INTRODUCTORY REMARKS

MARSHALL J. BREGER*

In the interpretation of any statute, there are at least three sources of understanding one can look to: the text, the legislators who penned it, and the judges who interpret it. Each of these sources plays a role in our textual understanding: the text because it is existentially there;[1] the legislators because they gave birth to the text and presumptively (although experience suggests not always) know what they mean to accomplish by it; and, of course, the judges because, under our constitutional system, they are the final canonical authority of textual (e.g., statutory) interpretation.

The methodological problem for lawyers is how to make use of each source of knowledge in attempting to know the law.[2] Judges Abner Mikva and Kenneth Starr, both from the United States Court of Appeals for the District of Columbia Circuit, join issue in the following debate about the correct weight, if any, to give to legislative history in interpreting a statute's meaning.[3] These distinguished jurists bring unique perspectives to the questions of legislative history. Judge Mikva served six years in the United States Congress and ten years in the Illinois General Assembly drafting legislation and, indeed, making legislative history.

---

* Chairman, Administrative Conferencc of the United States. B.A., M.A., 1967, J.D., 1973, University of Pcnnsylvania; B. Phil., 1970, Oriel College, Oxford University.

1. *See generally* W. WIMSATT, JR., THE VERBAL ICON: STUDIES IN THE MEANING OF POETRY (1954) (arguing that a text is distinct and legitimate in contrast to the mutable relationship between text and reader because the author's intentions are not available and the responses of readers are greatly variable). *But see* S. FISH, IS THERE A TEXT IN THIS CLASS? 22-67 (1980) (arguing that litcrature exists only in what it causes the reader to experience).

2. *See* Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court,* 95 HARV. L. REV. 892 (1982) (discussing clear statement model as current doctrine of the Court). *See also* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) (noting proliferation of statutes and suggesting courts be granted authority to modify or abandon obsolete or outdated laws).

3. For further expression of Judge Starr's views, see Eagle-Picher Indus. v. EPA, 759 F.2d 922, 930 n.11 (1985) ("The statute is, after all, the only measure which is laid before all members of Congress; and the statute is the only true indicator of what the members, collectively, believed the statute said."); Starr, *Judicial Review in the Post-*Chevron *Era,* 3 YALE J. ON REG. 283 (1986).

For further expression of Judge Mikva's views, see Mikva, *Reading and Writing Statutes,* 28 S. TEX. L.J. 181 (1986) (discussing his personal realism developed from experience in "making legislative history" as a Congressman and contrasting that experience with the overly deferential attitude commonly held by judges), and Mikva, *The Shifting Sands of Legal Topography* (Book Review), 96 HARV. L. REV. 534 (1982) (reviewing G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982)).

Judge Starr served as both law clerk for Chief Justice Warren Burger and Counselor to Attorney General William French Smith, for whom he drafted and promoted numerous legislative initiatives.

The positions taken in the colloquy between Judges Mikva and Starr reflect, in part, differing approaches to analyzing the written word. In broad terms, the issue they address is to what extent a writing has a determinate meaning and to what extent the reader is free to interpret the writing as he chooses. In the law, as in literary criticism,[4] this issue has sparked debate for years.[5]

Literary theory offers several approaches to textual interpretation. Literalists look only to the text, believing the text to be the sole source of meaning, even if it is ambiguous.[6] This view flourished in the 1940s, spurred by John Crowe Ransom and the proponents of the "New Criticism."[7] By contrast, contextualists interpret a text by looking beyond it to consider, for example, the kind of document that the writing purports to be, the life experience of the author, and the culture in which the author writes.[8] From the contextualist perspective then, the correct way to understand a document—such as Milton's *Paradise Lost*—is to study not only the text but Milton's life and the culture and theology of Roundhead England.

The most contemporary approach to literary criticism—deconstructionism—attacks the premises underlying both the literalist and contextualist positions, arguing that individual reactions to language subjectively differ. Thus, neither text nor context can help the reader settle upon one exclusive meaning.[9] Stated briefly, deconstructionists be-

4. For a clear discussion of the similarity between statutory interpretation and literary theory, see Abraham, *Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair,* 32 RUTGERS L. REV. 676, 680 (1979).

5. *See* Levinson, *On Dworkin, Kennedy, and Ely: Decoding the Legal Past,* 51 PARTISAN REV. 248, 254-64 (1984) (describing evolution in literary and legal domains of the philosophical debate over interpretation); *see also* E. HIRSCH, VALIDITY IN INTERPRETATION 209 app. I (1967) (discussing objective interpretation).

