutory analogy and judicial interpretation in relation to statutes. The thesis of this paper raises doubts about the validity of this distinction and seeks to establish what the essential focus of statutory interpretation must be in modern democratic political society.

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1. The Round Tables of the Thirties were enchanted with the fresh, sweet scent of new legal developments achieved dramatically through the regulatory statutes of the New Deal. The first Round Table specifically instituted to consider problems concerning legislation met in 1932. ASSOCIATION OF AMERICAN LAW SCHOOLS HANDBOOK 129 (1932). Its topic related to use of statutory materials in the law school curriculum. In 1934 Dean Landis delivered a paper on "The Implications of Modern Legislation to Law Teaching" to a session of the Associating meeting. ASSOCIATION OF AMERICAN LAW SCHOOLS HANDBOOK 122 (1934). The 1935 and 1936 Legislation Round Tables considered the proper scope of legal training with respect to legislation. ASSOCIATION OF AMERICAN LAW SCHOOLS HANDBOOK 166 (1935), 224 (1936). The 1936 Comparative Law Round Table included a paper on modern trends in interpretation. ASSOCIATION OF AMERICAN LAW SCHOOLS HANDBOOK 222 (1936). In 1939 the Jurisprudence and Legal History Round Table devoted part of its session to interpretation of statutes in the sixteenth century. The lively discussion of statutory interpretation taking place in legal periodicals during the thirties did not reach the Round Tables of the same period.

The Legislation Round Tables of the Forties and Fifties dealt almost exclusively with important problems concerning the drafting of statutes, the teaching of the legislation course, and the operations of congressional government. Only one of seven programs was directed toward investigation of the problem of assignment of statutory meaning. The subject of this program was *"The Use of Legislative History in the Interpretation of Statutes: Where Are We Going? Where Should We Go?"* ASSOCIATION OF AMERICAN LAW SCHOOLS PROCEEDINGS 187-8 (1953). Professor Henry M. Hart, who served as Chairman of the Round Table, prepared a "tentative restatement of the law" relative to use of legislative history to serve as a basis for discussion. See HART AND SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1284-6 (tentative ed. 1958). This restatement proceeded upon the assumption that statutory interpretation was essentially to be distinguished from modes of dealing with a statute that have been characterized as judicial lawmaking including, among others, use of a statute as a principle for deciding a case (the technique of statutory analogy). The speaker, as a discussant in that Round Table, took the position that the prudential character of legal process had implications for interpretative thesis that required greater recognition than had usually been given them. It was suggested that the interpreter of a statute must often engage properly in a lawmaking process and that an adequate thesis of statutory interpretation must respond "to the underlying exigencies of the lawmaking process, whether engaged in by a legislator, administrator, or judge, and . . . make these three arms of government coadjutors in the prudential process of legislative choice and its subsequent interpretative elaboration . . ." Witherspoon, *The Use of Legislative History in the Interpretation of Statutes: Where Should We Go?* 4-5 (mimeographed, 1953, on file in the University of Texas School of Law Library.

British and American legal scholars have engaged in an extensive discussion of our problem during the past sixty years. This discussion roughly divides into three areas. The first of these consists of scholars who assert that assignment of statutory meaning is properly to be done by a process according to discretion. One may call this process "interpretation," but it is necessary to see, these scholars assert, that the process is essentially one of discretion—of freedom to choose the statutory meaning desired and therefore a freedom throughout to make the law administered. This discretion or freedom to make law stems from the fact, they assert, that there is no valid concept of legislative intention or legislative purpose. Even if it may be conceded that these concepts have validity and respond to elements of reality in legislative process, the data of legislative intention or purpose behind a particular statute are not responsive to the mass of meaning—assignment problems encountered by the courts. Moreover, there are no other genuine standards or principles for assignment of statutory meaning. The canons and maxims of traditional interpretation doctrine must be considered as devoid of genuine directive content and mere facades for bolstering a judicial judgment already reached by independent means. Likewise, neither the concept of justice nor received notions of justice provide any guidance of an objective nature. Thus, the court is essentially engaged throughout the process of meaning-assignment in making law. The most articulate statement of this position, the "high road" of administrative discretion, was made by the late Professor Max Radin.[2]

A second group of scholars has suggested narrowing the area of judicial lawmaking just described. Recognizing with adherents to the "high road" that much of traditional interpretation doctrine is not now genuinely used by courts in determining statutory meaning, some of these scholars propose converting the so-called rules of this traditional doctrine into genuine and binding rules of law.[3] This proposed conversion is designed to cause the rules affected really to operate as the

2. Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930). Other scholars who have more or less shared this position, sometimes with significant innovations, are Mr. Ernest Bruncken, Professor Corry, and Dean Levi. See, Bruncken, *Interpretation of Written Law*, 25 YALE L.J. 129 (1915); Corry, *Administrative Law and the Interpretation of Statutes*, 1 U. TORONTO L.J. 286 (1936) and *The Use of Legislative History in the Interpretation of Statutes*, 32 CAN. B. REV. 624 (1954); and Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501 (1948). For an analysis of the "high road" position see Witherspoon, *Administrative Discretion to Determine Statutory Meaning: "The High Road,"* 35 TEXAS L. REV. 63 (1956).

