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Peter L. Strauss
Columbia Law School, strauss@law.columbia.edu

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THE COMMON LAW AND STATUTES

PETER L. STRAUSS*

Controversies about statutory interpretation and the proper roles for judges in interpretation are particularly noticeable in the Supreme Court but have penetrated downward throughout the judicial system. What I mean to explore here are some implications of our common law heritage and the presuppositions of a common law system for these controversies, that seem rarely noticed in the ongoing debates. I mean by this not only common law judging, but also what we might call common law legislating—that is, the practice of creating statutes to achieve marginal changes in existing law in response to perceived deficiencies, rather than legislating comprehensively as continental codes seek to do. At its most basic, my argument will be that our fundamental commitment to the common law, including our commitment to the system of precedent in statutory interpretation, is inconsistent with one approach to interpretation strongly bruited in the debates; this approach argues that the only proper (perhaps even the only constitutionally permissible) aim of interpretation is determining the textual meaning of a statute as of the date of its passage.

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* Betts Professor of Law, Columbia University. Derived from the Forty-First Annual John R. Coen Lecture delivered at the University of Colorado School of Law on April 20, 1998, this paper owes much to the faculty of Hong Kong University Law School, where I presented an early version, and to my colleagues Kent Greenawalt, Peter Lindseth, John Manning, and Jeremy Waldron. Its eccentricities and errors are of course my own. Many thanks are due also to Charles Sensiba who gracefully helped produce a skeletal documentation for a paper prepared for oral delivery.

The written literature on this subject is, by now, daunting. Just among my own colleagues, the recent work of Greenawalt, Manning and Waldron has added enormously to the dialog. *See* JEREMY WALDRON, LAW AND DISAGREEMENT (forthcoming 1998); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997); Kent Greenawalt, Twenty Questions About Statutory Interpretation: A Brief Comprehensive View (Feb. 23, 1998) (unpublished manuscript, on file with the *University of Colorado Law Review*). This paper inevitably draws from those debates, and tries however imperfectly to acknowledge its debts; but it is not a place from which to start a journey into the literature. Readers who wish a recent, thorough, and interesting assessment of the literature would do well to start with a young scholar's recent essay, Karen M. Gebbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy and Legal System Values*, 21 SETON HALL LEGIS. J. 233 (1997). Here, readers must evaluate the force of the arguments as they might have been heard, without the aid of much fine print at page's bottom.

My argument is premised in the reactive, pragmatic, and precedential qualities of a common law system. Before getting to this doubtless controversial proposition, however, it seems useful to lay some groundwork that I hope will be less problematic.

First, let me observe that the question what are proper techniques for statutory interpretation and the question what are proper roles for judges in interpretation are slightly different. Lawyers, bureaucrats, and ordinary citizens interpret statutes just as courts do, although of course they may be influenced by their knowledge how a court is likely to act. Questions about interpretation that is specifically judicial are influenced by our ideas about judicial roles, about the precedential force of a judicial decision for future disputes, and perhaps also by the timing of judicial decisions. Even in a society that makes declaratory judgment freely available, we can observe, judicial decisions often come considerably after other actors have had to make decisions about statutory meaning, decisions on which large sums may turn;[1] and it is at least possible that we will think this element of timing has something to do with our analysis.

A second characteristic of the issue for judges, as well as for bureaucrats, is that questions concerning how best to interpret statutes have a political aspect lacking for members of the public. Judges are a part of government, in a generalizable relationship to its other elements. Because their decisions help shape the evolving framework of law by which society is governed, questions of their responsibilities as a part of government enter into the analysis. In my judgment the common law responsibilities of judges in our political system are central to a thoughtful consideration of the problem of interpretation.

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1. Thus, in *Johnson v. Southern Pacific Co.*, the Court of Appeals for the Eighth Circuit in 1902 and then the Supreme Court in 1904 dealt with the Railway Safety Appliance Act of 1893. *See* 196 U.S. 1, 13 (1904). This Act required railroads immediately to commit substantial funds to purchasing safety equipment. *See id.* at 13-14. These investments were essentially complete by the time litigation over the consequences of an accident required the courts to decide central questions about the nature of that obligation—questions railroad general counsel and the Interstate Commerce Commission ("ICC") had, perforce, been obliged to resolve to their own satisfaction during the interim period. The Annual Reports of the ICC for the years 1894-1900 detail the variety of implementation issues faced and the progress of railroad investment. *See* Peter L. Strauss, Cases and Materials: Legal Methods 200-18 (Aug. 1998) (unpublished manuscript, on file with the author).

With this groundwork in mind, it will be useful now to sketch the American controversy and to suggest in a preliminary way how it is tied to our particular political system.

Simplifying a bit, we can identify three different attitudes toward how one should determine the meaning of a text. Textualists, who come to their task with a variety of ideas about the rigidity of the interpretive enterprise, agree that statutory meaning is to be found in the words the legislature has used—read with sensitivity and attention to context, perhaps, but most importantly read for textual meaning uninstructed by political history or other like considerations.[2] Purposivists, by contrast, prefer to interpret statutes in relation to broad purposes that they derive not only from the text simpliciter, but also from an understanding what social problems the legislature was addressing and what general ends it was seeking. Such an understanding, of necessity, requires some awareness of the political context in which the legislation arose and the mischief it was understood to address. Finally, intentionalists concern themselves more directly with actual, historical understandings of statutes that can be ascribed to the members of the legislature—usually, its responsible leaders, who are assumed to speak for the body as a whole when they address disputable questions of meaning.

In addition to these three approaches to finding meaning, we can identify two polar stances towards how that meaning can vary over time. Some interpreters take the position that statutes are stat*ic*.[3] For them, the meaning of a statute is invariable—a statute always means what it meant at the moment of its adoption. Once a common law court has determined that issue, of course, the system of precedent works to fix what the statute always meant as of the moment of that interpretation; that issue is not ordinarily open for reexamination. In this view, statutory meaning is fixed as of the moment of passage and can be altered

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2. *See* William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction* to HENRY HART & ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW at li, cxxv-cxxxiv (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958); Karen M. Gebbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy and Legal System Values*, 21 SETON HALL LEGIS. J. 233, 283 (1997).

3. Etymologically, both "statute" and "static" are remotely linked to the Latin *stare*, to stand. 16 OXFORD ENGLISH DICTIONARY 561, 564 (2d ed. 1989). There is, however, no necessary relation of meaning.

only by new legislation.[4] Other interpreters regard statutes as integral parts of a dynamic legal system. They may rather say that a statute's meaning is always determined in the current day, reflecting what it has become in the legal system as it has evolved since the moment of passage.[5]

Neither textualism, purposivism, nor intentionalism is inevitably static or dynamic in character.[6] One should imagine, rather, a grid like Figure 1, with possibilities throughout. Thus, a textualist who sees statutes to be static will be concerned with what meaning the words of the statute had at the moment of its adoption—how the statute's language would be understood in relation to other laws in force at that time, and so forth. A dynamic textualist will rather be concerned with how a contemporary reader would understand the language employed, in relation also to the law of the current day, including the language of other, perhaps more recent, statutes then in force. A person concerned with statutory purpose would consider, more broadly, what individuals subject to a statute would have understood it as seeking to accomplish at the time of its enactment, or what function it serves in the law in the current day. She will be much more concerned than the textualist with political history; she will assume that legislators are attempting to achieve rational ends in the legal system, to respond to some problem they have identified, and to ameliorate it in ways that make political sense in terms of the time frame she employs. Finally, a person concerned with particular intentions will be searching much more precisely for evidence of exactly how legislators understood the meaning of the words they were enacting, or what contemporary administrators have taken their language to mean.[7]

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4. *See, e.g.*, Neal v. United States, 516 U.S. 284, 290 (1996). An extended analysis of a recent Supreme Court term in which this problem was prominent appears in Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 437-38.

