

From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation

Philip P. Frickey*

From my limited and perhaps biased perspective, at least, the past decade has probably been the most fruitful in history for legal academics in the field of legislation. These developments have largely eluded the attention of many of our faculty colleagues, however, as well as the practicing bar. Moreover, the excitement that some of us find in the field has not always translated well into our classrooms. My goals in this essay are to explain to outsiders—our students, our colleagues, and our fellow attorneys—why scholarship in legislation has exploded and why pedagogy in legislation is important and challenging. My hope is that this “update from the front” will stimulate a greater appreciation for the field and, more particularly, a stronger sense for the centrality of legislation theory in the law school curriculum and in the practice of law.

“The Revival of Theory in Statutory Interpretation” is, admittedly, an inauspicious title for this endeavor. Most people, including most with legal training, probably consider statutory interpretation to be dreary, a bit like biblical interpretation without the poetic language and the promise of eternal payoff. Indeed, a revival of theory in statutory interpretation sounds like a return to the forbiddingly abstract about the drearily obscure.

Even more abstruse is the other part of the title: “From the Big Sleep to the Big Heat.” *The Big Sleep* and *The Big Heat* are movies of the genre “film noir”—“dark film.” In the late 1970s, statutory interpretation was in a big sleep; since then, it has become a hot topic in both academic and judicial circles. Furthermore, on the surface at least, statutory interpretation is

* Faegre & Benson Professor of Law, University of Minnesota. This essay is an expanded and footnoted version of a lecture given on March 3, 1992, to inaugurate the Faegre & Benson Professorship at the University of Minnesota Law School. William Eskridge, Daniel Farber, and several editors of the *Minnesota Law Review* provided helpful comments on an earlier draft.

“law noir”—dark, as in obscure. I will appropriate the chronological structure that this allusion to film provides in an attempt to shed some light on this murky subject.

I.

First, the big sleep. When I was a law student in the mid-to late 1970s, statutory interpretation was of little academic interest. Indeed, writing as recently as 1983, Robert Weisberg accurately reported that “[t]he general contemporary American view of statutory interpretation is that there is not a great deal to say about the subject. As a result, nothing else as important in the law receives so little attention.”¹ Hence, while tax professors might wax eloquently on the interpretation of tax statutes and regulations, at most only their tax colleagues would listen. Hardly anybody in legal academe thought that something useful could be said about the interpretation of statutes in general. Although professors presumably hoped that students would pick up skills in interpreting statutes, the general curricular mood was one of benign neglect, summed up in the notion that we teach so many statutory courses that the students will pick up these skills by osmosis. This is the “pervasive method” of teaching statutory interpretive skills, which is not so much a method as a default.²

In contrast, the practicing bar of the 1970s was differently situated. It had to worry about statutory interpretation because that was what a great many lawyers did for a good deal of their time. As Guido Calabresi has pointed out, twentieth-century law has become heavily “statutorified.”³ Translating this Yalespeak into English, what Calabresi meant was that statutes, not the common law, provide the boundaries for most legal inquiry. And so, of course, good practitioners needed to be capable of making effective statutory arguments and to be confident in their ability to advise clients on statutory problems.

Practitioners of that era who sought guidance on statutory interpretation found little available. No single theory domi-

1. Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 213 (1983) (footnote omitted).

2. See, e.g., Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 802 (1983) [hereinafter Posner, *Statutory Interpretation*] (teachers of statutory courses barely find the time to cover the substantive material and are presented with casebooks that do not attempt to address the larger issues of statutory interpretation).

3. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1 (1982).

nated the statutory interpretation decisions of that period, and there was little debate about the comparative utility of the plausible approaches. The Supreme Court of the United States sometimes seemed interested in following the plain language of a statute,⁴ more frequently seemed to consider congressional intent as the linchpin of statutory meaning,⁵ and occasionally spun off in more abstract and unpredictable directions, for example by relying upon the "spirit" or purpose of the statute⁶ or by bending apparent statutory meaning in the direction of constitutional values.⁷ The only doctrines that might have served as potential rules about statutory interpretation—the so-called canons of construction—the Court invoked unpredictably.⁸

In the 1970s, the Supreme Court made at least one outright blooper. In the otherwise famous *Overton Park* case, the Court absent-mindedly inverted the usual order of assessing statutory meaning by concluding that, because the legislative history was ambiguous, "it is clear that we must look primarily to the statutes themselves to find the legislative intent."⁹ Mostly, however, the opinions of the Court were simply workmanlike—recall that Justice O'Connor had not yet arrived. The Court was also sometimes rather modest about its conclusions in statutory cases. For example, in a case addressing whether to follow the Environmental Protection Agency's interpretation of the Clean Air Act, the Court stated: "We therefore conclude that the Agency's interpretation . . . was 'correct,' to the extent that it can be said with complete assurance that any particular interpretation of a complex statute such as this is the 'correct' one."¹⁰ As an aside, I might note that, whatever else has been gained recently by the revival of theory, the field has largely lost the virtue of humility conveyed by these words written by Justice Rehnquist in 1975.¹¹

4. See, e.g., *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978).

5. See, e.g., *Leo Sheep Co. v. United States*, 440 U.S. 668, 681 & n.18 (1979).

6. See, e.g., *United Steelworkers v. Weber*, 443 U.S. 193, 201-04 (1979).

7. See, e.g., *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

8. See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 598-611 (1992) [hereinafter Eskridge & Frickey, *Clear Statement Rules*] (overview of Supreme Court usage of canons, circa 1981).

9. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 412 n.29 (1971).

10. *Train v. Natural Resources Defense Council*, 421 U.S. 60, 87 (1975).

11. My impression is that in the 1970s the state supreme courts were more predictable in preferring to follow plain statutory meaning, probably because in many states nothing looking like authoritative legislative history was avail-

Indeed, in the 1970s the title to my lecture would be viewed as containing a grammatical error. The sharp-eyed observer would suggest that it should be entitled "the revival of theory *about* statutory interpretation." For statutory interpretation was seen as merely a thing one does, not a discrete subject one studies and analyzes.

II.

Now, the big heat. Today, in quite theoretical as well as practical terms, statutory interpretation has become a legitimate subject of academic inquiry and practical concern. It is not wrong to posit a revival of theory *in* statutory interpretation. Academics interested in theories of statutory interpretation are no longer like theologians, engaged in a discipline in which the very existence of the subject matter is open to dispute by the scholars themselves.¹²

In many academic disciplines, the catalyst for such a change would have been the emergence of a new school of thought. Consider the impact, for example, of deconstructionism on theory *in*, again not about, literary criticism. In contrast, a turn toward theory in legal scholarship has often been driven more by the real world of law—Supreme Court decisions and the judicial appointment process, for example—than simply by the minds of academics sitting in their offices attempting to conjure up insights.¹³

able to compete for judicial attention. But any good practitioner must have felt that, in many cases and regardless of the judicial forum, one simply made all the arguments and ultimately tossed the question to the judges for resolution.

12. The remark about theologians is stolen from Michael P. Malone, *The "New Western History," An Assessment*, in *TRAILS: TOWARD A NEW WESTERN HISTORY* 97 (Patricia Nelson Limerick et al. eds., 1991).