3. Silving, *A Plea for a Law of Interpretation*, 98 U. PA. L. REV. 499 (1950); Johnstone, *Evaluation of the Rules of Statutory Interpretation*, 3 KAN. L. REV. 1 (1954); *cf.* Jackson, *The Meaning of Statutes—What Congress Says or What the Court Says*, 34 A.B.A.J. 535 (1948).

basis or source of the meaning that is assigned to statutes. Under this proposal the meaning assigned to statutes is to be drawn principally, not from the statutes, but from rules for assigning meaning to them. Other scholars in this group merely appear to be proposing a genuine use of the traditional rules of interpretation by courts but without binding them to apply any one of these rules, where otherwise applicable, if indicia of purpose render it inappropriate to do so.[4] A contribution of Professor H. L. A. Hart on this matter[5] has been viewed by some as positing a "hard core" of meaning for statutory terms that must control their interpretation irrespective of the context or the purposes behind their use.[6] The suggestions of these scholars perhaps justifies labelling their position as the "low road" of administrative discretion.[7] Nevertheless, these scholars as a whole clearly agreed for the same reasons with "high road" adherents that much judicial administration of statutes is inevitably judicial lawmaking rather than interpretation and that it must be done by a process of judgment according to discretion.

Most scholars, however, take what may be called a "middle road" position on the problem of how statutory meaning is to be assigned.[8] Most of these scholars affirm what the other groups deny—that the legislative purpose concept is valid because responsive to realities in legislative process. Most of them also affirm that the central task in assigning meaning is to discover and effectuate relevant legislative purposes of a given statute.[9] In the main these scholars divide the task of administering statutes into two parts: one of these is to be performed by a process of judgment according to law and the other part by a process of judgment according to discretion. So far as courts are concerned, the administration of statutes is principally to be performed by a process according to law. This latter process itself is

4. Williams, *Language and the Law,* 61 L.Q. REV. (pts. I-IV) 71, 179, 293, 384 (1945); (pt. V) 62 L.Q. REV. 387 (1946).

5. Hart, *Positivism and the Separation of Law and Morals,* 71 HARV. L. REV. 593 at 606-15 (1958).

6. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart,* 71 HARV. L. REV. 630 at 661-9 (1958).

7. Witherspoon, *Administrative Discretion to Determine Statutory Meaning: 'The Low Road I, II,'* 38 TEXAS L. REV. 392, 572 (1960).

8. The scholars in question include Dean Pound and the late Professor De Sloovere, the work of whom constitutes a sub-position within the overall position.

9. The scholars in question include the late Professor Freund, Dean Landis, and Professors Fuller, Hart, Sacks, Horack, Jones, Nutting, Llewellyn, Cohen, Friedmann, Lenhoff, Newman, Surrey, Phelps, and Tunks. The outstanding exception is the late Mr. Charles P. Curtis, Jr. The pertinent works of these authors and of those referred to in note 8 *supra* are listed in Witherspoon, *Administrative Discretion to Determine Statutory Meaning: "The High Road"* 35 TEXAS L. REV. 63 at 71-3. To this listing should be added the recent work of Professors Hart and Sacks cited in note 1 *supra* and of Professor Fuller cited in note 6 *supra.*

divided into two parts: one is the assignment of statutory meaning by the legal technique of interpretation and the other is the making of law by the technique of statutory analogy. Neither of these functions properly considered, it is said, involves a process of discretion. Each is a process of judgment according to law, according to legal methods or techniques. Nevertheless, there is a difference in the binding effect upon the court of these two functions and their concomitant techniques. The court is not free to assign or not to assign meaning to a statute. It must assign meaning, if possible to do so, and it must assign this meaning by a process called interpretation. If certain meaning is indicated for a particular statute in light of the purposes underlying its explicit rules, the court is bound to assign that meaning and to apply the statute to cases comprehended by that meaning. There is a certain "field of operation" for the statute in light of its explicit rules beyond which the statute does not extend. Within that field, however, the court is bound to hue to the line circumscribed by the meaning that may appropriately be poured into the forms of the statute by interpretation. It is true that the "middle road" scholars agree that the literalist elements of traditional interpretation doctrine are neither helpful nor justifiable for assigning meaning to statutes. It is also true that most of these scholars recognize that various administrative factors or standards must be given effect by courts in performing the function of interpretation. Despite their recognition of this vital role for judicial use of administrative standards in assigning statutory meaning, these scholars have insisted that the judicial process relative to statutes here in question remains one of "interpretation" rather than becoming one of "lawmaking."