5. *See* Eskridge & Frickey, *supra* note 2, at cxxix n.333.

6. This point was particularly well made in T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988). *See also* Strauss, *supra* note 4, at 440.

7. *See generally* Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321 (1990).

Figure 1

	Static	Dynamic
Textualism		
Purposivism		
Intentionalism		

Each of these positions has had adherents in recent American history. Until about fifteen years ago, however, there was little theoretical discussion of them, and it might also be fair to say that since the emergence of legal realism in the early part of this century, a limitation of statutory analysis to statutory text has been reserved for only the most straightforward of cases—those where one confidently knew, on reading the statute, what it meant.[8] Both purpose and a narrower, "intended" meaning were invoked where the occasion seemed to call for it, and courts did not appear to pay much attention to whether they were giving a statute a meaning it had always had, or making it the best they could make it in terms of the current structure of law. Opinions mentioned dictionaries very infrequently.[9] They often relied upon legislative history.[10]

All of this began to change with the appointment of more conservative Justices to the Supreme Court, notably Justice Antonin Scalia, but also Justices Rehnquist, Kennedy, O'Connor, and Thomas.[11] Opinions began to voice principled objections to the use of legislative history, instead referring frequently to dictionaries, and even observing the difference between period dictionaries (which would reflect how words would have been

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8. *See* Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 279-81 (1990).

9. *See* Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1438 (1994).

10. *See* Wald, *supra* note 8. *See generally* Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351 (1994).

11. A considerable literature addressed this change, much tied to Justice Scalia. *See, e.g.*, William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231; Nicolas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597 (1991).

understood when written) and recent dictionaries that could tell one only how they would be understood when read.[12] The decided trend has been toward the formalities of textualism and toward an understanding of statutes as static. On this view, judges are to say what statutes meant when enacted, and have always meant ever since.

The arguments supporting this trend have at times acquired a constitutional hue. In a notable Supreme Court concurrence for himself and two others, Justice Kennedy argued that separation of powers considerations forbade the Court's use of legislative history materials.[13] Only Congress can make law, and Congress can make law only by enacting words, he reasoned.[14] It does not—cannot—enact the materials of legislative history.[15] Justice Kennedy's way of putting this argument appeared to deny the Court's status as a common law court in the Anglo-American tradition, as have other opinions in cognate areas—expressing skepticism, for example, whether the Court is constitutionally permitted to infer a federal common law remedy for the undoubted violation of a valid federal regulatory or criminal statute.[16] Thus, this argument appears to run, judges are constitutionally obliged to be careful in reading a statute and are not to add to it anything that the legislature's words do not directly command. My colleague John Manning has made a similar argument in ways that seem to raise fewer questions about judicial process.[17] Judges paying attention to the materials of legislative history, he argues, encourage legislators to attempt to make law in a manner not open to them, by manipulating the content of those materials, which they can do without having to secure their colleagues' approval. I have addressed Professor

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12. *See, e.g.*, Muscarello v. United States, 118 S. Ct. 1911 (1998); Director, Office of Workers' Compensation Programs v. Greenwich Collieries, 512 U.S. 267 (1994). *See also* Strauss, *supra* note 4, at 509-13.

13. *See* Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 467-89 (1989) (Kennedy, J., concurring).

14. *See id.* at 470.

15. *See id.* at 474-75.

16. *See, e.g.*, Cannon v. University of Chicago, 441 U.S. 677, 730-49 (1979) (Powell, J., dissenting). *See also* Strauss, *supra* note 4, at 536-40. *See generally* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985).

17. *See generally* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997).

Manning's argument in another place.[18] Here, it seems useful to focus on the argument for textualism as it concerns the judiciary's role in our government.

Let us start with what is, from a world perspective, a structural oddity of our particular version of separation of powers—an oddity that in my judgment has strong implications for the interpretive enterprise. Because the American President and each member of Congress are separately elected, and because we do not have a tradition of strong party discipline in the legislature, what Congress enacts into law is much less in the control of the government, as one might usually describe the executive branch, than is usually the case in England, western Europe, or other parliamentary democracies. The President can and does propose legislation to Congress, but so do many others. Yet the legislation Congress enacts is the result of lengthy and intensely political discussions and developments entirely within the legislative branch. The President and others might hope to influence those discussions but cannot control their result. That is determined strictly by the votes of the members of Congress, who are always free to vote as they choose, without regard even for the wishes of a President who is a member of their own party. The American government does not fall when the party in charge fails to enact important legislation; no member of the Congress loses party membership, or is otherwise disciplined, when she votes in a way different from what her party leadership would prefer.

This may suggest one reason why debates over the use of legislative materials in interpretation have played such a large role in American discussions. We may sometimes succeed in enacting carefully prepared legislation, but that is a rarity. In the usual case, we lack *travaux preparatoire*, white papers, or academic explanations of a thoughtfully prepared text. If one wanted to be able to understand the background of the words Congress enacted, one would usually have to consult a series of documents reflecting the discussions in Congress—reports by the responsible committees, changes made to the bill in the course of consideration, speeches made in the legislature, and so forth. These materials are much less elegant than *travaux preparatoire*.

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18. *See* Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242 (1998).

They are also subject to misunderstanding and manipulation, yet they are the principal source of information that we have about the way in which legislative words were understood by the people who chose them. So if one thinks it relevant to have an idea what members of the legislature might have thought they were doing when they adopted legislation, these materials are where one would have to look.[19]

Another important and distinctively American contribution to the problem, in my judgment, lies in how we imagine the role of judges as lawmakers in interpretation. In the founding case of our constitutional tradition, *Marbury v. Madison*,[20] our Supreme Court announced that it was finally for the courts to say what the law is. In its consistent practice since that time, the Court has asserted, too, that this final say is rooted in a common law framework. The Court does not come to the interpretive question afresh each time it arises; its reading acquires the force of precedent that itself binds future courts and actors until overruled.[21] In a world in which the Constitution controls what the President and the Congress are permitted to do, the power finally and durably to say what the Constitution means is an extremely important one. The Constitution is a written text. It may be interpreted literally, or in terms of its purposes, or in relation to what one concludes its drafters intended in some more specific sense. The choices to be made here have major implications for the power of judges as against the President and Congress, since they can be overturned *only* by amending the Constitution—which is not impossible, but very difficult to accomplish—or by persuading the judges that they were wrong.

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19. Interestingly, the generally textualist members of the Court signaled at one point in the Term just completed that they were quite prepared to rely on material having the character of *travaux preparatoire*. *See* Foster v. Love, 118 S. Ct. 464 (1997); Salinas v. United States, 118 S. Ct. 469 (1997). In *Foster*, the first of these two otherwise unanimous cases, Justices Kennedy, Scalia, and Thomas dissented from the majority's reliance on some legislative history materials. 118 S. Ct. at 466. But in *Salinas*, Justice Kennedy's opinion for the Court, without apparent hesitation or doubt, cited the explanatory materials of the Model Penal Code, as good an example of the *travaux preparatoire* genre as may exist in American law. 118 S. Ct. at 477-78. *See also* United States v. Beggerly, 118 S. Ct. 1862, 1865-67 (1998) (citing the Advisory Committee Notes to the Federal Rules of Civil Procedure).