13. It is easy to make this point about what has often catalyzed theory in constitutional law. For example, consider probably the most visible and most hotly debated book on constitutional interpretation in recent times, John Hart Ely's *Democracy and Distrust*, published in 1980. It is an impressive work, but the impetus for its intellectual agenda seems clearly to have been actual decisions by the Supreme Court. Specifically, Ely considered *Brown v. Board of Education* and the reapportionment cases to be the most important Supreme Court decisions of the decades of the 1950s and 1960s, respectively, and he considered them positive, indeed laudible, exercises of judicial review. In contrast, Ely viewed *Roe v. Wade*, the abortion case, as the most important decision of the 1970s, and for Ely this was a negative, even disastrous, exercise of judicial review. Seen from this background, his book becomes a straightforward way to generate a theory of judicial review that makes *Brown* and the reapportionment cases easy decisions to justify and *Roe* an easy case to condemn.

With respect to statutory interpretation, as I will explain, the emergence of a positive theory—one that purports to explain how the world operates—did have a major impact in the early 1980s. Of course, it would be unlikely that any one theory, or one judicial decision, or one jurist or academic commentator could trigger a revival of statutory interpretation theory, and, in fact, no such single causal agent can be plausibly asserted. Indeed, even a more modest account attempting to isolate a few primary catalyzing forces will necessarily be oversimplified and perhaps even irksome in slighting competing influences and ideologies. Nonetheless, I believe that it is possible to isolate the most important decision, the most important emerging theory, and the most important people who triggered the revival of interest in this subject. For me, that case is *United Steelworkers v. Weber*,¹⁴ decided by the Supreme Court in 1979; the theory is called public choice; and the people are Richard Posner, Frank Easterbrook, and Antonin Scalia. I begin with the case.

Weber involved Kaiser Aluminum & Chemical Corporation's Gramercy, Louisiana, plant. Until 1974 Kaiser had hired only craftworkers with prior craft experience. Because the craft unions had refused to admit African Americans, only 2% of Kaiser's craftworkers were African American. This racial imbalance in its workforce created a problem for Kaiser under Title VII of the 1964 Civil Rights Act.¹⁵ This is because in 1971, in *Griggs v. Duke Power Co.*,¹⁶ the Supreme Court had held that Title VII not only outlawed intentional discrimination against racial minorities in employment, it also prohibited the use of employment rules that had a strong and needlessly discriminatory effect.

To correct the racial imbalance, Kaiser took two steps. First, it abandoned the requirement that workers have prior craft experience, and in its place offered on-the-job training to teach some of its unskilled workers to do craftwork. Second, to cure its bad numbers on racial exclusion quickly, Kaiser dictated that craft trainees be selected by seniority, provided that at least 50% of the new trainees be African American, until the percentage of African American craftworkers approximated the percentage of African Americans in the local work force.

Brian Weber, an unskilled white worker denied admission

14. 443 U.S. 193 (1979).

15. 42 U.S.C. § 2000e (1988).

16. 401 U.S. 424 (1971).

into the training program, brought suit under Title VII. The Supreme Court denied his claim, upholding the Kaiser plan as consistent with Title VII, even though the majority opinion, written by Justice Brennan, essentially conceded that Title VII's plain language supported Weber.¹⁷ Quoting an 1892 case, *Church of the Holy Trinity v. United States*,¹⁸ Brennan said that "it is a 'familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.'"¹⁹ The spirit or purpose of Title VII, according to Brennan, was to open employment opportunities to previously excluded racial minorities.²⁰ Brennan concluded that it would be an ironic twist to interpret the first federal statute attacking our history of racial injustice in employment and benefitting historically disadvantaged peoples as prohibiting "all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy."²¹

In dissent, Justice Rehnquist argued that the statute could not have been plainer—essentially it said, "do not discriminate on the basis of race in employment"—and that this plain meaning persuasively demonstrated the intentions of Congress.²² Justice Rehnquist marshalled significant quotations from the legislative history to reinforce his conclusion that Congress intended the statute to compel color blindness in employment decisions.²³

In a concurring opinion, Justice Blackmun conceded that Justice Rehnquist may have had the better of the argument on conventional sources of statutory meaning.²⁴ But Justice Blackmun voted for the Brennan result for practical reasons. Kaiser was on a high tightrope without a net, said Blackmun: if it did nothing to correct the large racial imbalance in its workforce, it risked legal liability in an action brought by African Americans; if it took direct action to correct the percentage of racial imbalance, it risked legal liability to the Brian Webers in its workforce.²⁵ Justice Blackmun essentially presumed that

17. See 443 U.S. at 201.

18. 143 U.S. 457 (1892).

19. 443 U.S. at 201.

20. See *id.* at 202-03.

21. *Id.* at 204.

22. See *id.* at 226, 252-54 (Rehnquist, J., joined by Burger, C.J., dissenting).

23. See *id.* at 230-55.

24. See *id.* at 209 (Blackmun, J., concurring).

25. See *id.* at 209-11.

it cannot be the law that no matter which way Kaiser turned, it was violating Title VII. So Justice Blackmun concluded that if an employer finds an arguable violation of Title VII on its hands, it may correct it by reasonable affirmative action measures.²⁶

Weber was a very visible and important decision. In 1979, the affirmative action issue was not just on the minds of many judges, attorneys, legislators, academics, and other opinion leaders, it was a matter of general conversation. Just the year before, the Court had issued its famous *Bakke* decision, involving the constitutionality of a racial quota in admissions to a state university's medical school.²⁷

Weber was also a decision that for many legal observers was difficult to justify. Was it really right, the legal community began asking itself, for Justice Brennan to say that the "spirit of the statute" may trump seemingly plain statutory text and legislative intent? Did Justice Blackmun's practical resolution of the case exceed the bounds of the judge's role in *interpreting*, rather than amending, a statute?²⁸

Recall that Brennan relied upon an 1892 case called *Holy Trinity Church* for the proposition that the letter killeth but the spirit giveth life. In my legislation course, I tell my students that *Holy Trinity Church* is the case you always cite when the statutory text is hopelessly against you, and the case title lends some additional mirth to this observation. The tactic of relying upon the case does sometimes resemble the "hail Mary" pass in football. As a matter of attorney advocacy, that may be all well and good, but as a matter of judicial resolution of a critical social issue, it may seem like something altogether different.

To defend *Weber*, then, one needed a theory of statutory interpretation. Of course, to attack *Weber* one ought to have a theory, too, but Justice Rehnquist had marshalled the conventional sources of statutory meaning, and in so doing, he created at least a presumption that the Court was wrong and threw down the gauntlet for the creation of a theory under which it would be right.

26. *See id.*

27. *See Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

28. For an early dissent from *Weber* by a prominent academic, see Bernard D. Meltzer, *The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423 (1980).

Since *Weber*, there has been an explosion in theoretical writing about statutory interpretation. Indeed, immediately following *Weber*, Ronald Dworkin, the prominent legal philosopher, published an extended essay in the *New York Review of Books* defending the outcome in that case.²⁹ To get to the heart of this new debate in statutory interpretation since *Weber*, though, we need to turn not to the *New York Review of Books* of the 1970s, but instead to the Harvard Law School of the 1950s, and to the best thinking about statutory interpretation of that day. To understand that thinking, we must probe a bit of legal history.