6. *See* Abraham, *supra* note 4, at 688.

7. J. RANSOM, THE NEW CRITICISM (1941). Ransom was followed in the United States by Allen Tate. *See* A. TATE, THE FORLORN DEMON (1953) (arguing that criticism should expound the knowledge of life contained within a work).

8. *See* J. WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY 121 (1984); *see also* R. BLACKMUR, *A Critic's Job of Work,* in LANGUAGE AS GESTURE (1952) (advocating that the act of criticism is a creative act, the product of the tension in the critic's life rather than a study of one text).

9. *See* J. DERRIDA, OF GRAMMATOLOGY 30-44 (1976) (arguing that the meaning of language has no precise origin, but is continually determined by the varying contexts in which it can be repeated); *see also* Donato, *Ending/Closure: On Derrida's Edging of Heidegger,* 67 YALE FRENCH STUD. 3 (1984) (discussing Derrida's contribution to modern literary criticism). *See generally* S. FISH, *supra* note 1.

lieve that formalist interpretations of law and of other writings—whether IRS regulations or poetry—are based on an erroneous assumption that objective controlling principles of law or art do in fact exist. Through the process of deconstruction, the reader comes to understand how a text has several meanings and how no single interpretation is more correct than any other.[10] Deconstruction facilitates this process by uncovering—some might say excavating—assumptions that are otherwise hidden.[11] Thus no writing can communicate its author's intent to a reader, in part because of the indeterminacy of language. Deconstructionism enters the world of law through the Critical Legal Studies movement, proponents of which argue that the law has no objectivity.[12]

The question posed by this debate is, of course, somewhat more bounded—it is not the broader issue of whether texts have any determinacy at all. That wicket must be left to philosophers, literary theorists, and critical legal scholars.

Nor does this colloquy consider the series of methodological choices involved in interpretation of the Constitution. That jurisprudential debate focuses on the way to read an open textured document some 200 years old.[13] Those who argue for a living constitution urge that we view the normative provisions of the constitutional text—equal protection and due process—as evolving in meaning and reflecting the moral progress of our civilization.[14] Others seek to pursue the plain meaning of the text,[15]

10. *See* Hart, *Positivism and the Separation of Law and Morals,* 71 HARV. L. REV. 593, 607 (1958) ("There must be a core of settled meaning, but there will be as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out."). *See generally* Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought,* 133 U. PA. L. REV. 685 (1985) (developing rational and irrational bases for textual interpretations); Unger, *The Critical Legal Studies Movement,* 96 HARV. L. REV. 561 (1983) (discussing United States legal framework by deconstructing it).

11. *See generally* J. BAGWELL, AMERICAN FORMALISM AND THE PROBLEM OF INTERPRETATION (1986). An example of the deconstructive process might be when a reader, on first reading a poem, generally enjoys it. Then, with subsequent readings, the reader slowly perceives how the richness of the work subtly evokes both images and emotions.

12. For an overview of the Critical Legal Studies debate, see Boyle, *supra* note 10; Unger, *supra* note 10.

13. *See* Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle,* 94 YALE L.J. 821 (1985); *see also* Tushnet, *A Note on the Revival of Textualism in Constitutional Theory,* 58 S. CAL. L. REV. 683 (1985) (criticizing textualist view of Constitution because it fails to consider politics).

14. *In re* Winship, 397 U.S. 358, 359 (1970) (discussing cruel and unusual punishment and finding constitutional requirements of "essentials of due process and fair treatment"). *See* Brennan, *The Constitution of the United States: Contemporary Ratification,* 27 S. TEX. L.J. 433 (1986).

15. *See, e.g.,* Meese, *The Law of the Constitution,* NAT'L REV., July 17, 1987, at 30, 32 ("[O]nly the Constitution is our paramount law, not what the three branches say about it."); Meese, *The Battle for the Constitution,* POL'Y REV., Winter 1986, at 32, 33 ("The Text and Intention of the Constitution must be understood to constitute the banks within which constitutional interpretation

attempting to divine what the framers would say today if presented with a problem unknown to eighteenth century life. Happily, these heady problems do not generally apply to statutory interpretation, which deals with more specific texts anchored in more specific social and political contexts.

Instead of considering these broader questions, this colloquy addresses the narrower issue of the appropriate extent to which courts should take legislative history into account in interpreting statutes. The importance of this subject can be seen in the long and continuing struggle of courts and commentators in developing rules of statutory interpretation.