20. 5 U.S. (1 Cranch) 137 (1803).

21. *See* Neal v. United States, 516 U.S. 284 (1996); Cooper v. Aaron, 358 U.S. 1 (1958).

Finding an acceptable interpretive style, then, has enormous, even political, importance.

Although the Courts' interpretations of statutes can be more easily corrected if they are wrong than its interpretations of our Constitution, here too the chance for political conflict is not insubstantial. Because of our common law heritage, our judges also do not decide statutory questions just for the case at hand. Once they have interpreted a statute, their reading becomes a precedent for the future. Indeed, they have tended to say that precisely because Congress *can* correct their "mistakes," they should be more hesitant to change a statutory interpretation than a decision about the common law for which judges are wholly responsible.[22] Judges who are not sympathetic to statutes, who perhaps do not share the political impulses that produced them, can quickly defeat their operation. In the first part of this century, we went through a period of struggle between the political parts of our government and the courts, in which the courts substantially resisted political changes influencing legislation by applying quite formal techniques of interpretation and, in effect, by refusing to understand what the legislation was attempting to accomplish. This led to the development of alternative institutions for deciding some legal questions, to the creation of a considerable bureaucracy for administration.[23] It also led to professional and public debate about the role of the courts that, for a while, produced a judiciary much more attentive to the political background of legislation.[24] In the last decade or so, as our politics have in general become more conservative and a substantial number of quite conservative judges have been appointed to the bench, these difficulties seem to have reappeared.

We rarely pause to consider the systemic implications of our common law system for the problem of interpretation. Usually, my impression is, this system is just an unremarked background element in discussions of interpretation. Thus, in a colleague's recent paper, I found the following:

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22. *See Neal*, 516 U.S. at 295-96.

23. *Cf.* LOUIS L. JAFFE & NATHANIEL L. NATHANSON, ADMINISTRATIVE LAW: CASES AND MATERIALS 133-36 (2d ed. 1961).

24. *See* Strauss, *supra* note 18, at 247; *cf.* Felix Frankfurter, *Some Reflections on Reading the Statutes*, 47 COLUM. L. REV. 527 (1947).

> Those who believe that the meaning of a statute is fixed at enactment may view "mistaken" precedents more narrowly, and as more easily overruled, than those who favor an "evolving law"; but virtually no one contends that statutory precedents have only the status that the force of their reasoning carries.
>
> . . . .
>
> [If that were so, statutes] would carry no more force than a professional article asserting the same points that was brought to the attention of the judges.[25]

As an observation about American legal practice, these words are unexceptionable. What I would like us to note, however, is that it is an observation about *American* legal practice. If we were in a civilian jurisdiction—say, France or Germany—we could also find disagreements between people who regard statutes as static, formal documents, and those who find in them a more flexible framework whose meaning can evolve in response to changing social circumstances. Both sets of people, however, would probably agree that judicial pronouncements about what statutes mean "have only the status that the force of their reasoning carries,"[26] and that professional articles provide not just equal but even superior bases for understanding what a statute means. Judges in those systems, one might say, are *just* interpreters, and they acknowledge that they are not the only (or even the best) interpreters. Their interpretation is of necessity final in any given case, but they do not assert the right finally to say what the law is in any larger sense. Interpretations might or might not vary over the years, but if they do it is not because of what prior interpreters may have said. Social circumstances having changed, interpretations might change with them; but the fact of a particular interpretation does not itself change the law that is being interpreted. The view of a committed and dispassionate scholar can carry even greater force than that of a judge responding in greater haste and with perhaps less training to the particular contingencies before her.

The raging debates over interpretation have not much remarked this contingent observation about what we might call

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25. Kent Greenawalt, Twenty Questions About Statutory Interpretation: A Brief Comprehensive View 14 & n.17 (Feb. 23, 1998) (unpublished manuscript, on file with the *University of Colorado Law Review*).

26. *Id.* at 14.

the conversational quality of American statutory interpretation. It is time now to see where it can take us. That is, I am going to build on the premise that the American legal system is, as a matter of constitutional commitment, a common law system, in which law emerges from the decisions of judges as well as the votes of legislatures, in which statutory precedents have *more* status than the force of their reasoning conveys. It is not that judges could not, in fact and in practice, abandon this system and, by force of repeated decision, convert American statutory interpretation to the civilian model. Perhaps they could—although, paradoxically, that too would take its force from the system of precedent. But if they did effect this change, we would all recognize, I believe, that something quite fundamental was happening, that we were experiencing a switch that cast adrift our understanding of a distinctive feature of the American legal system.

Another way of approaching the same observation is to remark that the kind of statute undergirding the civilian attitude, the *Code Civile*, let us say, has characteristics that support the more distinctly separated judicial and legislative roles characteristic of western European legal systems. These statutes emerge in a single legislative act, after exquisite intellectual consideration, as an integrated whole. They are rarely if ever amended; and if amended, only after equivalent study and attention to the integrated effects of change. A cohesive, comprehensive, enduring text, not easily changed in any forum, the *Code Civile*—like, say, our Restatements—invites scholarly explication *and* judicial modesty. Understanding its intricacies and interrelationships, courts would naturally hesitate to give more than provisional status to their applications of its terms to particular congeries of fact. It is obvious which is the permanent literary work and which, the contingent encounter. No one confuses author with reader. That interpretations may change is natural as readers change, but that which is read remains constant. The deposit of past readings is no better than interesting; the text remains the challenge.

Of course other systemic features of *those* legal systems are also in play there. The legal culture and social expectations about it are different from what they are here. Judges' training, careers, the mechanisms for their appointment, their social and political standing, all differ sharply from our own. A young

colleague to whom I showed an earlier draft of this essay, expert in French public law, wrote me that:

> [T]he actual practice of civil law judging is less alien to our tradition than is usually supposed, in ways that I think actually support your basic argument about the relationship between judging and statutes.
>
> Codes can be notoriously vague—the French tort provisions are the favorite example of teachers of comparative law—requiring extensive judicial elaboration. The current meaning of French tort law has much more to do with well-settled precedent—la jurisprudence constante; e.g. relating to strict products liability—than the Code's original references to delictual responsibility for "une faute." Codes must also be, by definition, sufficiently general to handle a variety of unforeseen circumstances ("féconde en ses conséquences," as the French put it). Therefore, the prevailing method of interpretation, to use your terminology, is purposive and dynamic (the so-called "teleological method of interpretation").[27]

The metaphors that are evoked in American discussions of statutory interpretation, it may be noted, often misleadingly assume that the act of interpretation has no permanent effect on the text being interpreted. Whether we are invited to consider reading statutes as comparable to the reading of literary texts, of the Bible, or of musical compositions,[28] our attention is called to a text with a distinctive creator (the legislature) and a different reader (the judge). The interpreter might mention that statutory text does not have a distinctive creator, but that is by way of introducing the difficulties of collective authorship. This makes problematic the idea that legislation can have an "intent" if it emerges from the highly variable participation of 535 legislators divided among two Houses of Congress and their many committees and subcommittees, and assisted by innumerable staff and lobbyists. However imperfect it may be to think of authorship, then, author and reader are still distinct. It is, in a way, easy to celebrate the individuality and contribution of the reader—the

27. E-mail letter from Peter Lindseth, Associate Director, European Legal Studies Center, Columbia University, to Peter L. Strauss, Betts Professor of Law, Columbia University (Apr. 14, 1998) (on file with the author).