Notwithstanding the flexible approach to statutory interpretation suggested by the 1892 opinion in *Holy Trinity Church*, many Supreme Court decisions of the early twentieth century seemed to view statutory interpretation as the mechanical application of either statutory text³⁰ or legislative intent³¹ to the interpretive problem at hand. During the 1930s, the so-called legal realists that dominated legal scholarship effectively attacked these formalistic approaches.³² The legal realists contended that in many cases of statutory interpretation, judges necessarily make, rather than find, the law. Many statutes lack a "plain meaning." Moreover, the notion of legislative intent is a myth, or more accurately an oxymoron, or contradiction in terms, like military justice or slam dancing. How can 535 legislators have an intent about anything? Because neither statutory text nor legislative intent was universally determinate and confining, the legal realists insisted that statutory interpretation often involved substantial judicial discretion and constituted judicial lawmaking, not lawfinding.

By the 1950s, the legal realists' critique of interpretive formalism had become deeply rooted. Nevertheless, there was a growing yearning for less skepticism about judicial decision-

29. Ronald Dworkin, *How to Read the Civil Rights Act*, N.Y. REV. BOOKS, Dec. 20, 1979, at 37, reprinted in RONALD DWORIN, *A MATTER OF PRINCIPLE* 316 (1985).

30. See, e.g., *Caminetti v. United States*, 242 U.S. 470 (1917).

31. See, e.g., *Takao Ozawa v. United States*, 260 U.S. 178 (1922).

32. Perhaps the most important critique is found in Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930), upon which the remainder of the paragraph in the text is based. Other, later examples include Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1950); Arthur W. Phelps, *Factors Influencing Judges in Interpreting Statutes*, 3 VAND. L. REV. 456 (1950).

making as well. In materials entitled *The Legal Process*,³³ two Harvard professors, Henry Hart and Albert Sacks, attempted to synthesize an approach that would accommodate the legal realist critique, yet provide meaningful rules that could constrain judges and establish objective ways to critique judicial behavior.

Hart and Sacks agreed that plain meaning and legislative intent, if applied mechanically, were absurd ways to resolve a statutory question. For them, statutory law should not be fundamentally different from other law, like the common law and constitutional law: all law is supposed to be rational and be premised on intelligible purposes.³⁴ In other words, it is more important to be functional and practical than it is to be literal or to act as the faithful agent of the enacting legislature. In this sense, Justice Blackmun's concurring opinion in *Weber* is a direct descendent of Hart and Sacks.

But other elements of the Hart and Sacks model sounded more like Justice Brennan's majority opinion in *Weber*. For Hart and Sacks proposed a "purpose approach" to statutory interpretation that is similar to that suggested in *Holy Trinity Church*, the old precedent upon which Brennan relied in *Weber*. Hart and Sacks suggested that the judge read the statute carefully and then conjure up plausible organizing purposes for it. These purposes were supposed to be rational—indeed they were presumptively good as well—since the court was to assume that the legislature that passed the statute consisted of "reasonable persons pursuing reasonable purposes reasonably."³⁵ Hart and Sacks did not consider legislative history off limits in interpretation, but cautioned that it should be consulted last, and then only as an aid in selecting among the plausible overall purposes that had already been identified.³⁶

Hart and Sacks provided the last prominent discussion of statutory interpretation for over two decades.³⁷ Accordingly, commentators in the early 1980s considering statutory interpre-

33. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tentative ed. 1958).

34. "[E]very statute and every doctrine of unwritten law developed by the decisional process has some kind of purpose or objective . . ." *Id.* at 166.

35. *Id.* at 1415.

36. *See id.* at 1284-86.

37. This observation slights the work of several people, especially that of Reed Dickerson, whose work did not have an impact commensurate with its quality. *See, e.g.*, REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* (1975). Dickerson's scholarship may well have suffered simply because the subject of statutory interpretation was held in such low esteem during this period. For a comparatively recent analysis by another longstanding

tation in general, or the *Weber* case in particular, necessarily looked to Hart and Sacks for guidance. Hart and Sacks did seem to support the Brennan opinion in *Weber*, but an academic development since the 1950s undermined reliance in the 1980s on Hart and Sacks, and implicitly undermined the Brennan opinion in *Weber* as well. Here we have the appearance of "public choice theory," that, when picked up by several prominent academically-minded commentators turned judges, helped catalyze the revival of statutory interpretation theory.

We encounter, first, the influence of Richard Posner. Following his appointment to the Seventh Circuit, Judge Posner necessarily began doing a good deal of statutory interpretation. In short order, he also began writing about it, with his customary vigor.³⁸

Posner found the Hart and Sacks framework a plausible place to begin, but felt that a heavy dose of reality was in order.³⁹ Public choice theory, in which the methodology of economics is applied to the democratic marketplace of the legislature,⁴⁰ demonstrated, to Posner's satisfaction, that legislators frequently were *not* "reasonable persons pursuing reasonable purposes reasonably," and that statutes frequently did *not* embody broad public policy purposes. From this law and economics perspective, statutes were frequently the result of no more than compromises struck in the legislature, often involving what we commonly call special interest groups.⁴¹

The implications of public choice theory for statutory interpretation are significant. From this perspective, the deals struck in the legislature and embodied in statutes depend upon interest group strength, which is not attributable to the sheer numbers of people represented by the group, but rather by whether the group can organize easily to promote its ends and whether it can limit the benefits gained from its lobbying to its membership. Small groups likely to receive discrete benefits or suffer disproportionate burdens are more likely to organize and

and outstanding commentator, see J. WILLARD HURST, *DEALING WITH STATUTES* (1982).

38. See Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982) [hereinafter Posner, *Economics*].

39. See Posner, *Statutory Interpretation*, *supra* note 2, at 819.

40. On public choice theory and law, see generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991).

41. See Posner, *Statutory Interpretation*, *supra* note 2, at 819; Posner, *Economics*, *supra* note 38, at 265-68.

lobby effectively than the diffuse public. Hence, rather than assume, along the lines of Hart and Sacks, that all statutes embody broad public-interest purposes, we should expect to find lots of statutes that provide concentrated, unjustified benefits to small groups at the expense of the general public.⁴²

In this light, the Hart and Sacks purpose approach seems to have two great flaws. First, principled judges could reach wrong results by following Hart and Sacks, for they could end up broadly promoting a public policy purpose gleaned from the statute rather than following the true lines of legislative compromise.⁴³ Second, willful, manipulative judges could reach wrong results by attributing a purpose to the statute that just happens to coincide with the judges' own policy preferences.⁴⁴ After all, if I ask what "reasonable people pursuing reasonable purposes reasonably" would have wanted in a given context, am I not likely to assume that those reasonable people are similar to the reasonable person I know best—myself—and, thus, would want what I think is the right answer? And wouldn't this natural psychological phenomenon be grossly exaggerated in willful judges, much to the danger of the rule of law?

For Posner—more accurately, for the Posner of the early 1980s⁴⁵—the appropriate modification of Hart and Sacks is to jettison the idea of the judge flexibly attributing a public-policy purpose to a statute. Instead, the judge should simply be the faithful agent of the enacting legislature. The judge is supposed to follow the lines of legislative compromise—to enforce the legislative contract—warts and all. In most situations in which those lines of compromise are not crystal-clear, Posner asserted that judges should put themselves in the minds of the enacting legislature and imaginatively reconstruct what the leg-

42. For a further discussion of interest groups and their impact on the political process, see, e.g., FARBER & FRICKEY, *supra* note 40, at 12-37.