For over 150 years, our legal system was based on common law principles. During that time, the Supreme Court never sanctioned a definitive code for interpreting common law precedent.[16] As the law evolved during the last fifty years from a common law to a statutory framework, however, the challenge of interpreting controlling texts became greater. In large measure, statutory interpretation is difficult because Congress has abdicated its responsibility to write clear statutes. Indeed, such congressional failure often reflects a consensual choice for ambiguous draftsmanship. When problems become too sticky, one solution is to leave matters to the courts—each side creating its legislative record as ammunition for the interpretive lawsuit it knows will surely come.[17]

Early commentators sought to develop a science of statutory construction. Several canons of construction were codified to assist in interpreting legislative intent.[18] One group of these canons, exemplified by the phrase *reddendo singula singulis* (by referring each to each), consists of rebuttable presumptions about how legislators use language.[19] This particular canon permits a presumption that, "context permitting, the reader may properly infer that the author has intended a distributive re-

must flow."); Monaghan, *Our Perfect Constitution,* 56 N.Y.U. L. REV. 353 (1981) (criticizing constitutional interpretations based on current political morality).

16. *See* Jackson, *Problems of Statutory Interpretation,* 8 F.R.D. 121, 124 (1948).

17. *Id.* Justice Jackson suggests that traditional interpretive inquiries about precedent within a forum were never codified either officially by Congress or in practice at the Supreme Court, which left the Justices to develop their own means of interpretation. Justice Jackson further points out that vague inquiries and individual approaches were no longer appropriate once statutes assumed a larger role. *Id.* at 125-26.

18. Kernochan, *Statutory Interpretation: An Overview of Method,* 3 DALHOUSIE L.J. 333, 363-65 (1976); Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term,* 68 IOWA L. REV. 195, 206-07 (1983).

19. R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 233 (1975); 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 47.26 (4th ed. 1972 & Supp. 1984).

lationship between two juxtaposed series of ideas."[20] A second example of this group, *in pari materia* (on like subject matter), requires that all statutes on the same subject and under the same jurisdiction be read in relation to one another.[21] A third, the canon *noscitur a sociis* (it is known from its associates), dictates that words be read in context with surrounding words in the same document.[22]

Another group of canons suggests guidelines for deciding cases when the specific language of a statute does not provide an answer. For example, if two statutes are contradictory, some jurisdictions adopt the rule that the later-enacted statute prevails.[23] A third group of canons suggests how to override some part of legislative meaning when there is a conflict with accepted legal norms—for example, reading a statute strictly where the statute is in derogation of common law.[24] Yet another group helps to interpret language that specifically mandates one conclusion. An example of this is the canon *expressio unius est exclusio alterius,* which dictates that the expression of one thing indicates the exclusion of another that is unexpressed.[25]

Academicians and practitioners have criticized these canons on two grounds: as masking the interpreter's intention[26] or as failing to respect the legislators' true intent.[27] Despite this criticism, these canons remain traditional starting points for interpreting statutory language. Yet, as latin scholarship declines, so does interest in these arcane modes of statutory analysis. The terrain is shifting toward the use of legislative history as a source of guidance for the judiciary.[28] Legislative history is more available today than years ago, and there is more of it[29]—both facts which may or may not add to its qualitative value. Today legislative history often is perceived as a record where an opponent or supporter of

20. R. DICKERSON, *supra* note 19, at 233 (noting the example "men and women may become members of fraternities and sororities").

21. *Id.*

22. *Id.*

23. *Id.* at 228 n.31.

24. *See id.* at 206-08, 228.

25. *See* R. DICKERSON, *supra* note 19, at 234-35 (noting the role of this expression but sharply criticizing it as "at best, a description, after the fact, of what the court has discovered from context"); J. SUTHERLAND, *supra* note 19, at § 47.23-.25; BLACK'S LAW DICTIONARY 521 (5th ed. 1979).

26. Note, *supra* note 2, at 895 n.28.

27. *See* Towne v. Eisner, 245 U.S. 418, 425 (1918) (Holmes, J.) ("A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.").

28. J. SUTHERLAND, *supra* note 19, at § 47.01 (discussing greater modern role of legislative history).

29. *See* Wald, *supra* note 18, at 200 (microfiche, compilations and computerized services have made legislative materials more widely available today than in the 1950s).

a bill may log his viewpoint with the sole purpose of influencing some judge's future interpretation of the law.[30] Moreover, even after passage of a bill, legislative history may be amended to include or delete critical language.[31] The mutable nature of this record has prompted criticism from judges, academicians and legislators alike.