28. *See generally* Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259 (1947).

interpreter—if we do not notice that her act of interpretation controls future readings by others. To be sure, the power of particular readings or our habit of hearing a poem read a particular way may influence how other readers approach the text, in sympathy or abreaction. Yet there is no formal power to control here. That Furtwangler and Toscanini each give different readings of a Beethoven symphony[29] expresses a kind of truth about the human spirit; and it does not matter which of them gets to the text first.

Of course, the audience's stake in how a statute is read rather differs from its interest in the rendering of a symphony or play, as has been noticed.[30] We are not as interested in originality in our statutory interpreters, in the way we might be in our conductors; we want closure and we want predictability, important legal system values.[31] We may also have a more important political claim to faithfulness to authorial instructions than marks our theatergoing. How a poem is read does not ordinarily have significant real-world consequences. But the particular difference I want to start us out with is that, as we usually think about it, how the poem is read does not authoritatively change its text for future readers. In a system that gives precedential force to authoritative readings, as the American system does, the text does change. Future readers must equally consider those readings with the initial text.

Our metaphors about interpretation are troubled, too, by the conversational qualities of statute-making in the paradigmatic common law context. In the civilian code model, a statute is in contemplation self-contained. It is the product of deliberate reflection in terms of a unified structure of law and a coherent and, at least in design, independent and complete intellectual product. By contrast, statutes in a common law system ordinarily emerge against the backdrop of the common law, as legislators observing imperfections in the existing state of law attempt to fashion responses. The processes that generate them are more political than intellectual. In particular, comprehensive efforts to place and reconcile new statutory enactments with the

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29. *See id.* at 1260-61.

30. *See generally* Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

31. *See* Gebbia-Pinetti, *supra* note 2, at 240-56.

existing body of law are relatively rare.[32] It may even be assumed by those who write the legislation, and by the public receiving it, that that work will be done by judges, pursuing "the ideal of a unified system of judge-made and statute law woven into a seamless whole by the processes of adjudication."[33] That ideal, again, reflects a reader who authoritatively changes the text; and now we see a further quality, that the new text is to be received into, and perhaps will alter, a framework of authoritative meaning that has been generated exactly by those who are responsible for reading it. How those readers understand their

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32. As my colleague Peter Lindseth also pointed out, *see supra* text accompanying note 27, the reality in civilian systems often operates in this fashion as well—and the civilian understanding, if anything, strengthens the argument of this paper:

> The legislative response of choice [to the realization that social and economic circumstances have changed since the adoption of code provisions] is not direct amendment of the Code itself—legislators, too, respect the systematic nature of the Code—but so-called "ancillary legislation" to solve the specific problem at issue. The amending effect, of course is the same, because the more specific law will trump the more general. In code-based systems, one cannot evaluate the overall state of the law in a specific area simply by looking at the code (there is, for example, so much ancillary commercial legislation in France that commentators speak of "decodification"). In this sense, your description of statutes in the common law system—resulting from legislators "observing imperfections in the existing state of the law [and] attempt[ing] to fashion responses"—is not so far from the nature of ancillary legislation in a code-based system. . . . And ultimately, the responsibility of meshing these disparate laws into a workable legal system falls to the judge, again providing him/her with some considerable normative leeway.
>
> Of course, this entire discussion relates primarily to private law, where the great civil and commercial codes prevail. However, public law adjudication, in my experience, is in fact even closer to the common law model that you advance. In France, at least, the method and interpretative prerogatives of the administrative judge are much closer to that of the common law judge—administrative law and regulatory practice is ultimately what the Conseil d'Etat says it is until the legislature/[g]overnment changes the law/reg[ulations]. The irony here is that, historically, administrative jurisdiction developed in France (in the seventeenth and eighteenth centuries) for strikingly similar reasons that it did in the [U.S.] in the twentieth [century]: political distrust of the judicial courts. The great achievement of the French administrative judiciary has been the capacity to exploit its organic attachment to the executive to develop a truly independent system of legal control of state action.

E-mail letter from Peter Lindseth, Associate Director, European Legal Studies Center, Columbia University, to Peter L. Strauss, Betts Professor of Law, Columbia University, *supra* note 27.

33. Harlan Fiske Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 12 (1936).

responsibilities in relation to their prior readings and this new (as they might see it) intrusion has evident importance.

Perhaps at this point my readers will be thinking that these observations are somewhat out of date. Statutes intruded into the framework of the common law when the American Constitution was adopted, but today we live in a world of statutes, and especially so at the federal level, the level at which the contemporary American debates have largely been generated.[34] Yet, as my colleague's comment may have suggested,[35] the common law framework, and in particular the idea of precedent, continues to dominate our thinking. At the state level, the common law largely continues to provide the framework within which statutory work is done.[36] If federal judges have given up the idea that there exists a general federal common law, they have not abandoned the presuppositions of a common law system. They remain able, if at times reluctant, to generate common law solutions in the aegis of federal statutes;[37] and, in particular, federal judges remain committed to the idea of precedent, to the idea that their readings do acquire authoritative force, above and beyond what a professor might achieve in an academic writing like this one.

The workings of a system of precedent ought to suggest that the debates over interpretation should focus on the legislative-

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34. *See generally* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); Samuel Estreicher, *Guido Calabresi's Uncommon Common Law for a Statutory Age*, 57 N.Y.U. L. REV. 1126 (1982).

35. *See supra* text accompanying note 25.

36. This point was made gracefully by Hans Linde, a voice of lonely eloquence in calling our attention to the institutions of state law. *See generally* Hans A. Linde, *State Constitutions Are Not Common Law: Comments on Gardner's Failed Discourse*, 24 RUTGERS L.J. 927 (1993); Hans A. Linde, *Are State Constitutions Common Law?*, 34 ARIZ. L. REV. 215 (1992).

37. Not all Supreme Court Justices in recent times have observed the important difference between the absence of general common law authority—a proposition easily tied to the limited legislative competence of the federal government—and the question whether they are judges in the common law model. Yet it is hard to imagine an understanding of our Constitution that did not affirm that they are judges in the full sense that would have been understood at the drafting, and at all intervening points to the current day. It is also hard to imagine such a reading that would have authoritative force, in its own terms. To deny their status as common law judges is to deprive their textual readings of that force, outside the boundaries of the particular case they are deciding. Any force their judgments may have as law, that is, comes only from the presuppositions of a common law system. *See* Strauss, *supra* note 4, at 536-40; *cf.* Cannon v. University of Chicago, 441 U.S. 677, 730-31 (1979) (Powell, J., dissenting).

judicial dialog *over time*. Certainly, the qualities of those interactions have, at times, affected both judicial and legislative behaviors in important ways. Yet discussions about interpretation tend to address the issues in terms of some particular statute being interpreted. Larger views of process may be invoked in describing the operation of Congress as an institution, and how one or another approach to interpretation might influence the way in which it approaches the development of statutory text. Still, it is the particular statute that has in fact been enacted at a particular time that is the subject of this conversation. We are thinking about how to interpret *this* statute, enacted *then*. What tends not to be evoked is the general process of law-development, the machinery through which statutory law evolves over time; how it happens that statutes are enacted to address some problems and not others; and with what level of attention to coherence and fit.