Turning to the second mode for administering statutes according to law, the technique of statutory analogy, we find "middle road" scholars taking the position that this mode is not mandatory upon the courts. Contrary to the technique of interpretation, the technique of statutory analogy is viewed as part and parcel of the equipment of a court operating in its native habitat of the common law. Thus, if a statute does not cover a controversy before the court as determined through application of the technique of interpretation to it, the court may, but need not, apply that statute to that controversy if it is otherwise logically relevant. The binding effect of statutory law upon a court coincides, therefore, with "the field of the statute" as determined by interpretation. Outside this "field" the court may, if it decides to do so, turn to common law principles as a source for decision rather than utilize the statutory analogy. The determination to utilize the

one or the other source for decision is to be reached by means of the appropriate techniques of common law decisional process. The freedom to use or not to use a statute posited by the technique of statutory analogy was first supported in this century in this country by Dean Pound.[10] His notion of this technique was substantially adopted later by Dean Landis,[11] Professors Hart and Sacks,[12] and other scholars.

Beyond the two techniques of decision according to law for administration of statutes just mentioned, "middle road" scholars speak of a process of decision according to discretion. Some of them, such as Dean Pound, tally this process with a step of judicial decision termed "application" of the law as contrasted with the so-called prior steps of "finding" and "developing" or "elaborating" the law.[13] The problem of judicial application and, therefore, of discretion, is said to arise in its typical form with respect to statutory standards. The concepts of the "fair and the equitable," "reasonable," and "just" present, it is said, a problem of application rather than elaboration. Nevertheless, it is recognized that judicial application of the narrower concepts of rules may present the same problem involved in administration of standards if judgment relative to the application to be made by the court is not foreclosed as a result of the appropriate rule having been found and elaborated. These scholars also assert that the various forms for administration of statutes by administrative agencies (legislative rule-making, initial licensing, contracting, mediating, inspecting, etc.) appropriately involve, so far as elaboration and application of a statute is concerned, a process of judgment according to discretion rather than according to law. This paper will not examine the validity of the assumptions underlying this attempted distinction in techniques or methods of decision. It must be said, however, that an adequate thesis concerning statutory interpretation must examine these assumptions and resolve the meaning-assignment problems necessarily presented by judicial application and administrative agency administration of statutory law.

The position to be presented here on what may be called the problematic of statutory meaning substantially accords with the position of

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10. Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908); *The Theory of Judicial Decision*, 36 HARV. L. REV. 641 at 647-8 (1923); III JURISPRUDENCE 654-63 (1959).

11. Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213 (1934).

12. HART AND SACKS, *op. cit. supra* note 1 at 107-8, 436-7, 476, 486-9, 798-808.

13. Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940 at 950-2 (1923); II JURISPRUDENCE 353-74 (1959); IV JURISPRUDENCE 10-1, 24-5 (1959); JUSTICE ACCORDING TO LAW 42-3 (1951); LAW AND MORALS 58-61 (1924); AN INTRODUCTION TO THE PHILOSOPHY OF LAW 52-65 (Rev. ed. 1954). Also see, HART AND SACKS, *op. cit. supra* note 1 at 160-79.

those "middle road" scholars who affirm the validity of the legislative purpose concept and who state that the central task in assigning statutory meaning is to discover and effectuate legislative purposes. Nevertheless, the proposition will be supported that the position as currently stated by its proponents, with the exception of Professor Fuller, suffers from severe, if not fatal, defects. The remainder of this paper will be devoted to outlining a part of what may be a more valid solution of the problematic of statutory meaning and the reasons for considering it to be a more valid solution. In view of the limited topic of the Round Table this presentation will not cover the important related problems of judicial review of administrative action and of lawmaking by administrative agencies.

We may begin most appropriately with the proposition that the currently understood dichotomy between judicial interpretation and judicial lawmaking by statutory analogy must be rejected. One reason has been mentioned by Professor Dickerson. This is the difficulty —one could well say impossibility—of distinguishing between the judicial creativity encompassed under the aegis of interpretation, on the one hand, and the judicial creativity we find in areas of explicit judicial lawmaking, on the other, e.g., in the use of statutory analogy. This reason for rejection is one of procedural integrity—of calling a spade a spade, of recognizing the fictitious character of any monolithic view of interpretation. There is, however, a more fundamental reason for rejecting the dichotomy. Judicial lawmaking in relation to statutes has been viewed as having at least two aspects. One form has been regarded by some as an improper departure from the technique of interpretation. Usually, however, one may reasonably reply that this so-called judicial lawmaking either is or is not a proper determination and use of legislative purpose as the basis for assigning statutory meaning. It is this kind of reply Professor Cohen has in mind when he felicitously distinguishes between nonusurpatory and usurpatory judicial lawmaking and when he insists the former, properly considered, is not judicial lawmaking at all. The other form of judicial lawmaking, that involving use of statutory analogy, has already been mentioned. It has been regarded as a freedom to use or not to use a statute with regard to a situation before the court that interpretation indicates is not "covered" by the statute. The more fundamental reason for rejecting the current dichotomy between statutory interpretation and statutory analogy, it is suggested here, is that this distinction cannot be justified and prevents courts from achieving the essential focus of statutory interpretation.