The problem of statutory interpretation has been brought into sharp focus by Justice Scalia during his first term on the Supreme Court. His opinions can be seen as a continuing tutorial on the subject. As might be expected from his circuit court opinions,[32] Justice Scalia favors relying solely on the statutory text whenever possible. Less than two weeks after the Mikva-Starr debate occurred, the Supreme Court decided *Immigration and Naturalization Service v. Cardoza-Fonseca.*[33] The majority employed legislative history in partial support of its holding that "asylum" and "withholding of deportation" are different forms of relief subject to different standards of proof under the Immigration and Nationality Act.[34] Noting that the plain language of the statute appeared to settle the question,[35] the Court nonetheless looked to the legislative history to determine "only whether there is 'clearly expressed legislative intention' contrary to that language."[36] The majority opinion also analyzed a lead-

30. *See id.* at 202 (arguing that as more legislators consciously rely on creating a record, fewer judges should rely on the product).

31. *See* Mikva, *Reading and Writing Statutes, supra* note 3, at 185 (discussing how such rewrites occur); *see also* Wald, *supra* note 18, at 204 (noting the "suspect worth" of postenactment legislative history).

32. *See, e.g.,* Consumers Union of United States, Inc. v. FTC, 801 F.2d 417, 420-21 (D.C. Cir. 1986) (reviewing FTC promulgation of regulations in light of FTC Act and Administrative Procedure Act); Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 534-36 (D.C. Cir. 1986) (interpreting enforcement of regulations in light of Federal Mine Safety and Health Act); Church of Scientology v. IRS, 792 F.2d 146, 148-50 (D.C. Cir. 1986) (interpreting § 6103 of the Internal Revenue Code in light of Freedom of Information Act); Hirschey v. FERC, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring) (arguing that details of legislative history neither come to attention of nor are voted upon by the house which passes the committee's bill, and suggesting that routine deference to legislative history has fostered predictable expansion of detail); City of Cleveland v. FERC, 773 F.2d 1368, 1370 (D.C. Cir. 1985) (interpreting § 205 of the Federal Power Act and approving broad statutory language); Sanchez-Espinoza v. Reagan, 770 F.2d 202, 206-07 (D.C. Cir. 1985) (interpreting Alien Tort Statute to allow waiver of sovereign immunity); FAIC Securities, Inc. v. United States, 768 F.2d 352, 361 (D.C. Cir. 1985) (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837 (1984) as grounds to limit interpretation to clear meaning of the Federal Deposit Insurance Act and the National Housing Act); Gott v. Walters, 756 F.2d 902, 907 (D.C. Cir. 1985) (interpreting language of 38 U.S.C. § 211(a) to be "specific," thus barring review); Center for Auto Safety v. Peck, 751 F.2d 1336, 1339 (D.C. Cir. 1985) (reviewing change in regulations under Motor Vehicle Information and Cost Savings Act).

33. 107 S. Ct. 1207, 1211-12 (1987) (various proof standards apply to different sections of Immigration and Nationality Act).

34. *Id.* at 1211-12 n.6.

35. *Id.* at 1212.

36. *Id.* at 1213 n.12.

ing authority on immigration matters[37] and reviewed the logic of a prior amendment to the Act to buttress its interpretation of Congress's intent.[38]

In his concurrence, Justice Scalia accepted the Court's reading of the plain meaning of the statutory text but pointedly criticized the majority for choosing to go further. He noted that needlessly seeking intent in the legislative history was an "ill advised deviation" from a "venerable principle" of statutory interpretation: "Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent."[39]

Similarly, while concurring in the judgment in *Rose v. Rose*,[40] Justice Scalia took the majority to task for concluding on the basis of legislative history that a statutory prohibition against any attachment of veterans' benefits does not apply to an attachment to enforce child-support obligations because such an attachment would not frustrate the purpose of the provision. Justice Scalia argued that: "[w]hile incompatibility with the purpose of a federal statute may invalidate a state law that does not violate its text, I know of no precedent for the proposition . . . that compatibility with the purpose of a federal statute can save a state law that violates its text."[41]

In another context (determining the constitutionality of a state statute under the establishment clause of the first amendment by considering whether the legislature had a "secular purpose"), Justice Scalia elaborated on the difficulty of determining legislative purpose by means other than referring to the language of the statute itself:

> [A] particular legislator need not have voted for the Act either because he wanted to foster religion or because he wanted to improve education. He may have thought the bill would provide jobs for his district, or may have wanted to make amends with a faction of his party he had alienated on another vote, or he may have been a close friend of the bill's sponsor, or he may have been repaying a favor he owed the Majority Leader, or he may have hoped the Governor would appreciate his vote and make a fundraising appearance for him, or he may have been pressured to vote for a bill he disliked by a wealthy contributor or by a flood of constituent mail, or he may have been seeking favorable

37. *Id.* at 1213 (citing 1 A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 180 (1966)).