Perhaps we do not focus our attention on process because, in any individual case, what we find seems likely to be depressing and chaotic. However one likes statutes or sausages, one should not watch them being made.[38] Here, suspect lobbyists; there, ambitious staff; in the center, politicians whose eyes are on the prize of reelection and the financial support needed to secure it. Not doubting these problems, I want to turn our attention to a characteristic of the legislative process in its largest dimension—that, like the traditional adjudicative development of the common law, our legislative process is an essentially reactive, pragmatic process, and not a proactive or rational one.[39]

This characteristic, too, is one about which in my judgment we have no choice absent social changes much too large to contemplate, and certainly not appropriate for judges to impose on our political system out of their own wishes for order. We do not have individuals or even committees scouring existing law for its adequacy (by whatever measure), deciding which areas of the law require rationalization, and then devoting months or years to the building up of thoughtful, coherent structures. Rather, we have problems washing up against the legislature over time,

38. This analogy is widely attributed to Otto von Bismark, Chancellor of Germany. *See* RESPECTFULLY QUOTED 190 (Suzy Platt ed., 1989).

39. *See generally* Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369 (1989); Peter L. Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 COLUM. L. REV. 427 (1989).

much as (through the common law) they also wash up against the courts, and eventually acquiring an urgency that produces response. To a greater or lesser extent, depending on how we view the teachings of public choice or similar schools, that response will reflect the view of the current electorate. It takes its legitimacy from that relationship, as judges' responses to what washes against their shores take legitimacy from coherence with other law or accuracy in reflecting social conditions and considerations of justice. Howbeit, what I particularly want to call attention to is this conversational, continuous, interactive quality of law-generation by our legislatures; response, rather than rationalization, is the key impulse. The background assumptions of our mechanisms for producing statutes are, in this way, just like the background assumptions of our mechanisms for producing common law: law will emerge, over time, as a series of pragmatic marginal adjustments to existing social structures.

This account might seem to make hash of what may be the single most quoted piece of advice in *The Legal Process*, that bible of the previous generation of interpreters:

> Every statute must be conclusively presumed to be a purposive act. The idea of a statute without an intelligible purpose is foreign to the idea of law and inadmissible.
>
> . . . .
>
> *Deciding what purpose ought to be attributed to a statute is often difficult. But at least three things about it are always easy.* (a) The statute ought always to be presumed to be the work of reasonable men pursuing reasonable purposes reasonably, unless the contrary is made unmistakably to appear. (b) The general words of a statute ought never to be read as directing an irrational pattern of particular applications. (c) What constitutes an irrational pattern of particular applications ought always to be judged in the light of the overriding and organizing purpose.[40]

People sometimes appear to react to these words as if they were intended to be descriptive of, or at least a response to an account of, an actual legislative process. However accurate such a description might be of a continental legislature, at least of the

40. HENRY HART & ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1124-25 (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958).

idealized continental legislature in its code-generating mode,[41] no one could believe it as a description of American legislating in any but the most extraordinary setting. It could perhaps describe the Uniform Commercial Code, but never the general run of legislative business.

If, however, we understand that this passage is a normative statement prescribing proper attitudes for judges in their dealing with the work of legislatures, rather than a positive one describing what legislatures are, then it is not so trivially susceptible of disproof (as, viewed *de*scriptively, it has *always* been in our system). Then we need to consider it, not in the context of truth or falsity, but as an element of a working system of law that includes both legislatures and judges, institutions grounded in common law sensibilities, each responding in a pragmatic way to the exigencies that they encounter. Compare the following two propositions:

1. "The idea of a statute without an intelligible purpose is foreign to the idea of law and inadmissible";[42] and
2. The idea of judicial judgment without an intelligible holding is foreign to the idea of law and inadmissible.

For the common law judge, both sentences fit the workings of the system of precedent well. Prior judgments have more authority than is generated simply by how, today, we would assess the force of their stated reasoning; they have that authority independent of specific rationality-in-fact, as they are considered an element of a working system for continuously approximating a coherent pattern, a "unified system" of law, a "seamless whole."[43] We see that cases with their varying facts move the courts in patterns that can be judged by what Llewellyn called their "apperceptive mass";[44] we attribute a kind of purposiveness to the enterprise as a whole—to the shared search for reason, to the

41. We ought not forget that the comparison of legislating and sausage-making is widely attributed to Otto von Bismarck, *see supra* note 38, and that civilians acknowledge that outside code-making—that is, in the normal domain of public legislation—their legislating, like ours, is more episodic, reactive, and political than coherent, proactive, and academic.

42. HART & SACKS, *supra* note 40, at 1124.

43. Stone, *supra* note 33, at 12.

44. KARL N. LEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 59 (1960).

accumulating evidence of results. The common law is, at root, a pragmatic process of continuous approximation. Seen from a distance, its patterns emerge as fractals from the seemingly random process of stimulus and response.

Legislation, too, may be viewed as a process rather than a series of unconnected individual results; and then it may be similarly described. The problems on which legislatures act, analogously to the issues that percolate through common law processes, are the product of private choices and pressures resulting from the continuing experience of society under the law as it has existed up to that point. No more than courts, do our legislatures expend significant resources in proactively exploring problems in the abstract that have not been socially experienced. Yet we can attribute a kind of purposiveness to the enterprise as a whole and understand it as a pragmatic process of continuous accommodation. In their ordinary operation, legislature and court operate in parallel, working marginal change in response to social pressure, not academic design. The messiness of the legislative process in individual situations is, in this respect, almost precisely the point. We have chosen pragmatism over theoretical elegance. That is, one might say, the defining characteristic of our common law orientation.

Let us look again, now, at the proposition that we accord precedential force to judicial pronouncements about statutory meaning. By arming a kind of possible competition, this practice gives our judges' work a political importance that would be missing from a system in which judges are *only* interpreters and, in contemplation, come to statutory language afresh each time they confront it. If it does not formally matter what prior judges said about the statute, if the voices of academicians count for as much, then we might imagine that any errors perpetrated on particular occasions would be both less influential and more readily brought to light. It seems at least intuitively likely that less powerful interpreters, not imagining themselves responsible for the shape of the law, would respond to social signals of discomfort with given interpretations by taking a different path that, formally, remains fully open to them. In a way, academic explications and explanations provide data about problems and possibilities, just as an "interpretation only" perspective keeps judges out of politics' way. It is clear where the law is, and that

a statute's text calls on each occasion for the interpretation that will best render its meaning in the current day.

Once interpretations acquire the force of precedent, the statute changes with the act of interpretation. It can be revised only by a fresh legislative act, which is not easy to come by,[45] or by a judicial overruling—generally unlikely and often said to be especially difficult in the statutory context, where the legislature can overrule error.[46] Here, the judges are not only exercising a power of law-making that "interpretation" alone does not claim; they are also defending their law-making, and enhancing the power of their claim, by insisting that the judicial reading will remain the authoritative reading of the statute absent legislative disapproval. Often presented as if it were an act of self-abnegation (it is for the legislature, after all, not the courts, to make the law), giving interpretations precedential force actually dramatizes judicial power; it makes the courts a political competitor with the legislature in the creation of law. Interpretation has only to become headstrong, as it has under every known approach to it and its materials, for one to see how precedential effect arms battles between legislature and court.[47] What the Court has made of the Sherman Act competes with what the text of the Act seems to say and what more recent enactments have been generally understood to accomplish.[48] Ostensible legislative disapprovals of judicial readings are repeatedly found inadequate in one or another respect, as preferences embodied in precedent are reasserted.[49] While the Supreme Court can today announce a conclusion in terms of what it asserts a statute has always meant (however it has been understood by lawyers and lower courts in the years intervening between enactment and its judgment),[50] legislative correction, absent the clearest of indica-

45. *See* T. Alexander Aleinikoff & Theodore M. Shaw, *The Costs of Incoherence: A Comment on Plain Meaning,* West Virginia University Hospitals, Inc. v. Casey, *and Due Process of Statutory Interpretation,* 45 VAND. L. REV. 687, 698 (1992).