The support given to the technique of statutory analogy by scholars such as Dean Pound, Dean Landis, Professors Hart and Sacks, and others is obviously pursuant to a view moving in the right direction. The question is whether it sufficiently accords to statutes the status they should be given in the overall regime of law. It is the position of the speaker that this view fails to accord to statutes their rightful status—indeed commits statute law to a second-class citizenship in the city of law. Dean Landis has said that the central question concerns the place "that statutes are to occupy in the ultimate processes of lawmaking by judges."[14] He has in mind the realm of common law and the possible use of "statutes as a source of common law" by judges.[15] This question concerning judicial lawmaking must be rephrased to indicate that it arises in the realm, not of common law, but of statute law. Obviously this is the way the question must be phrased with regard to administrative agencies. There is no justification for phrasing it differently with regard to courts. In talking about judicial lawmaking in the realm of common law by use of statute law, advocates of the technique of statutory analogy have already begged the essential issue concerning the proper role of courts in administration of statutes. They have assumed that all judicial lawmaking, including that done with reference to statutes, involves the same basic considerations and the same commitments.

We now turn to the fundamental error that pervades the whole of the attempted dichotomy between statutory interpretation and statutory analogy and therefore prevents any possibility of compromise in support of it. It is the error of legal positivism, because the attempted dichotomy of decisional techniques assumes law to be bound up wholly in the notion of the legal rule. Law is viewed as beginning and ending with legal rules and the hold of a particular statute law upon a court is conceived as beginning and ending with the particular precepts through which it is expressed by the legislature. Even when scholars like Dean Landis and Professors Hart and Sacks properly assert the necessity for resort to legislative purposes in statutory administration, they remain bound to the foundations of legal positivism with Bentham and Austin and Dean Pound. They remain so bound by virtue of extending the mandatory administration of statutes only to administration of express statutory rules and their necessary implications. They thus view the realm of statutory law as circumscribed by the "linguistic possibilities" of express statutory rules.[16] The cleavage they wreak between manda-

14. Landis, *op. cit. supra* note 11 at 214.
15. *Id.* at 219.
16. Hart and Sacks, *op. cit. supra* note 1 at 1220-2.

tory elaboration of legislative purposes and discretionary elaboration of those same purposes is as fundamental an error as that committed by legal positivists in attempting to effect a cleavage between law and morality, purpose and rule, fact and value. The advocates of the technique of statutory analogy have been moved to their advocacy in order, most properly, to escape the confines of current notions relative to the technique of statutory interpretation. For inherent in these current notions of interpretation, whether of the intention or purpose variety, is a commitment to a pseudo-definitive scope of application—the so-called "statutory field"—beyond which the statute does not constitute law binding the court. The advocates of statutory analogy properly see that such a view of statutes represents a waste of "legal gold," a veritable misuse of an institutional product, particularly in modern political societies. They deeply desire to move courts to make greater use of statutes. They have faced, however, the unenviable task of justifying advocacy at one and the same time of a "freedom from" and a "freedom for" utilization of the same statutory purposes in the so-called field not covered by the statute. They have not made a persuasive case for greater utilization of statutes in judicial administration. Courts generally continue to express the view of statutes as belonging to an area of law whose chief characteristic is to be in the form of definitive, finished, express rules. Although the actual results courts reach in administering statutes indicates the fictional character of this view and of the technique of interpretation that supports it, practice in adjudication has made no greater doctrinal accommodation than legal theorists have between the notion of what statutes are and a greater utilization of them. Those who have advocated greater use of statutes through employment of statutory analogy should have questioned whether a technique of statutory interpretation was valid that made necessary a resort to statutory analogy in order to avoid the institutional waste in question.

It is not possible here to explore and expound the nature and repercussions of the fundamental error of legal positivism as it has impinged upon the theory of judicial and administrative decision making. It will be sufficient for our purposes simply to state that the error is two-fold. On the one hand the exaltation of the legal rule as the ultimate tool of law administration has been an abortive and unjustifiable attempt to separate a world of law from a world of non-law. On the other hand, the attempt to separate as far as possible a human and therefore essentially purposive instrument, the law, from its purposes, has hobbled our ability and desire to examine the reality and structure

of human decision-making and to fashion it more perfectly. The debilitating effect of the positivist separation is more than procedural, however, as some have thought. More fundamentally, it has dulled our intellectual appetite for the exciting adventure involved in exploring the processes, matter, and limits of adequate judgments concerning the human values with which law must be concerned. The positivist error is essentially a Victorian pushing under the rug of the problem of human evaluation. In the realm of traditional law we are overcoming and in the realm of constitutional law we have in the main avoided this fundamental error of legal positivism. In the realm of statutory law both theory and practice are still laboring under the burden of this error.