43. See Posner, *Statutory Interpretation*, *supra* note 2, at 819.

44. See *id.* (to ignore reality of legislative process "runs the risk of attributing to legislation not the purposes reasonably inferable from the legislation itself, but the judge's own conceptions of the public interest"); *cf. id.* at 820-21 ("The secret thoughts not only of many modern legal academics but of some modern judges" are that a creative "misreading" of statutes might be necessary to update statutes and counter injustice "where legislative amendment is blocked by interest-group pressures" (citing CALABRESI, *supra* note 3, at 34, 38)).

45. Judge Posner's views on statutory interpretation have evolved, and his most recent scholarly discussion of the subject reveals substantially more skepticism about any "objective" method of statutory interpretation. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 275 (1990) [hereinafter POSNER, PROBLEMS].

islature would have done had it considered and resolved the issue.⁴⁶

Although Posner did not expressly apply this methodology in the early 1980s to critique *Weber*, his approach obviously follows Justice Rehnquist's dissent in that case. Even if, unlike Rehnquist, one concedes that the statutory language and legislative history are not absolutely determinative of congressional intent on the issue in *Weber*, these sources may seem clear enough to allow, à la Posner, for an imaginative reconstruction of probable legislative intent that supports the Rehnquist interpretation. Posner's concerns about the responsible judge being misled by, and the manipulative judge willfully misusing, a purpose approach fit the Rehnquist critique of the Brennan opinion in *Weber* well. Moreover, later writing by Posner has used *Weber* as an example of a statutory interpretation problem that is subject to analysis from the "legislation as compromise" perspective.⁴⁷

In the same 1983 issue of the *University of Chicago Law Review* that contained Posner's proposal for imaginative reconstruction in statutory interpretation, Frank Easterbrook, then a Chicago professor, published an article calling for a revival in literalism in statutory interpretation.⁴⁸ Unlike Posner, who simply wanted more realism in applying Hart and Sacks, Easterbrook attempted to jettison all aspects of the Hart and Sacks scheme.⁴⁹ And, as with Posner, the critique and the positive method suggested by Easterbrook were rooted in public choice theory.

Looking to a different branch of public choice than that explored by Posner, Easterbrook argued that legislatures cannot have intents or purposes.⁵⁰ Easterbrook relied on the "incoherence" wing of public choice, which is based on "Arrow's theorem," named after its Nobel Prize winning progenitor, economist Kenneth Arrow.⁵¹ Arrow and his followers have demonstrated that in any complex, multimember decisionmak-

46. See Posner, *Statutory Interpretation*, *supra* note 2, at 817-20.

47. See POSNER, *PROBLEMS*, *supra* note 45, at 283-86, 289, 291.

48. See Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983).

49. Although Easterbrook never took on Hart and Sacks directly, his repudiation of their approach is apparent throughout his article, especially in such statements as "judicial pursuit of the 'values' or aims of legislation is a sure way of defeating the original legislative plan." *Id.* at 546.

50. See *id.* at 547-48.

51. On the Arrowian problem in general, see FARBER & FRICKEY, *supra* note 40, at 38-62, which provides support for the assertions in the text. Easter-

ing institution, like a legislature, a phenomenon called "cycling majorities" frequently occurs. In these situations, there is always a majority ready to abandon the winner of the last vote in favor of another alternative. Of course, such endless cycling does not actually happen in a real legislature, primarily because it follows a fixed agenda. But in a sense, that just makes matters worse. In a situation where cycling majorities are present, the ultimate outcome is merely the one of the many alternatives to which the agenda leads, and therefore that outcome seems to have no more majoritarian legitimacy than other alternatives. This puts enormous power in the hands of the agenda setter, for example, the committee chair. Another factor undermining any coherent notion of legislative intent is strategic voting, such as logrolling.⁵² So why in the world, Easterbrook contended, would anybody try to interpret statutes based on legislative intents and purposes?

It comes as no surprise, then, that Easterbrook specifically attacked Posner's imaginative reconstruction approach. For Easterbrook, legislatures have no intention to reconstruct imaginatively; they have "only outcomes," not "'intents' or 'designs.'"⁵³ Moreover, these legislative outcomes, rooted in complicated compromise and context, are usually inscrutable even to judges examining them in good faith. "The number of judges living at any one time who can, with plausible claim to accuracy, 'think [themselves] into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar,' may be counted on one hand."⁵⁴

Easterbrook laid down a new conservative challenge in statutory interpretation. Rather than relying upon the intentionalism of Rehnquist and Posner, Easterbrook posited a literal approach to interpretation.⁵⁵ Read the text like a good

brook expressly relied upon Arrow's work. See Easterbrook, *supra* note 48, at 547 n.20.

52. Easterbrook described logrolling as a situation "in which legislators express the intensity of their preferences by voting against their views on some proposals in order to obtain votes for other proposals about which their views are stronger." Easterbrook, *supra* note 48, at 548.

53. See *id.* at 547.

54. *Id.* at 550-51 (quoting Posner, *Statutory Interpretation*, *supra* note 2, at 817).

55. For a more recent discussion, see Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988). Compare *In re Sinclair*, 870 F.2d 1340 (7th Cir. 1989) (Easterbrook, J.) (analyzing Supreme Court precedents on whether legislative intent, shown by legislative history, may trump plain meaning of statutory text).

lawyer, Easterbrook seemed to say, and we will have predictability, certainty, and less judicial transmogrification of statutory meaning. Letting the text carry the full load is also more consistent with our separation of powers, for the text is all that the two houses of Congress vote on and the President signs.

After Easterbrook joined Posner on the Seventh Circuit, the decisions by these two fine legal minds, and especially their occasional sparrings, have provided textbook illustrations of the competing models of statutory interpretation—better, unfortunately, than any series of similar debates at the Supreme Court.⁵⁶ But if Posner and Easterbrook provided much of the initial intellectual agenda for the revival of theory in statutory interpretation, another jurist, Antonin Scalia, contributed most of the fireworks.

In 1985, while a circuit judge, Scalia delivered a lecture at several law schools that, to use a legal term of art, was an “in your face” to the conventional mode of statutory interpretation.⁵⁷ He promoted literalism along the lines of Easterbrook and lodged a strident attack on the use of legislative history. Scalia charged that legislative history is the product of legislators at their worst—promoting private interest deals, strategically posturing to mislead judges, or abdicating all responsibility to their unelected staff, who create legislative history at the behest of interest groups or to promote their own private agenda.⁵⁸ This critique embraces the realistic, even cynical, assumptions about politics that underlie public choice theory.

As a Supreme Court Justice, Scalia has continued this attack at almost every opportunity.⁵⁹ One of my favorite quotations from him comes from a separate opinion he wrote chiding

56. For my money, the best judicial exchange about the nature and methodology of statutory interpretation during my professional career is found by comparing *United States v. Marshall*, 908 F.2d 1312 (7th Cir. 1990) (en banc) (Easterbrook, J.) with *id.* at 1331-38 (Posner, J., dissenting). The Supreme Court affirmed the Easterbrook opinion in *Chapman v. United States*, 111 S. Ct. 1919 (1991). The quality of the discussion in the majority and dissenting opinions there falls short of the Easterbrook/Posner dialogue.