46. *See* Neal v. United States, 516 U.S. 284, 295-96 (1996).

47. *See, e.g.,* Landgraf v. USI Film Prods., 511 U.S. 244, 250-51 (1994); West Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 113-15 (1991) (Stevens, J., dissenting); Estate of Reynolds v. Martin, 985 F.2d 470, 475 n.2 (9th Cir. 1993).

48. *See, e.g.,* Schwegman Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951).

49. *See, e.g., West Virginia Univ. Hosps.,* 499 U.S. at 112 n.11 (Stevens, J., dissenting); *Estate of Reynolds,* 985 F.2d at 475 n.2.

50. *See, e.g.,* Central Bank v. First Interstate Bank, 511 U.S. 164, 168-70 (1994).

tors, can operate only into the future.[51] The presuppositions of a common law system thus arm the possibility of interbranch war.[52]

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51. *See, e.g.*, *Landgraf*, 511 U.S. at 265-66.

52. Subsequent to the Coen Lecture, an editor's query suggested that readers might find a concrete example helpful to illustrate what has been a somewhat abstract essay. This example concerns the intersection of two statutes. The first is a 1984 statute that created the United States Sentencing Commission and instructed it to implement a general policy of rationalizing sentence practice to reduce unwarranted sentencing disparities and match sentences with offense seriousness. *See* 28 U.S.C. § 991 (1994). *See generally* Mistretta v. United States, 488 U.S. 361 (1989) (documenting the United States Sentencing Commission). The second is a 1986 statute that set mandatory minimum sentences for drug dealers who sold specified weights of "a mixture or substance containing a detectable amount of" various drugs, including the drug LSD. 21 U.S.C. § 841(b) (1994); *see* United States v. Marshall, 908 F.2d 1312 (7th Cir. 1990) (en banc), *aff'd sub nom.* Chapman v. United States, 500 U.S. 453 (1991). For most illegal drugs sold in "cut" form, the potency of the drug is a function of the weight percentage of the drug in the mixture, and so the number of doses in a given weight of mixture sold at the street level is quite predictable; the weight ranges given in the 1986 statute created five year minimums for dealers in the tens of thousands of street doses, and ten year minimums for dealers in considerably higher amounts. *See Marshall*, 908 F.2d at 1322. For LSD, however, the drug is sold by dose, in carriers whose weights vary widely—from sugar cube to blotter paper to gelatin square; if the carrier weight is considered part of the "mixture or substance," the seller of sugar cube LSD could receive a ten year mandatory sentence for selling a number of doses that would result in no mandatory minimum at all if the carrier were gelatin. *See id.* at 1331-34 (Posner, J., dissenting). Of course, awareness of this outcome doubtless would encourage knowledgeable dealers to use lighter media, but that is hardly an ascribable purpose of the legislation; sentencing provisions do not ordinarily favor the more deviously thoughtful criminal engaging in equally harmful conduct. Even then, drug pushers would receive mandatory minimum sentences for dealing in thousands fewer doses of LSD than of other drugs, such as heroin and cocaine, that one would expect Congress to have regarded as more threatening.

These considerations led to closely divided en banc opinions in the Court of Appeals for the Seventh Circuit, *see id.* at 1312, interpreting the sentencing statute to include LSD carrier weight in "mixture or substance"—opinions characterized by one scholar of statutory interpretation as the finest he had encountered in his career. *See* Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 254 n.56 (1992). In 1991, in *Chapman v. United States*, the Supreme Court, less closely divided, affirmed the Seventh Circuit; a dissent for two Justices, Stevens and Marshall, noted the absence of action by the Sentencing Commission on the problem, but substantially relied on the uniformity-generating policies of the 1984 Act in finding the disparities produced by that interpretation unacceptable. 500 U.S. at 473.

Subsequently, the Sentencing Commission *did* act. In a guideline effective in 1993, it instructed courts to treat each dose of LSD on any carrier medium as having the effective weight of 0.4 milligrams--without regard to the actual weight of the carrier employed. *See* Neal v. United States, 516 U.S. 284, 292 (1996). The effect of this guideline was to assure uniformity in LSD sentencing, and also to make the number of doses of LSD that would trigger the various mandatory sentences roughly

The possibilities of inefficiency, even of interbranch war, are heightened if a court generally denies a dynamic quality to statutory law, limiting the force of precedent to its own pronouncements. Here is where the element of timing comes to bear. Our Supreme Court has only one hundred or so opportunities each year to decide issues of any character. Of necessity, then, many issues percolate through the lower courts for years without reaching it. It may take decades for them to do so. The accumulating evidence of lower court action may appear to have settled some issues during those years. In such a case, Congress would receive no signal of any problem requiring its action. The legal order would appear to have come to rest. But as these are lower court judgments, they have no formal authority over the opinion of the Supreme Court. If the Court believes that the only issue for it to decide is what the statute meant as of its enactment, the intervening developments in the lower courts will be irrelevant, and the Court may quite easily reach a different conclusion.[53]

In this respect, the Court's behavior is quite different from the approach that would be taken by a common law court in viewing a question open for its decision at its level, but which had been the subject of a uniform trend at the lower court level. That trend would itself operate as a signal to a common law court—a reason if not precedent for reaching a similar conclusion.[54] Such

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equal to the numbers having that effect for other serious drugs. Could this new interpretation, serving undoubted and important congressional policies and uttered by an agency specifically empowered to implement those policies, prevail?

Writing in 1996, in *Neal v. United States*, the Supreme Court unanimously rejected any such possibility. Once the Court had determined the statute's meaning in *Chapman*, other courts must

> adhere to [that] ruling under the doctrine of *stare decisis*, and . . . assess an agency's later interpretation of the statute against that settled law.
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> . . . Entrusted within its sphere to make policy judgments, the Commission may abandon its old methods in favor of what it has deemed a more desirable "approach" to calculating LSD quantities. [The courts], however, do not have the same latitude to forsake prior interpretations of a statute. True, there may be little in logic to defend the statute's treatment of LSD . . . . [The Court here noted the problems of sentence disparity]. Even so, Congress, not this Court, has the responsibility for revising its statutes.

Id. at 295-96 (citations omitted).

53. *See* Peter L. Strauss, *Changing Times: The APA at Fifty*, 63 U. CHI. L. REV. 1389, 1413-20 (1996) (analyzing Director, Office of Workers' Compensation Programs v. Greenwich Collieries, Inc., 512 U.S. 267 (1994)); Strauss, *supra* note 4, at 509-13 (analyzing Central Bank v. First Interstate Bank, 511 U.S. 164 (1994)).

54. Similar constraints, under the rubric *"la jurisprudence constante,"*

legal system values as predictability and stability in law would argue strongly against breasting such a tide, even though it would be within the formal power of the court to do so; it would feel under a considerable obligation to develop reasons and explanations for its departure from the law as it had been developing. What the common law had generally been at the last time the court addressed a similar question would hardly seem the sole dispositive consideration in this regard.

One difficulty that might be posed to the argument being developed here is that it assumes a kind of benignity about the legislative work product. The discussion has been supposing a kind of partnership between legislature and courts in the work of government, that in my judgment is instinct in both the common law idea and, in general, our Constitution. We can, without difficulty, imagine circumstances in which the idea of such a partnership would be repugnant. In particular, if the course charted by the legislature were unjust—say, the propagation of Jim Crow legislation in the United States or apartheid in South Africa—we might regard as heroic those judges who withheld their cooperation. In *Justice Accused*, Robert Cover argued forcefully that American courts' turn to formalism in the mid-nineteenth century was significantly in reaction to the moral repugnance of slavery, which northern judges found themselves called upon to ratify in the Fugitive Slave Act and other legislative measures of the time.[55] As human institutions, legislatures are no more inevitably benign than are courts. A court, holding its own commitments to justice, might not merely take refuge in obstructive formalism, but find it the morally commanded course, should it find that a legislature had embarked on the course of injustice.