We may, however, elaborate an important and a justifiable function for the operation of the explicit rules of statutory law without committing courts in administering statutes solely or even chiefly to "administering rules." In order to achieve a satisfactory elaboration of this function, two considerations are essential. One relates to the role of legislative purposes in the administration of statutory rules. The other concerns the ultimate or basic tool for administration of statutes by courts. This is the statutory principle, that ineffable product of the interplay in judicial administration between legislative purposes, statutory rules, and administrative factors. No fruitful evaluation of the role of legislative purposes and of the ultimate tool in statutory administration by courts is possible unless it is made in light of the function courts perform in the overall framework of legal institutions in modern political society. This function, by common agreement, is adjudicative settlement of justiciable controversies by a process of judgment directed toward the achievement of "justice according to law." To this goal some would add: "and, when appropriate, justice according to discretion." One may raise important questions concerning the form and limits of adjudication as well as the distinction between judgment according to law and judgment according to discretion. Whatever be the proper answer to these questions, however, they cannot draw into serious question the basic fact that courts through adjudication make and are expected to make an essential contribution to the content of the on-going law they administer. This essential contribution to content has been variously described as resulting from "the collaborative articulation of shared purposes" (Professor Fuller),[17] the "reasoned elaboration of the purposes underlying legal arrangements (Professors Hart and Sacks),[18] "the Grand Style of the Common Law

17. Fuller, *Human Purpose and Natural Law,* 3 NATURAL L.F. 68, 74 (1958).
18. HART AND SACKS, *op. cit. supra* note 1 at 162, 164-5.

. . . a way of thought and work . . . [and a] future-directed quest for ever better formulations for guidance" (Professor Llewellyn),[19] or simply "the process of evolving concepts" (Dean Green).[20] The point is not so much that the legislature does not or cannot make this contribution to content, but that courts inevitably make an essential contribution to the content of the law they administer. As adjudicative administration of law proceeds from case to case, there gradually emerges as the growing basis for decision a decisional principle which increasingly subordinates the prior applications of a relevant rule or even of several related rules. This decisional principle is at once a reflection of those prior applications, the purposes or ends underlying those applications, and administrative factors such as considerations of justice, practicability, coherence, necessity, and logic. One may most appropriately say that one essential function of the court in our legal institutional framework is to contribute adjudicative decisional principles to the content of the law by the proper employment of existing rules, underlying and relevant purposes, and administrative considerations.

One of the vehicles by which the judicial contribution to statutory content is effectuated is the range or hierarchy of legislative purposes underlying statutory law. The great bulk of "middle road" scholars have always insisted that relevant legislative purposes must be carefully regarded in administration of statutes. In light of the rather universal legislative, administrative, and judicial practices obtaining today in this country concerning the operation of legislative purposes the war concerning the role of legislative purposes in administration has been won by these scholars. The question is no longer whether these purposes will be regarded in administration of statutes, but rather how they will be utilized. It is the author's position that a new, broader-gauged, and longer-ranged concept of legislative purpose must be given effect in statutory administration. Relevant legislative purposes include far more than immediate historical purposes at work in the legislative process that produces a particular statute. These are the purposes that have been the main focus of "middle road" scholars. These purposes are important, but they are frequently less important than other legislative purposes properly bearing on administration of a particular statute. Relevant legislative purposes also include those at work in two or more fields because of the necessity for these fields to maintain a rational connection between each other. Looking in the opposite direction we may see that legislative purposes developed subsequently to the

19. LLEWELLYN, THE COMMON LAW TRADITION 36, 38 (1960).
20. GREEN, TORT LAW: PUBLIC LAW IN DISGUISE II 257, 268 (1960).

enactment of a statute must also have their impact on the administration of that statute. This expression of purpose may occur through legislative oversight of judicial and administrative action or it may occur through enactment of new statutes in the field of law to which the first particular statute belongs or in one of several related fields. The new hypothesis of legislative purpose here suggested greatly increases the useful range of express statutory precepts. It does this by way of requiring the court to shape the content it gives to express rules in light of a more complex purposive framework. The new hypothesis also realigns administration of statutes with the integral, unitary, on-going reality of legislative lawmaking. We disregard this reality when we view relevant legislative purposes as confined to those immediately occasioning a given statute.

The new hypothesis of legislative purpose suggested is not only a development of first priority in the immediate future. It also will necessitate great changes in administrative techniques and scholarly research. We have long been accustomed to studying judicial process in administration of common law with a view to grasping prudential factors and purposes "across-the-board" in various common-law fields irrespective of whether the decision making is taking place at the same time or with respect to closely related matters. We have in view by such comparison the expectation that the way decisions are being reached in one field at one time may be suggestive of better decision-making in other fields at other times. Little similar research, however, has been done upon the decisional process utilized by legislators in making statutes. We have not attempted to focus upon prudential factors and purposes at work in legislative process "across-the-board" in various fields and how these are brought to bear upon decisions required to be made in legislative prudential process. Nor have we attempted to carry such analysis over into the area of statutory administration with a view to making these factors and purposes operative in assignment of meaning to statutes.