57. See Antonin Scalia, *Speech on Use of Legislative History* (delivered between fall 1985 and spring 1986 at various law schools in varying forms) (on file with the *Minnesota Law Review*).

58. For a related discussion in the same time frame by then-Judge Scalia, see *Hirschey v. FERC*, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring).

59. A recent example is *Union Bank v. Wolas*, 112 S. Ct. 527, 534 (1991) (Scalia, J., concurring). In *Wisconsin Pub. Intervenor v. Mortier*, 111 S. Ct. 2476, 2484 n.4 (1991), however, the majority opinion stated that the use of legislative history in statutory interpretation remains acceptable.

the majority for taking into account legislative history that cited some lower court decisions:

As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . but rather to influence judicial construction. What a heady feeling it must be for a young staffer, to know that his or her citation of obscure district court cases can transform them into the law of the land, thereafter dutifully to be observed by the Supreme Court itself.⁶⁰

Among other things, one might question the empirical assertions Scalia has made about the creation and purposes of legislative history.⁶¹ But the important point is that in Scalia, the so-called "new textualism" found the right person—brilliant, bold, and nothing if not persistent—at the right place (the Supreme Court), at the right time, when there would be people to educate and followers to lead among the Reagan-Bush appointees.

The new textualism's sharp break with the old intentionalism of Rehnquist and Posner was evident when the *Weber* issue returned to the Supreme Court in 1987, in *Johnson v. Transportation Agency*,⁶² this time involving affirmative action for women. The majority of the Court, again in a Brennan opinion, allowed the affirmative action in question and refused to reconsider *Weber*. In dissent, Scalia launched a strong attack upon *Weber* from the perspective of the new textualism and public choice theory.

Recall that Justice Rehnquist had argued that *Weber* was wrong because it was inconsistent with legislative intent—the importance of the text of Title VII was that it was the best evidence of legislative intent.⁶³ In contrast, in his *Johnson* dissent, Scalia said that the fundamental error of *Weber* was abandoning the plain meaning of the text of Title VII as the linchpin of statutory meaning, not as the best evidence of legislative intent.⁶⁴ Scalia scathingly attacked the majority's refusal to reconsider *Weber*. In response to the majority's assertion that Congress had implicitly ratified *Weber* because no bill had ever

60. *Blanchard v. Bergeron*, 489 U.S. 87, 98 (1989) (Scalia, J., concurring in the judgment).

61. See, e.g., FARBER & FRICKEY, *supra* note 40, at 98.

62. 480 U.S. 616 (1987).

63. See *supra* text accompanying notes 22-23.

64. See 480 U.S. at 669-71 (Scalia, J., dissenting).

been introduced to change the outcome in that case, Scalia invoked public choice analysis to provide a contrary empirical explanation:

It is unlikely that today's result will be displeasing to politically elected officials, to whom it provides the means of quickly accommodating the demands of organized groups to achieve concrete, numerical improvement in the economic status of particular constituencies. Nor will it displease the world of corporate and governmental employers . . . for whom the cost of hiring less qualified workers is often substantially less—and infinitely more predictable—than the cost of litigating Title VII cases and of seeking to convince federal agencies by nonnumerical means that no discrimination exists. In fact, the only losers in the process are the Johnsons of the country [Johnson was the white male plaintiff in this case], for whom Title VII has been not merely repealed but actually inverted. The irony is that these individuals—predominantly unknown, unaffluent, unorganized—suffer this injustice at the hands of a Court fond of thinking itself the champion of the politically impotent.⁶⁵

Since the mid-1980s, the debate has raged among at least three schools of statutory interpretation theory: the old intentionalism, the old *Holy Trinity Church* purposivism, and the new textualism. The Supreme Court remains up for grabs. For every case that seems to be a victory of textualism,⁶⁶ another can be found that reflects more conventional intentionalist methodologies,⁶⁷ and the purpose approach is not dead, either.⁶⁸ For the first time in a long while, perhaps the first time ever, the Justices are frequently debating statutory interpretation methodologies at a level of theory that far transcends the details of the case at hand, and that implicates the very question of the Court's interpretive role in a democracy.⁶⁹

65. *Id.* at 677.

66. *Compare, e.g.,* Connecticut Nat'l Bank v. Germain, 112 S. Ct. 1146 (1992) (Thomas, J.) (textualist approach finding no superfluity between two arguably redundant statutes) *with id.* at 1150 (Stevens, J., concurring in the judgment) (legislative history and background confirm majority's interpretation) *and id.* at 1150-51 (O'Connor, J., concurring in the judgment) (majority approach, although rendering one of two overlapping statutes largely superfluous, correct because consistent with congressional intent).

67. *Compare, e.g.,* Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989) (Stevens, J.) (imaginative reconstruction of legislative intent) *with id.* at 528 (Scalia, J., concurring in the judgment) (textualist approach moderated by canon of avoiding absurd constructions) *and id.* at 530 (Blackmun, J., joined by Brennan & Marshall, JJ.) (purpose approach).

68. *Compare, e.g.,* Chisom v. Roemer, 111 S. Ct. 2354 (1991) (Stevens, J.) (purpose approach and imaginative reconstruction broadly promoting remedial goals of Voting Rights Act) *with id.* at 2369-76 (Scalia, J., joined by Rehnquist, C.J. & Kennedy, J., dissenting) (textualist approach).

69. I must concede that my reliance on *Weber*, public choice, and the writings of Posner, Easterbrook, and Scalia is old news to some, and incomplete

III.

This is not the place for an extended assessment of contem-

news to all. Other factors were, of course, also present in the early to mid-1980s that made statutory interpretation a ripe field for new inquiry. At least a brief acknowledgment of these influences is in order.

The most obvious factors were political and institutional. By the early 1980s, our long period of divided national government began to appear perpetual in nature. In such a state of affairs, the very nature of statutes and their interpretation become matters of great practical importance. Are statutes truly the domain of the (Democratic) legislature? Or does the (Republican) president have a role in statutory enactment? For example, might the presentment and veto provisions of Article I authorize the president to sign legislation conditioned upon his own understanding of the bill—even if that interpretation is in tension with the congressional understanding expressed in the legislative history? Once a statute is enacted, is it, in *Marbury*-like fashion, emphatically the province of the (Republican-appointed) judiciary to say what the statute means—even through the use of interpretive techniques, like textualism, that undercut the influence of (Democratic) congressional intent? When the (Republican) executive branch promulgates regulations pursuant to congressional delegations of rulemaking authority, may it take the current administration's policies into account—even if it knows that the Congress has a different ideological cut on the problem at hand? Suddenly, statutory interpretation theory became relevant in the real world of national governance.

As was Congress, academe was ideologically alienated from the Supreme Court and the executive branch by the early to mid-1980s. Public law scholars had developed a rich trove of writing on constitutional interpretation, most of it aimed at expanding the Supreme Court's role in protecting liberty and equality—just when the Court itself veered rightward and became far less interested in such matters. As constitutional law became almost a dead field for liberals interested in the intersection of legal scholarship and practical law reform—a description that fits the great majority of public law scholars—the scholarly “turn toward interpretation” necessarily became something of a turn toward statutory inquiry. That Congress, as opposed to the executive and the Court, had a far more compatible ideological perspective with these scholars surely played a role as well.