Is this a course commanded *in general* by the Constitution, perhaps as another check on the momentary passions of the public, like that embodied in the two-house structure of Congress and the provision for presidential veto? The argument that it should be (and intentionally was made) hard to legislate verges

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characterize issues on which civilian courts and commentators have long come to rest. *See generally* INTERPRETING PRECEDENTS: A COMPARATIVE STUDY (D. Neil MacCormick & Robert S. Summers eds., 1997).

55. *See generally* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975).

on that claim in some articulations.[56] Yet, so baldly put, the claim amounts to the proposition that we are constitutionally committed to minimalist government. It imagines the judiciary as an obstructionist force to the legislature wholly apart from the justice-in-fact of any given legislative choice—an attitude quite impossible to square with the Constitution's general anticipation that Congress would be the principal source of the nation's laws. The difficulties are magnified by the fact of precedent's force in a common law system. If in general Congress has a claim superior to the courts' to supply law to the nation, it can hardly be that the courts are to operate as if Congress's every action were suspect, and to impose on it the obligation of repeated actions to achieve its ends.

The conclusion that Congress has acted unjustly must have a more pointed, a more focused source. "Clear statement" rules are a conventional and accepted expression of doubt on the subject;[57] one notes that such rules call for clear statements only in particular circumstances, in the shadow of identifiable constitutional doubts about Congress's possible course.[58] Even questions of justice that have identifiable constitutional roots can be overbroad. Thus, the crisis over "substantive due process" grew out of judicial concerns for the sanctity of liberty, property, and contract as much as it did judicial defense of the general presuppositions of the common law. Perhaps another way to put the proposition is this: should our system of laws become institutionally unjust, we might hope for a judiciary that could help to divert us from that result, as indeed has happened in our recent history.[59] Nonetheless, it would be intolerable to have the courts acting at all times as if our legal system were threatening that outcome.

Now, it seems appropriate to return to the debates over interpretation, to the competition between textualism and alternative approaches framed in terms of purpose or even specific legislative intent. All of these approaches, one might note, seem to agree on what is essentially a political proposition—that legislative directions are entitled to prevail over

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56. *See generally* Manning, *supra* note 17.

57. *See* Kent v. Dulles, 357 U.S. 116, 128 (1958); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 457-59 (1989).

58. *See, e.g.*, Chapman v. United States, 500 U.S. 453 (1991).

59. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954).

judicial preferences, that a properly enacted statute has priority over the claims of the common law, and that judicial approaches to interpretation ought to secure fidelity to what statutes accomplish and to subdue judicial adventurism. Disagreements come over how that ought to be accomplished. For the textualist, only the text is reliably accessible, and dependence on other indicators risks empowering judicial will and, perhaps worse, conferring legislative authority on persons not entitled to exercise it. Those who favor attention to specific legislative intent see textual approaches as "clever" means for constructing meaning rather than finding it—using a "limited palette" that puts a premium on judicial manipulation of language, rather than focusing attention on legislative will and correspondence to the social circumstances from which legislation sprang.[60] In its strongest expression, one may even suggest, the obeisance to "legislative intent" that characterized the post-New Deal courts expresses a kind of apology for the federal judiciary's strong-willed resistance to legislation in the 1920s and early 1930s. Purposivists occupy an unstable middle ground; the search for "purpose" acknowledges both the groundedness of legislation in some mischief to which it is supposed to respond (usually but not invariably signaled by its text) and, at the same time, the frequent futility (or worse) of seeking specific legislative intention.

Congruent with the exposition thus far, it seems useful to discuss the problem in a rubric often employed, that of a conversation. Starting with Lieber,[61] many have framed the problem of interpretation in terms of a conversation between a master and her servant. Master and servant have many conversations over time. There is no question who is entitled to give instructions, or that there is an institutional interest, instinct in the relationship, in the servant understanding his instructions well. The particular instruction Lieber uses, accompanied by the presentation of some money, is to "fetch some soup-meat."[62] Lieber points out how much is implicit in this instruction—what cut and quality of meat is to be bought, where, how quickly, at what kind of price,

60. *See* Merrill, *supra* note 10, at 372-73.

61. *See* FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 28 (Neil H. Alford, Jr. et al. eds., The Legal Classics Library 1994) (1839).

62. *Id.* at 28.

for whom, whether the servant is to return the change, and so forth.[63] Specification would be inane and useless, Lieber argues.[64] Turning to its baleful effects on the public conversations that concern us, he observes:

> The British spirit of civil liberty, induced the English judges to adhere strictly to the law, to its exact expressions. This again induced the law makers to be, in their phraseology, as explicit and minute as possible, which causes such a tautology and endless repetition in the statutes of that country that even so eminent a statesman as Sir Robert Peel declared, in parliament, that he "contemplates no task with so much distaste as the reading through an ordinary act of parliament." Men have at length found out that little or nothing is gained by attempting to speak with absolute clearness and endless specifications but that human speech is the clearer, the less we endeavor to supply by words and specifications, that interpretation which common sense must give to human words.[65]

In the end, he concludes, "somewhere we needs must trust at last to common sense and good faith."[66]

In Lieber's example, we might note, the servant has a pointed interest in correct understanding. It is not only our conventions about what it means to be a servant, or what are the qualities of a "good" servant, but also that the master holds the possibility of dismissing the servant from his job. We can change the hypothetical a little bit—again, in a way suggested to me by my colleague's thinking[67]—to underscore some important characteristics of the problem in the legislative-judicial context. Imagine now a public hospital with a civil service nursing staff responsible for day-to-day administration of medical care, including the administration of prescriptions for which doctors are responsible. The doctors' orders for care result from conferences among the various consulting specialists at the hospital. They are busy and tend to rely on each others' judgment in areas in which each is expert; they communicate formally with the nurses by notations on patients' charts. These notations require

63. *See id.* at 28-30.
64. *See id.* at 30.
65. *Id.*
66. *Id.* at 30-31.
67. *See generally* Greenawalt, *supra* note 25.

interpretation. Although of course the nurses observe patterns of notation by the doctors and have informal relationships with them, they also have much closer and more continuous relationships with individual patients and, consequently, may tend to believe that they may be somewhat better in seeing the "whole picture." Of course, the nurses too have an accumulated body of experience and even expertise on which to draw. We can even imagine that they have developed conventions about how particular instructions are to be understood, that once developed acquire a kind of force of their own in the day-to-day administration of the hospital. Perhaps the nursing staff has even developed a kind of manual all nurses are expected to consult.