If, as the author believes, judicial resort to legislative purposes other than those occasioning passage of a statute is appropriate under normal operating conditions, the very foundations of modern administrative theory are shaken. These foundations posit an essential difference between judge-made law administration and statutory law administration. These foundations, however, are seriously weakened, if not destroyed, under the hypothesis just suggested since in that event the court in administration of statutes legitimately has a creative role as great and probably greater than the creative role traditionally exercised in the making and administration of common law. Under this hypothesis the very

concept of interpretation takes on dimensions not overtly conceded in the last and present centuries. Also the judicial function relative to statutes becomes more closely aligned with that of the legislature without, however, losing its essential character. Many of the deficiencies and difficulties of present interpretative theses, which the legislative purpose variety does not avoid, become less insoluble. The particular historical purpose and meaning of a statutory precept, while important, may be relegated to a more modest role under some circumstances. Indeed, the statute becomes more important than the precepts it includes and the statutory fabric of which the statute is a part becomes the vital factor in assignment of meaning to it. The statute becomes a dynamism capable of responding to the changes in conditions inevitably presented during the administration of that statute. Yet administration is not freed from its duty of fidelity to legislative process—it must be, indeed, more faithful to that process under the new hypothesis because it must be faithful to more of that process.

Nevertheless, the fullest and most adequate concept of legislative purposes will not suffice, without more, to make the statute an effective legal instrument. An essential component in any area of law administration, whether of traditional, constitutional, or statutory law, is the legal principle or formula that mediates between purposes relevant to the general rule and the rule itself. Wholly apart from differences in the way a legal principle comes into being in each of these areas of law administration, it is clear that law cannot live without effect being given to legal principles or formulas for administering its general rules. It can only die. This is as true of statutory law as any other form of law.

The author thus is of the view that the central aim in administration of a statute is to discover or formulate, as well as give effect to, principles or formulas for elaborating the purposes bearing upon the statute and for administering its precepts. It is important to see that relevant legislative purposes other than historical purposes of a particular statute must infuse administration of that statute from the outset. It is even more important, however, to recognize what function is to be performed by legislative purposes. This is to serve, along with statutory precepts, as a guide for discovery or formulation of statutory principles. The statutory precept is conceived from the weakness of the legislative position, of being removed from the furnace of individual cases that have to be decided. So conceived by the legislature the statutory precept is partial, inadequate, and basically in need of development of its underlying or internal integrity. This integrity is its principle, at bottom a product of administration in light of legislative and administrative standards. The

contribution of the legislature and the court to the formulation of statutory principles will vary from statute to statute. In all cases, however, the contribution of the court will be a very considerable one. Its contribution will be made largely pursuant to administrative standards that are either concerned with discovery and processing of legislative purposes or with adding new considerations relevant to just and wise administration.

Once the statutory principle is discovered or formulated, the court is as bound to preserve and enhance that principle as it was in first instance to discover or formulate it. There is never a time when the court may turn its back on the statute and say it is free to stop carrying its statutory principles and purposes forward to applications indicated by usual administrative considerations and instead resort to principles of traditional law (or to a claim of "no applicable law"). The contention that a court is free to do this is precisely the central error of "middle road" scholars like Dean Pound, Dean Landis, and Professors Hart and Sacks. The court is an agency of administration relative to a statute even when engaged in subordinate lawmaking by use of that statute. This means it has the duty of fidelity to statutory principles and legislative purposes provided for directing formation and administration of those principles. Of course, we have never recognized that administrative agencies may dispense with the duty of fidelity to these principles and purposes. No more can we justify any alternative to this duty of fidelity in the case of a court. This is the necessary result of the court's relation to the legislature in democratic political society. When the court administers a statute and whether or not it engages in subordinate lawmaking by use of that statute, it is an administrator of law. If it resorts to common law, as it frequently will, it only does so in its role as administrator of the statute and in subordination to the central purposes and principles of the statute.

Let us examine more closely the suggested hypothesis for statutory administration by courts. The legislature always provides certain express provisions in a statute, and, in a more or less discernible way, legislative purposes that bear upon administration of those provisions. Sometimes the legislature may go further and provide in fairly definitive form statutory principles that are to be given effect in administration of statutory precepts and that are to mediate between those precepts and relevant legislative purposes. More generally the legislature will not provide definitive statutory principles because they presently cannot be provided. When this occurs, statutory precepts represent inchoate legislative guides for courts to use in developing statutory principles in light of relevant legislative purposes. These precepts serve to give an initial form and direc-

tion to administration while the latter drives, as it inevitably must, toward development of statutory principles.

Thus, in the early period of judicial administration of a statute, express statutory precepts more or less "comprehend" the cases to which the statute is to be applied. This simply means that these precepts are directive of the obvious cases for inclusion and exclusion in light of relevant legislative purposes. Yet even from the beginning it is only relatively true that express statutory precepts comprehend the cases to which the statute is applied. Moreover, as administration of the statute becomes farther removed from its creation, these precepts become less and less determinative of the results in administration. This is true because application of the statute involves consideration of a variety of possible applications. Resolution of these problems requires resort to both legislative purposes and various administrative considerations. Eventually cases are presented to which express provisions, viewed inaccurately as determinate, definitive rules or directions, cannot "apply." On the other hand, the underlying mode of past application does call for the statute to be applied to the cases in question if legislative purposes are to be subserved presently as in the past and if analogous or similar cases are to be treated similarly. The statute should be applied to these cases. When the statute is applied, what is applied is a statutory principle or formula, one evolved in administration. The application involves the judicial creation of a new statutory precept by adjudicative lawmaking, one which usually parallels or supplements express statutory rules of the statute. At other times the new statutory precept may even modify express statutory precepts so that they may operate with respect to conditions developing for the first time after enactment of the statute.