For whatever reasons, in the early 1980s liberal commentators began rediscovering statutory interpretation and the intersection of statutes and the common law as subjects worthy of inquiry. In particular, Guido Calabresi's book, *A Common Law for the Age of Statutes*, published in 1982, provoked significant scholarly commentary on the role of statutes in American law. Although Calabresi concerned himself mostly with problems of statutory obsolescence rather than statutory interpretation, his approach intrigued a variety of reviewers of his book to ponder interpretive questions as well. Indeed, it was in a review essay of this book that Robert Weisberg said, as noted earlier, see text accompanying note 1 *supra*, that nothing else as important as statutory interpretation receives as little scholarly attention in the law.

With all due respect to Calabresi and other centrist and liberal scholars, however, in my view there would have been no significant revival of attention to statutory interpretation without the partisan divisions in our national government and the provocative and highly visible work of Posner, Easterbrook, and Scalia, all of which called for a response. Easterbrook, Posner, and especially Scalia had the unique advantage of spreading their messages in judicial opinions as well as in scholarly commentary. When the Dean at Yale pro-

porary statutory interpretation controversies. I will take advantage of this format, however, to make a few observations.

In many ways, the emergence of the new textualism and the consequences flowing from it have been healthy developments. Judges and attorneys must now focus more carefully on one of the wiggliest of legal creatures, statutory language. No one can oppose being against sloppy legal constructions. More generally, the new textualism has challenged those of different interpretive persuasions to defend their ideas, rather than simply to rely upon conventionalism or legerdemain in brief and opinion drafting. The drive toward theory provoked by the new textualism is rooted in important judicial pronouncements and has significant practical consequences, demonstrating that legal theory is relevant outside as well as inside the classroom and faculty lounge.

In my judgment, however, the great virtue of the new textualism—its rigidity—is also its essential vice. I lack the faith of the new textualists that human beings can come up with one reading of a statute that compels the human mind to accept it in the kinds of cases the Supreme Court gets—hard cases, where the lower courts are divided and the stakes are high. What may promote predictability and certainty in routine cases is, I suggest, much less useful at this level.

Recently a prominent attorney told me the following joke, which, he informed me, he heard from a high church official, and thus I feel that I can repeat it without seeming sacrilegious. What is the difference between a liturgist and a terrorist? You can negotiate with a terrorist. If one substitutes “literalist” for liturgist, the humor remains, in my opinion. The stridency and self-assurance of the new textualism is not what we need in identifying statutory meaning in hard cases. What the Supreme Court should do, I submit, is not read long, complicated federal statutes in isolation from the underlying social contexts in which they reside, but rather consider itself, under our separation of powers, a partner in the process of getting on with the government of this country.⁷⁰

In this sense, the appropriate methodological contrast to

pounds an interesting, new theory about statutes, one hopes that at least a major portion of the scholarly community listens; but when a Supreme Court Justice does the same, the entire legal community cannot help but react.

70. The Court's recent struggles with the long, detailed, and complicated federal bankruptcy code reveal this tension. *See, e.g.*, *Dewsnup v. Timm*, 112 S. Ct. 773 (1992); C. Robert Morris, *Bankrupt Fantasy: The Site of Missing Words and the Order of Illusory Events*, 45 ARK. L. REV. 265 (1991); cf. POS-

the new textualism is not the old intentionalism or the old purposivism—the “hail Mary” approach of *Holy Trinity Church*. If we return to *Weber* one last time, we should consider the opinion in that case that has been neglected in the latter portions of this essay—the concurring opinion of Justice Blackmun. The flexibility displayed in that opinion contains severe risks of judicial overreaching. But the candor in the opinion allows observers to understand what the judge is doing; in this instance, the judge was not hiding behind the old intentionalism or the old purposivism. And I much prefer the contextual, bottom/up or inside/out quality of the way in which Blackmun worked through the situation Kaiser faced, rather than the top/down, imposed rigidity of textualism.⁷¹

It might be that the new textualism can hold its rigidity in any context, but I doubt it. Indeed, a new development, little noticed up to now, but of potentially great significance, is the use of the canons of interpretation—and particularly, stringent clear statement rules—to provide a safety valve when the new textualism jeopardizes other values that strike a majority of the current Court as salient.⁷² I could well be wrong, but I don’t think combining two layers of rule-like rigidity is likely to produce the kinds of interpretations that, in the long run, will remain robust in the legal community. Moreover, the value judgments inherent in invoking these clear statement rules—which prefer ordering by private elites to government regulation, state sovereignty to national legislative authority, and executive rulemaking to congressional lawmaking—are anything but neutral or inevitable.⁷³

All this is too interesting to escape the attention of even law professors, and indeed the debate about the new textualism has fueled an explosion in the academic literature on statutory interpretation. Recall again that, writing in 1983, Robert Weisberg accurately reported that “[t]he general contemporary American view of statutory interpretation is that there is not a

NER, PROBLEMS, *supra* note 45, at 302 (correctness of an interpretation may be “political rather than epistemic, pragmatic rather than apodictic”).

71. For my own attempt to construct a contextual model of statutory interpretation that considers statutory text, legislative intent, statutory purposes, and other factors, see William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990) [hereinafter Eskridge & Frickey, *Statutory Interpretation*].

72. See Eskridge & Frickey, *Clear Statement Rules*, *supra* note 8, at 611-40.

73. See *id.* at 640-45.

great deal to say about the subject. As a result, nothing else as important in the law receives so little attention."⁷⁴ In less than a decade, almost the inverse has become true: people have had so much to say about statutory interpretation that the scholarly literature has become almost overwhelming.⁷⁵ A veritable cottage industry has developed in this area, and I was lucky to have been an early investor. Not surprisingly, the *Weber* case is frequently used in these writings as a prototypic example of a hard statutory case—that is, a case in which the plausible theories conflict and the outcome is therefore quite theory-sensitive.⁷⁶ Moreover, public choice theory and the writings of Posner, Easterbrook, and Scalia feature prominently.⁷⁷

Rather than attempt an overview of these writings, which others have done,⁷⁸ in the space that I have remaining I would like to use this new scholarship to suggest a relationship that is

74. Weisberg, *supra* note 1, at 213 (footnote omitted).

75. This assertion screams for a string citation, but that risks failing to cite something worth citing (or that the author considers worthy of citation, anyway). Hence, to support the assertion of an explosion in the literature, I hope that it is sufficient simply to note that in the 1992 supplement to our casebook, Bill Eskridge and I cited about fifty-five books, articles, and other publications on statutory interpretation written since the casebook went to press in 1987. See WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* ch. 7 (Supp. 1992).

At least one article does deserve special mention, however, for its early recognition and response to the emerging controversies over statutory interpretation in the 1980s. Just as the strands of public choice, textualism, and the attack on the purpose approach began taking root, Jonathan Macey published an important article attempting to justify the purpose approach for public choice reasons. See Jonathan Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

76. Compare, e.g., William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1488-94 (1987) (*Weber* as appropriate vehicle for judicial evolutive statutory interpretation) with Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 302-06 (1989) (*Weber* as probable violation of norm of legislative supremacy). Judge Posner's recent book discusses *Weber* as a paradigm case of statutory indeterminacy. See POSNER, *PROBLEMS*, *supra* note 45, at 283-86, 289, 291.