38. *Id.*

39. *Id.* at 1224. *See also* Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 378-82 (1978) (discussing grounds for judicial interpretation of statutory language).

40. 107 S. Ct. 2029 (1987).

41. *Id.* at 2041 (Scalia, J., concurring in part). *See also* Johnson v. Transportation Agency, 107 S. Ct. 1442, 1472 (1987) (Scalia, J., dissenting) (arguing that Court should refrain from "the divination of congressional 'purposes' belied by the face of the statute and by its legislative history").

> publicity, or he may have been reluctant to hurt the feelings of a loyal staff member who worked on the bill, or he may have been settling an old score with a legislator who opposed the bill, or he may have been mad at his wife who opposed the bill, or he may have been intoxicated and utterly *un*motivated when the vote was called, or he may have accidentally voted "yes" instead of "no," or, of course, he may have had (and very likely did have) a combination of some of the above and many other motivations.[42]

Justice Scalia is thus a protestant in his approach to text. Like Luther and Calvin, giants of the Reformation, he rejects any effort to apprehend the spirit of the law and sticks to the four corners of the received text.[43] Just as Luther remonstrated with the church for its reliance on papal pronuncios and other extrinsic sources to interpret and expand upon biblical writ,[44] so Justice Scalia considers the very discussion of legislative history in cases where the plain meaning is available to be "ill advised" and "excessive."[45]

In the following colloquy, both Judges Mikva and Starr avoid zealotry, and neither stakes out a polar position. Judge Mikva can be considered a contextualist. Perhaps because he is a former legislator, he places special weight on the principle of checks and balances in the American constitutional system. Within this context, he is more willing to look behind the words and see the legislative branch as an institution deliberating over legislation. Judge Starr, on the other hand, is closer to the literalist position. He sees a statute as the finished product of the legislature and would avoid sorting through preliminary materials.

The dispute between Judges Mikva and Starr, however, is over hue and shade rather than fundamental principle. Both accept that statutes create special interpretive problems and that judges face greater constraints than philosophers in interpreting texts. Both agree that one should not turn to the *Congressional Record* when the plain meaning is clear and that legislative history can provide useful insight when the text itself only confounds and frustrates.

---

42. Edwards v. Aguillard, 107 S. Ct. 2573, 2605-06 (1987) (Scalia, J., dissenting) (emphasis in original).

43. *See* T.H.L. PARKER, JOHN CALVIN: A BIOGRAPHY 74-77 (1975) (explaining Luther's and Calvin's approaches to biblical interpretation); Levinson, *"The Constitution" in American Civil Religion,* 1979 SUP. CT. REV. 123, 125-29. In this fascinating article Professor Levinson draws an extended and incisive comparison between the theological disputes that characterized the Protestant Reformation and the current debate over methods of constitutional interpretation. Like the Bible, the Constitution may be interpreted by reference to the text alone or in the context of an unwritten tradition. Similarly, interpretation may be the province of the individual or may rest exclusively in an ultimate arbiter—the Supreme Court or the Pope.

44. *See* T.H.L. PARKER, *supra* note 43, at 74-75; Levinson, *supra* note 43, at 127-28.

45. INS v. Cardoza-Fonseca, 107 S. Ct. 1207, 1224 (1987) (Scalia, J., concurring in the judgment).

Of course, one judge's plain meaning may be another's ambiguity. For example, Justice Powell, dissenting in *Cardoza-Fonseca*, pointed out that he found "the language far more ambiguous than the Court does."[46] Determining what level of ambiguity is sufficient to trigger the use of extrinsic aids and to abandon the effort to resolve interpretive problems at the level of the text will always be the central issue. Judge Starr (like Justice Scalia) would, I suspect, require a high level of textual ambiguity before triggering a legislative history analysis; Judge Mikva would be satisfied with a lower threshold. It is in this focused area of inquiry that debate—such as the discussion that follows—can be illuminating and fruitful.

46. *Id.* at 1227 (Powell, J., dissenting).