You and I, the patients in this hospital, have very real stakes in how the doctors and nurses understand each other and in any power struggle that might erupt between them. We probably value the initiative and even the independence of the nurses, to a degree. They are more involved in our individual care; they may sense issues that persons viewing our situation more abstractly would not quite see. At the same time, we have our reasons for paying the doctors better and putting them in charge. They are better able to assess the teachings of science; they are superior diagnosticians; and they are more likely to see and stay the long course of treatment required for serious disease than a nurse responsible for the day-to-day of crisis management. Even if we imagine that the nurses can usefully embroider on the instructions they receive as our immediate circumstances may seem to dictate, we surely start with the wish to have them accurately and faithfully understand the notations the doctors have made. We think, in that respect, that if they understand (as they should) the relevant claims of the doctors to expertise in the particular case, that will help them in understanding. In a busy world of limited resources and imperfect language, we want neither doctors nor nurses attempting the fullest possible communication; that will hardly eliminate the likelihood of misunderstanding and, by consuming precious time will limit the resources available to attend to the health needs of our community. Above all, we also will think that in the end good faith is required—that we will depend on the nurses to accept the instructions they receive in the imperfect ways they are almost necessarily given, and to use every tool at their disposal to understand their prescription. If the nurses' attitudes are

headstrong, if they insist on formalities, if they demand to be the ones who set the terms of conversation, if they in practice refuse to understand what it is they are being asked to do unless the request comes in the terms they like, that would place our health in peril. It would signal the breakdown of a necessary framework for conversation, a framework that is necessary for our, the patients', interest.

None of this is to deny, of course, that the doctors in our imaginary hospital should be trying to express themselves in terms that their nurses, and perhaps also their patients, can readily understand. In the refractory world we are now imagining, it is not inconceivable that the doctors, like the English Parliament of the nineteenth century, would develop ways of speaking that accommodated to the nurses' wishes; they might do so simply because they continued to wish to improve their patients' health, and could understand that this was the only way to achieve that end. Other outcomes would be possible, too. The doctors might be able to find, in other cadres of hospital staff, workers better disposed to carry out their instructions in an understanding way. Reassigning work to them to the extent they can would avoid the nurses and their problems.[68] Over time, that might lead the nurses to see that it was in their interest, if they wished to maintain their importance in the hospital, to be more open to the doctors' instructions. Still, the struggle itself would seem a decided disservice to the hospital's patients. Any claim by the nurses that they were simply preserving and protecting the doctors' important place in the hospital, by insisting that they speak with clarity as the nurses chose, and chose finally, to define it, would strike us as hypocrisy.

It may be apparent by now, if it has not long been, where this discussion is heading. Legislators and judges are partners in the work of government. In a democracy, the legislature has the larger claim for respect for its judgments; but in a common law system any realistic description is that the two institutions, legislature and courts, share responsibility for the development of the law over time. The very fact of precedential force makes it impossible to say of a judicial reading of a statute that it is

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68. *Cf.* JAFFE & NATHANSON, *supra* note 23. I have not sought here to examine the arguably different position, as to *stare decisis* and other matters, of administrative agency interpreters. *See generally* Strauss, *supra* note 7.

merely interpreting, and that all legal force has been created by the legislature. Once the judiciary has spoken, the statute will have been, perforce, reshaped. The common law framework of judicial action entails that its decision creates precedent having authority independent of the simple force of its reasoning.

Preserving legislative supremacy in this context, in my judgment, simply excludes the permissibility of static textualism as the preferred interpretive approach. Static textualism both denies the dynamic effect of the Court's own judgment—which, once pronounced, will have changed the statute's meaning for all future readings—and ignores the mechanisms by which the legislature learns, over time, what problems do, and what do not, require its corrective attention. By forcing legislative attention to its preferences in expression, rather than learning the legislature's, the Court asserts a prerogative of power quite inconsistent with its proclaimed submission to legislative judgment. It may be, indeed, that the very idea of precedent in the context of statutory interpretation is instinct with inappropriate judicial power; but, surely, once we have admitted the common law into that field, judges must be honest about what they are doing. Correspondingly, they must be assiduous to learn in any way they can what legislation is about, and how it has been understood by its relevant communities, before purporting to give it effect. They must respect the reactive nature of the legislative enterprise, which (no more than the courts) does not speak in the absence of perceived social problems.

If this paper makes a contribution to what has been a very wide-ranging debate, that contribution lies in its calling attention to the longitudinal, dialogic quality of legislative-judicial interaction in a common law system. It is worth summing up, as we conclude, what in my judgment are the presuppositions of that discussion:

1. Courts "make law" as a consequence of the operation of a system of precedent. That is, however a court may articulate to itself and the readers of its opinions what it is doing (establishing a new principle, gap-filling, or simply finding the right, ostensibly pre-existing rule), a subsequent court encountering the same or a similar question will experience its freedom of action as having

been constrained by the earlier court's action in a way it would not have been had that action not been taken.

2. The system of precedent operates in relation to statutory interpretations, as it does in relation to judicially developed rules of decision, the common law. Just how the system of precedent operates may differ as between the two settings. Courts sometimes argue, for example, that they are less justified in reexamining the precedents they set in interpreting statutes, because they are more responsible for the shape of the common law, or because the legislature is presumed to know their interpretations and can be expected to disapprove those with which it disagrees. But this is quite a different argument from the one that characterizes civilian jurisprudence, where, in formal understanding, an interpreting court returns to the language of the statute, not to its prior interpretations, whenever its application is at issue.
3. The legislature is the primary law-maker, and the judiciary a secondary law-maker. Thus, in case of conflict between the common law and legislative judgment, absent some supervening principle (such as constitutional right), the legislative judgment is entitled to prevail. It will, of course, be a question to what extent a legislative provision displaces the common law—as, for example, whether it is to be taken as a preferred source for analogical reasoning. In principle, however, this issue, too, is subject to legislative determination. A court finding the legislature to have repudiated a given line of common law development would be obliged, absent some infirmity in the repudiation, to prefer the legislature's judgment to its own.
4. In general, the relationship between court and legislature is a cooperative one. Both are elements of government and committed to its success. The legislature's superior claim to generate governing law entails this relationship. Non-cooperation may be justified in particular instances, but cooperation is the default position. The courts are not entitled to be neutral, in general, about securing the ends of government. Resistance to legislative direction must be specially justified.

5. In the American governmental system, such resistance is commonly and appropriately justified on the basis of commands found in the higher law of the Constitution. Statutes may be found to violate constitutional principle in terms; or, as importantly, the force of constitutional policies may provide reasons to interpret statutes more narrowly than might otherwise be warranted. Excluded from this kind of justification, however, are propositions of social policy touching on economic interests. There is no general constitutional principle favoring minimal government, no principle that would entitle judges to resist legislative direction increasing political controls over economic behavior. That road was once taken and was decisively rejected.
6. One can imagine other comparable justifications, drawing, for example, on universal principles of human rights. That is, one can question whether judges are obliged to cooperate with an unjust political regime; they may, indeed, have moral obligations to resist it. Again, however, this cannot be their ordinary stance; judicial indifference, much less opposition, to the ends of government is unsustainable absent special justification. To imagine that that burden could be met with regularity, and across the whole range of a given government's activities, is to condemn that government on moral principle; it is, in effect, to assert that it cannot claim the shelter of lawfulness.

One might think that all of this is a very elaborate way of rephrasing some observations Grant Gilmore made in his small jewel of a book, *The Ages of American Law*. "[W]hat we mean by law," he said in its opening pages, is not those propositions that most dramatically affect or reshape a society, but "[t]he process by which a society accommodates to change without abandoning its fundamental structure."[69] We are talking here about the ordinary case, in a passably just society, that employs precedent as well as statute-making to generate its governing principles, and we are asking about judicial attitudes towards understanding statutes in that context. In that context, the presuppositions

69. GRANT GILMORE, THE AGES OF AMERICAN LAW 14 (1977).

and effects of a common law system of legislating and judging, in my judgment, simply exclude static textualism as an interpretive option. To adopt that approach *is* to abandon our fundamental structures, and to abandon them in the service of a judicial authority it is hard to imagine many citizens would knowingly choose.