77. For recent writings on public choice, see, e.g., Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1 (1991); *Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167 (1988). Scholars are now turning to a somewhat different form of analysis, positive political theory, that may have more promise in illuminating public law problems. See *Symposium, Positive Political Theory and Public Law*, 80 GEO. L.J. 457 (1992).

78. See, e.g., Earl M. Maltz, *Rhetoric and Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy*, 71 B.U. L. REV. 767, 773-76 (1991); Peter Schanck, *The*

frequently posited but rarely defended. The turn toward theory in statutory interpretation is a validation that there is actually an important relationship between legal scholarship and law teaching. For example, Posner's important 1983 article setting out the theory of imaginative reconstruction was entitled "Statutory Interpretation—in the Classroom and in the Courtroom."⁷⁹ Posner argued that law professors were overlooking two separate but highly related problems—how statutes should be interpreted, and how law schools should teach these skills to students.⁸⁰ One of the reasons that, in 1983, Bill Eskridge and I, as brand-new law professors, started putting together a legislation casebook⁸¹ was the sense that our own legal educations had not prepared us for the everyday practice of modern, statutorified law. Once we started in that project, it became clear that legal theory in this area was muddled, to the extent that it had not been forgotten.

Patricia Nelson Limerick, a brilliant historian and the leader of the scholarly movement called the "New Western History," reports that she first began to reconsider the dominant paradigm in the history of the American West when she concluded that she simply was not teaching the subject effectively to her students. She has written:

In order to realize how completely you are entrapped by traditional thinking, you must entrap yourself repeatedly in front of a group of eighteen-to-twenty-two-year-olds. If you are a decent and fair teacher, then eventually you will no longer feel comfortable at imposing on their deference. At a certain point, you will finally have to say to them (and, more important, to yourself), "What I am offering you in the way of a big interpretation does not make very much sense."⁸²

That happened to me when I started teaching a course in legislation. The "big interpretation" of how courts construe statutes did not make much sense, and I finally gave up trying to windowdress the problems in the old intentionalism or the

Only Game in Town: An Introduction to Interpretive Theory, Statutory Construction, and Legislative Histories, 38 KAN. L. REV. 815 (1990).

79. Posner, *Statutory Interpretation*, *supra* note 2.

80. For a more extended discussion also developed in the early 1980s, see Robert Williams, *Statutory Law in Legal Education: Still Second Class After All These Years*, 35 MERCER L. REV. 803 (1984).

81. See WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (1988).

82. Patricia Nelson Limerick, *The Trail to Sante Fe: The Unleashing of the Western Public Intellectual*, in *TRAILS, TOWARD A NEW WESTERN HISTORY*, *supra* note 12, at 59, 68.

old purposivism. In particular, merely teaching the *Weber* case several times triggered my interest in many larger issues.

My experience is far from unique. When one examines the recent theoretical writings on statutory interpretation, one finds that the articles do attempt to propose a general theory of interpretation, rather than the field-specific theory that would have fit the perspective of the 1970s. That is, whether the author is a tax professor⁸³ or an immigration law professor⁸⁴ or an environmental law professor,⁸⁵ the article attempts to say something about statutory interpretation in general. But the article also contains examples of statutory interpretation, of course, and it should come as no surprise that the examples frequently parallel the author's field of substantive expertise. Tax professors use tax cases,⁸⁶ environmental law professors use environmental cases,⁸⁷ and so on. This work can lead these scholars or others to produce field-specific work—work that takes the general theory and examines how a field of law would hold up under it.⁸⁸

I suppose that no model of the relationship of scholarship and teaching is just right, but this one strikes me as at least especially useful. From a scholarly perspective, the back and forth movement between general theory and field-specific analysis can make substantial contributions at three levels: the theoretical, the doctrinal, and the practical (for practitioners may find the work especially accessible and useful). From a pedagogical perspective, there are also significant advantages. Forcing students to recognize that one must have a theory, or at least a defensible and replicable method, to resolve hard statutory cases can significantly illuminate the practical lesson that law is not a system of rules so much as a collision of theories in a professional interpretive community. The further lesson is

83. See William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541 (1988).

84. See T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988).

85. See Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281 (1989).

86. See Popkin, *supra* note 83, at 577-78, 601, 603, 607, 615.

87. See Farber, *supra* note 85, at 294-302.

88. My own experience certainly fits this model. Shortly after finishing the casebook and a co-authored piece with Bill Eskridge on a general theory of statutory interpretation, see Eskridge & Frickey, *Statutory Interpretation*, *supra* note 71, I then applied that theory in an article concerning my field of specific interest, federal Indian law. See Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137 (1990).

that these collisions may reach equilibria somewhat differently depending upon the field of law involved; for example, we may care more about plain meaning or legislative intent in some circumstances than others.⁸⁹

The optimistic note upon which I close should not obscure the stakes involved in the revival of theory in statutory interpretation. Even in the bright light of this new analytical morning, statutory interpretation may appear merely to be a rarified debate over "the meaning of meaning" among pedantic judges and their academic running dogs. Instead, at its core this battle is over redefining (or perhaps defining precisely for the first time) the relationship among the three branches of our national government. It is no coincidence that this tension has arisen in an era of longstanding and bitterly divided government.

For example, surely one consequence of textualism, and the concomitant repudiation of identifying and following legislative intent, is to make it more difficult for Congress to have its way. Although I do not believe that the battle boils down simply to the conservative Republican executive branch and Court versus the liberal Democratic Congress,⁹⁰ it would be foolish to ignore the concrete consequences of the debate and consider it merely in rarified academic terms.

A recent dispute provides a vivid example. Under 42 U.S.C. § 1988, as amended in 1976, in certain civil rights cases the court may allow the prevailing party "a reasonable attorney's fee as part of the costs."⁹¹ Are fees paid to experts hired by attorneys to assist in preparing the case and to testify at trial recoverable as part of these fees? Writing amidst a division in the circuits, Judge Posner held for the Seventh Circuit that expert fees were recoverable.⁹² Posner read several Supreme Court precedents as rejecting a "plain language" approach to § 1988, and more fundamentally concluded that appeals to unadorned plain language are unsound. He then opted for an inquiry based on legislative intent and purpose, and concluded:

When a court can figure out what Congress probably was driving at

89. The pathbreaking article in this regard is Eskridge, *supra* note 76.

90. For an argument along these lines more subtle and more plausible than my comment, see Stephen F. Ross, *Reaganist Realism Comes to Detroit*, 1989 U. ILL. L. REV. 399. See also *supra* note 69 (discussing the effect of a divided national government upon theories of statutory interpretation).

91. 42 U.S.C. § 1988 (1988).