Let us take one example of the author's proposal in action. We may begin with the common situation of a statute being administered by a court or agency through adjudication. This is the case of a statute the express rules of which do not provide in their words for a given class of situations. Let us assume there is a complete absence of words dealing with what to do with the case. On the other hand, if we have regard for the discernible "statutory principle" dealing with like cases as well as the purposes bearing upon that principle and the express precepts through which it is realized, we are provided with a means for handling the case before the court. It is a situation, moreover, in which we are presented with more than the availability of a means for handling the particular case. We are also presented with the alternative that if the particular case is not handled like the other cases, the statutory principle, unlike common law and constitutional principles, will not be permitted to operate

for the cases for which it is most adapted. If giving effect to a common law or other principle would call for a different result in the case, then rejection of the applicable statutory law principle by a court involves rejection of the action of a coordinate agency of democratic political society that has thought about the general problem and has produced the purposes and the principle (in some cases only the material for formulating a principle) for resolving the controversy. In *Kirschwing v. O'Donnell*,[21] the Supreme Court of Colorado was faced with precisely the problem just described.

The charter of the City and County of Denver, Colorado, provided for policemen's pensions. In a suit by former members of the police department to compel payment of larger pensions it was contended by the defendant city officials that the charter provisions, properly interpreted, provided that a policeman retiring at the end of his fortieth year of service should have his pension determined on the basis of his salary and rank for his twenty-fifth year of service rather than his fortieth. The charter expressly covered a number of classes of retirement situations. If a policeman retired at the end of twenty-five years of service, he was due a pension equal to one-half the average monthly salary received during his twenty-fifth year of service. If salaries of policemen were raised, pensioners were due an increase in pension equal to one-half of the raise in pay granted in the rank the pensioner held at retirement. Sick leave as well as disability leave was provided for an officer at one-half the salary for the rank held at the time the illness or disability occurred. Payments to widows of officers were provided upon the basis of the salary of the deceased officer at the time of retirement, death, or disability, whichever had first occurred. The charter provision, however, did not speak to the pension of an officer who elected not to retire at the end of twenty-five years. It simply stated that this election was permitted and that the extended service would terminate if he became physically or mentally unfit to perform his duties.

In rejecting the contention of the defendants the Supreme Court of Colorado referred, *inter alia,* to the statutory purposes and to the principle for payment of pensions that it could see at work in the several rules covering the various pension situations other than the one presented to the court to which the statute did not speak by a rule. All of these rules made the year in which service was terminated the year determinative of the salary and rank upon which pensions were to be based or modified. This was the statutory principle at work in these rules. More-

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21. 120 Colo. 125, 207 P.2d 819 (1949).

over, the various purposes underlying the statute supported application of the principle at work in other pension situations to the pension situation presented in the instant case. These purposes included the reward of efficiency, the encouragement of officers to remain in the service, and the giving of an assurance that a decent living would be available upon retirement, whether from disability or other cause. All of these purposes would be disserved if the statutory principle of basing pension on salary and rank in the last year of service used in other pension situations were not applied to the case of an officer retiring in his fortieth year. The total absence of an express rule placed no difficulty in the way of the court providing a judge-made precept paralleling the express statutory precepts in light of the relevant underlying statutory principle and the various relevant statutory purposes.

The Supreme Court of Colorado reached the right result in the *Kirschwing* case. Not once did it falter in its conception that it was an administrator of the statute and committed to fidelity to the statute, its purposes, and its principles. It did not conceive it was limited in its mandatory administration of the statute to pouring meaning only into the express rules of the statute. Its function of assigning meaning was properly conceived as extending to a situation where no rules were provided. Presumably the court could have stated the legislature had not provided for this case. In fact it had not, in terms of a rule. Had the court taken this route it might have declared that since the plaintiff was not provided with a pension under the statute and since the common law did not provide principles relating to pensions of employees, he had no substantive right to assert against the city and county. The court might instead have analogized the situation to one of a contract between an employer and an employee providing for the payment of a pension but failing to specify the amount of the pension in this situation. The court might then have determined that the principles of contract or quasi-contract law demanded that the city respond to the former employee with a pension at least equal to the highest or other pension provided for in the express rules, as the measure of the value of the pension due. This conceivably could have been the pension for the person retiring in his twenty-fifth year. The point is that a number of ways of dealing with the controversy between the city and the employee on the matter of the pension became possible if the court could properly view the statute as not binding on it because it contained no express rules to which meaning could be assigned in order to solve the case before it. It is submitted that the only accurate approach to administration of the statute was the one utilized by the court. This was one of conceiving that it was bound to

a faithful administration of the statute in light of relevant legislative purposes and the statutory principle underlying its express rules. It properly conceived of its task as one of discovering or formulating principle in light of the legislative purposes and express statutory precepts. To speak of the court here as being free to use or not to use the technique of statutory analogy and as operating in the field of common law with an eye on the city charter merely as a possible source of law is to demote statutory law to an inferior and undeserved rank.

