# Theories of Statutory Interpretation

Elizabeth Garrett, "Legislation and Statutory Interpretation"[1]

[T]he aspiration of textualists to use their method of interpretation to force Congress to pay more attention to legislative drafting and consider difficult questions of policy rather than punting them to the less democratic judiciary has been drawn into question by sophisticated understandings of the legislative process inspired by political science. Scholars have also recently deployed the tools of political science to provide more nuanced approaches to intentionalism; others who have been greatly influenced by public choice have developed theories that have an affinity to purposivism. . . .

1. Intentionalism

Intentionalism has long been the most widely accepted theory of statutory interpretation. Blackstone[2] opined that "[t]he fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made." In the United States, many have argued that judges must seek to implement the meaning that legislators intended because of constitutional separation of powers. Attention to the legislature's will is required by the Constitution's "democratic purpose" because the power to set policy has been delegated to the legislature by the people. In the policy-making realm, the Constitution mandates that legislators are the superiors of judges, who should act as the lawmakers' faithful agents when interpreting unclear statutory commands. If agency officials, rather than judges, are interpreting statutory language, they do so as part of their responsibility to execute the policy set by Congress. Thus, no matter which branch – judicial or executive – is faced with the interpretive question, the argument from constitutional structure suggests it is bound by Congress' intent.

The problem, recognized long before political science's recent influence on legal scholarship, is that Congress is a multimember body that must act collectively. Thus, it is difficult to determine an "intent" that fairly captures the varied motivations of those who might support a particular bill. Blackstone ignored this issue by referring to only one legislator when identifying the intent relevant to interpretation. Not only is this approach unrealistic, but it also overlooks one of the aspects of a legislature that provide its commands legitimacy, compelling even those who disagree with the law to obey it. A law merits this kind of respect because it represents the collective action of a representative body in the face of the circumstances of politics, i.e. "action-in-concert in the face of disagreement." . . .

Drawing on the work of Arrow and others, public choice scholars have contended that the available methods of aggregating legislators' views into a decision are subject, among other things, to cycling and strategic manipulation.[3] They contend it is impossible to ascribe rationality to any

[1] *The Oxford Handbook of Law and Politics* 360–77 (Keith E. Whittington, R. Daniel Kelemen & Gregory A. Caldeira eds., 2008).

[2] William Blackstone, *Commentaries on the Laws of England* 59 (1765).

[3] [Ed.: Kenneth Arrow's Impossibility Theorem showed that any system for aggregating individual ordinal preferences, such as those of legislators, into a social preference, must violate one or more

legislative outcome, and it certainly cannot be presumed that the outcome necessarily represents the majority's sentiment. The possibility of cycling and other voting pathologies also means that the procedural rules shaping the choices put before legislators become crucial to determining outcomes; in particular, the group controlling the agenda has disproportionate influence over legislative output. For some, that challenges the legitimacy of the decisions of democratic bodies; these decisions are either chaotic and meaningless or the product of agenda manipulation by a few, a reality that undermines majoritarianism. Other less pessimistic scholars still conclude that decision theory leads to a sobering bottom line: "Voting theory teaches that majoritarian democracy is necessarily a compromised process and that any institutional design chosen to promote democracy will have a problematic relationship to our normative aspirations."

One way in which legislators manipulate the process, according to the bleak public choice view, is through the manufacture of legislative history that does not reflect the views of the majority enacting the law. Since the Supreme Court indicated a willingness to look at congressional materials to ascertain the meaning of vague or ambiguous legislative text in *Holy Trinity Church v. United States* (1892), judges have turned to committee reports, floor debate, and other materials for evidence of what enacting lawmakers understood text to mean. The problem identified by public choice theorists is that legislative history is particularly susceptible to manipulation by those who did not succeed in enacting their objectives and who produce a sort of "loser's history." They then have a second and perhaps a third chance to prevail when they use the manufactured legislative history to convince agencies and judges to interpret language in a way that a congressional majority was unwilling to legislate. Indeed, under this conception of the legislative process, enormous amounts of legislative history will be produced – some by losers, some by the winners to respond to the anticipated behavior by losing legislators, and some in the ordinary course of lawmaking to provide information to members as they decided how to vote. Judges will find themselves relatively unconstrained in interpreting statutes because they can always find some legislative materials to support their decision. Interpreting therefore inevitably becomes policy-making, undermining the constitutional order as well as leading to uncertainty about the meaning of legal commands. . . .