92. *Friedrich v. City of Chicago*, 888 F.2d 511 (7th Cir. 1989), *cert. granted and judgment vacated*, 111 S. Ct. 1383 (1991).

and how its goal can be achieved, it is not usurpation . . . for the court to complete (not enlarge) the statute by reading it to bring about the end that the legislators would have specified had they thought about it more clearly or used a more perspicuous form of words.⁹³

The issue ultimately reached the Supreme Court. In *West Virginia Hospitals, Inc. v. Casey*,⁹⁴ Justice Scalia's majority opinion repudiated the Posner approach as "profoundly mistak[ing] our role,"⁹⁵ and, not surprisingly, opted for textualism. According to Scalia, judges are obliged to enforce unambiguous statutory language, for otherwise a "usurpation" occurs in which the judge's own policy perspectives control the outcome.⁹⁶ For Scalia, "[t]he record of statutory usage demonstrates convincingly that attorney's fees and expert fees are regarded as separate elements of litigation cost" because, although some statutes, "like § 1988, refer only to 'attorney's fees,' . . . many others explicitly shift expert witness fees *as well as* attorney's fees."⁹⁷

In a strong dissent,⁹⁸ Justice Stevens embraced the Posner approach. Stevens demonstrated that Congress amended the statute to override the Court's holding in *Alyeska Pipeline Ser-*

93. *Id.* at 514. The context of this quotation is illuminating. Immediately prior to the quotation, Judge Posner wrote:

We are quite aware that appeals to literalism are common. The cases are thick with references to "plain meaning" and with such tired saws as that interpretation must begin with the words of the statute—and stop there if they are clear. In fact, interpretation must begin with the linguistic and cultural competence presupposed by the author of the statute. . . . [J]udges realize in their heart of hearts that the superficial clarity to which they are referring when they call the meaning of a statute "plain" is treacherous footing for interpretation. They know that statutes are purposive utterances and that language is a slippery medium in which to encode a purpose. They know that legislatures, including the Congress of the United States, often legislate in haste, without considering fully the potential application of their words to novel settings. The presence of haste here is suggested by the fact that the civil rights fees statute was passed on the last day of the Ninety-Fourth Congress.

Id. at 513-14 (citation omitted).

94. 111 S. Ct. 1138 (1991). For a thoughtful analysis of this opinion, 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 (1992).

95. 111 S. Ct. at 1148.

96. *See id.*

97. *Id.* at 1141. Justice Scalia explained that if attorney's fees and expert fees are not "distinct items of expense, . . . dozens of statutes referring to the two separately become an inexplicable exercise in redundancy." *Id.* at 1143.

98. *See id.* at 1148-56 (Stevens, J., joined by Marshall & Blackmun, JJ., dissenting).

vice Co. v. Wilderness Society,⁹⁹ which had generally forbidden judicial fee-shifting in public interest litigation absent express statutory authority. For Stevens, the legislative history made clear that Congress intended to return to “the pre-*Alyeska* practice in which courts could shift fees, including expert witness fees, and make those who acted as private attorneys general whole again, thus encouraging the enforcement of the civil rights laws.”¹⁰⁰ The case under consideration was “precisely the type of public interest litigation that Congress intended to encourage by amending [the statute] to provide for fee shifting,” and, thus, the majority’s denial of expert fees was “at war with the congressional purpose of making the prevailing party whole.”¹⁰¹

But what of Scalia’s point that a “usurpation” occurs when judges move beyond plain textual meaning? Justice Stevens acknowledged the Court’s recent “vacillat[ions] between a purely literal approach to the task of statutory interpretation and an approach that seeks guidance from historical context, legislative history, and prior cases identifying the purpose that motivated the legislation.”¹⁰² Stevens argued that the choice of method should be dictated by an ultimate respect for Congress, not for statutory text. Stevens cited numerous instances in which Congress has not disturbed purposive interpretations in tension with plain textual meaning, but has responded with statutory amendments to override textualist interpretations.¹⁰³ For Stevens, the Court “do[es] the country a disservice when we needlessly ignore persuasive evidence of Congress’ actual purpose and require it ‘to take the time to revisit the matter’ and to restate its purpose in more precise English whenever its work product suffers from an omission or inadvertent error.”¹⁰⁴

Stevens concluded with a prophetic utterance: “Only time will tell,” he wrote, “whether the Court, with its literal reading of § 1988, has correctly interpreted the will of Congress with respect to the issue it has resolved today.”¹⁰⁵ To Scalia, this was

99. 421 U.S. 240 (1975).

100. 111 S. Ct. at 1153.

101. *Id.*

102. *Id.* at 1153-54.

103. See *id.* at 1154-55. See also William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) (providing extensive documentation of the circumstances in which Congress has overridden the Court, and positing theoretical explanations for these events based on positive political theory).

104. 111 S. Ct. at 1155 (footnote omitted).

105. *Id.* at 1156.

double foolishness: it looked past the conventional silliness in interpretation—the search for the (oxymoronic) legislative intent of the enacting Congress—to a heightened form of folly, in suggesting that his opinion was wrong if the *current* Congress repudiated it. “The ‘will of Congress’ we look to,” responded Scalia, “is not a will evolving from Session to Session, but a will expressed and fixed in a particular enactment.”¹⁰⁶

Stevens did prove a good prophet: in the Civil Rights Act of 1991, Congress amended the statute expressly to provide for the recovery of expert fees in some cases.¹⁰⁷ *Casey* thus provides an especially good illustration of the difference that statutory interpretation theory can make, both to the outcome in a given case and to the potential congressional response. Is its story a repudiation of textualism—a tale in which Congress was needlessly called upon to correct a Supreme Court decision that reached a dysfunctional outcome through wooden, hyperformalistic methods? Or are *Casey* and its aftermath a vindication of textualism—a vivid example of the Court forcing Congress to choose statutory language carefully in a specific area and, more generally, firing a warning shot across the legislative bow about the consequences of drafting mistakes and omissions? In other words, was the decision anti-democratic, democracy forcing, or perhaps simply an example of the rule of law operating in a democracy-neutral fashion?¹⁰⁸

106. See *id.* at 1148 n.7 (majority opinion).

107. See 42 U.S.C.A. § 1988c (West Supp. 1992).

108. Evaluating these questions requires assessing a number of difficult issues, including the degree to which textualism can legitimately carry a banner of “neutrality,” the access that different sorts of “losers” in the Supreme Court have to the Congress, see Eskridge, *supra* note 103, and the extent to which congressional overrides such as the one concerning *Casey* may have retroactive impact. Incidentally, the potential retroactive impact of legislative changes in law is a hot current topic, with Justice Scalia arguing for a strong presumption against retroactivity. See *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990) (O’Connor, J.) (acknowledging tension between two lines of precedent, one favoring retroactivity, one presuming against it); *id.* at 840-58 (Scalia, J., concurring) (arguing for a strong presumption of nonretroactivity). At this writing, five circuits have held that the 1991 Civil Rights Act, which includes the provision overriding *Casey*, does not have retroactive impact. See *Gersman v. Group Health Assoc.*, 975 F.2d 886 (D.C. Cir. 1992); *Johnson v. Uncle Ben’s, Inc.*, 965 F.2d 1363 (5th Cir. 1992); *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929 (7th Cir.), *cert. denied*, 113 S. Ct. 207 (1992); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992); *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir.), *cert. denied*, 113 S. Ct. 86 (1992). *But see Davis v. City of San Francisco*, 61 U.S.L.W. 2192 (9th Cir. Oct. 6, 1992) (holding that the Act applies to cases pending at the time of its enactment, and to pre-Act conduct still open to challenge after enactment).

As *Casey* demonstrates, the dispute about statutory interpretation transcends the law schools, and even the legal community, and appropriately belongs in the political marketplace of our society. It cannot be resolved without a firm sense of the nature and mission of our governmental institutions, of the role of the rule of law in a democracy, and of the potential accomplishments and limitations of our legal community. As such, it poses a fundamental challenge to law student and law professor alike, the reach of which may exceed our collective grasps. But then, what's a law school for?