Although the *Kirschwing* case involves perhaps the simplest situation in which the statutory principle must be judicially isolated or formulated, it contains a profound lesson in judicial administration. A more complex situation is presented when much more judicial creativity must be employed in formulating the statutory principle to be utilized in resolving the case before the court. Sometimes this creativity will involve the application of the principle of one statute in the course of administering a different statute, as in the recent case of *Delta Air Lines, Inc. v. Civil Aeronautics Board*.[22] Here there was an express rule of the statute available to serve as the vehicle for application of the principle underlying the so-called *Ashbacker* doctrine.[23] In *Keifer and Keifer v. Reconstruction Finance Corporation*[24] the statutory principle at work in forty-odd statutes similar to the one before the court was applied although there was no express rule of the statute to serve as the vehicle of application. The Supreme Court of the United States first settled the relevancy of the statutory principle at work in the other federal statutes to the administration of the statute before it. It said: ". . . the circumstances attending the origination of Regional make it manifest that it was within the considerations that have uniformly led Congress to make its immediate corporate creatures subject to suit."[25] Having established the relevancy of the statutory principle for another statutory area, the Court deemed itself bound to be faithful to that principle. To act otherwise and "to imply for Regionals a unique legal position compared with those corporations to whose purposes Regional is so closely allied, is to infer Congressional idiosyncrasy"[26] and to "do violence to Congressional purpose."[27] The same judge who wrote the opinion in *Kiefer and Kiefer*, however, faltered when faced with essentially the same problem of utilization of

22. 275 F.2d 632 (D.C. Cir. 1959).
23. Ashbacker Radio Corp. v. Federal Communication Commission, 326 U. S. 327 (1946).
24. 306 U. S. 381 (1939).
25. *Id.* at 392.
26. *Id.* at 393.
27. *Id.* at 395.

statutory principle in *Addison v. Holly Hill Fruit Products, Inc.*[28] In this case the problem of judicial creativity was considerably eased by virtue of the legislature having specifically directed the administrator of the statute to bear the initial and major responsibility for formulating a statutory principle to guide the administration of the provision in question. The performance of the task of judicial review of administrative formulation of statutory principle required judicial creativity only to the extent of calling upon the court to judge the adequacy of the formulation in light of underlying legislative purposes and analogous provisions of the statute. Nevertheless, the overall task of administration by agency and court alike was more extensive than in the *Kirschwing, Ashbacker,* and *Delta* cases since the bulk of the content of the statutory principle had to be formulated in the course of administration.

In the view of the author, therefore, the court is not an interpreter whose function is merely to discover the historical meaning of language used in statutory rules and to apply these rules as so interpreted to individual cases. More accurately the court is engaged in assignment of meaning to statutes or in making statutes meaningful for administration. This involves attribution of purpose to statutes and in discovery, or more accurately, development and evolving of statutory principles in light of these purposes and relevant administrative standards. Moreover, the court is engaged in putting these principles and purposes to work. Most of the time this will involve application either of express rules of a statute or rules parallel to these developed in the course of prior administration. It may be seen that a court here is "doing what comes naturally." It cannot do otherwise and "make sense." It cannot do otherwise and make the contribution only it or another adjudicative agency can make to administration of law. It cannot do otherwise and at the same time treat statutory law as having a first class citizenship in the regime of law. Thus, in administration of statutory law a court in assigning statutory meaning has many roles. It is an attributer of purpose, a developer of statutory principle in light of legislative purpose, a judicial lawmaker, and finally an applier of rules that are kept responsive to statutory principles as necessary by judicial lawmaking.

This new hypothesis gives effect to much of existing practice of our best courts operating at their best. The concepts it involves of legislative purpose and statutory principle are realistic and balanced. The new hypothesis gives to courts an important role in development of statutory policy but in an ordered way that implements and improves on raw ma-

28. 322 U.S. 607 (1944).

terials of legislation. It thus perfects institutions of democratic society: the perfection consists in utilizing the best contribution of its chief lawmakers in making and administration of statutory law. The existing dichotomy between statutory interpretation and statutory analogy is largely responsible for the growing decline in prestige of American state courts in a regime of law becoming increasingly statutory in composition. The dichotomy is also responsible for the variation in excellence of product one sees too frequently in the work of federal courts and administrative agencies. When courts and agencies more generally take on roles envisaged by this new hypothesis, they will be enabled to achieve the same strength, originality, responsibility and statesmanship that belong to the grand tradition of the common law and to the great periods of our constitutional law. If common law and constitutional law are equal to the perennial problems of administration, so is statutory law. It is, one may well say, a matter of applying statutory principles evolved judicially in light of relevant legislative purposes and proper administrative considerations.