[S]cholars working to rehabilitate intentionalism . . . focus on procedures and institutions to discern a legislative intent that can illuminate textual meaning. Positive political theory (PPT) and communication theory provide methods to distinguish cheap talk by legislators trying solely to influence subsequent interpretations from credible, costly signals by lawmakers constructing a deal that will successfully navigate through legislative vetogates.[4] Legislative materials are not always, and perhaps not primarily, produced with an eye to interpretation by courts or agencies; instead, these materials are crucial tools for assembling a legislative majority. Some Congress members who play key roles in enacting legislation must communicate truthfully with colleagues

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minimally demanding axioms of rational choice. Cycling occurs when no outcome of voting is stable, because any coalition can defeat any other coalition by calling for a new vote. *See* Dennis C. Mueller, *Public Choice III* 84–85, 582–96 (2003).]

[4] McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 Law & Contemp. Probs. 3–37 (1994). [Ed.: McNollgast is a *nom de plume* for Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast.]

to convince them to support bargains; if they dissemble or misrepresent they will find it more difficult in the future to pass legislation. Of particular importance in this analysis are the signals sent by key players at stages in the legislative process necessary for a bill's enactment, especially those by repeat players who need to develop reputations for truthfulness. In addition, statements revealing the views of pivotal lawmakers whose support is necessary for enactment are apt to more fairly represent the bargain than the statements of ardent supporters or opponents, who have incentives to provide extreme interpretations. . . .

[Some] scholars view the role of interpreters as reconstructing the legislative communication process and sorting credible signals that motivated pivotal lawmakers to vote for the bill from strategic signals sent by ardent supporters. Only in this way can courts fulfill their role as the faithful agents of the legislature. Indeed, the argument goes, if interpreters ignore the more moderate interpretation of statutory language that an emphasis on pivotal actors yields and adopt instead the expansionist interpretation favored by ardent supporters, then legislative compromise will be more difficult in the future. Congressional moderates will be unwilling to support legislation because they will fear that subsequent interpretation will allow more sweeping change than they were willing to agree to, and those seeking to craft compromise cannot credibly promise that judges will stick to the terms of the agreement.

Moreover, PPT supports the notion that judges can get away with imposing more extreme interpretations that might not have been able to pass the legislature in the first place. The procedures providing legislative stability entrench the status quo; as long as some ardent supporters are in a position to block any attempts to reestablish the understanding that drove the original enactment, it will be difficult for Congress to override an expansive interpretation. A determined minority can block legislation, particularly if its members control a veto gate, such as a committee, or if they can take advantage of supermajoritarian aspects of the legislative process, such as the Senate filibuster.

Even if judges do not ignore the signals sent by pivotal lawmakers in order to "enact" their own view of the right policy, they may misinterpret the legislative bargain because they are not competent to discriminate between reliable signals and strategic talk. Although agency officials may be sufficiently well-versed in the intricacies of the legislative process to accurately decode the signals, generalist judges who have little familiarity with the often convoluted legislative process are likely to make mistakes as they sift through voluminous legislative history. . . .

This discussion, whether informed by the pessimistic public choice vision of the legislature as rife with social choice pathologies, or by the recent work seeking to construct a coherent legislative intent by replicating the legislative bargain, assumes that the intent being discovered is that of the enacting legislature. A different approach to interpretation, also strongly influenced by PPT, is based on the notion that the relevant intent is that of the legislature sitting at the time the court interprets the statute. In some cases, the current legislature will be made up largely of the original enactors, but in others, its composition will be entirely different – and a majority of its members may have very different preferences to the enacting body. This argument does not rest

on the realist[5] grounds that interpreters can only offer interpretations that align with the preferences of the current lawmakers who have the power to override the judicial decision. Instead, [Prof. Einer] Elhauge argues that the enacting legislature will rationally prefer interpreters to try to track current legislative preferences, i.e. "enactable preferences," because this approach allows them to influence not only the legislation they pass but all legislation being interpreted while they are in office. . . .

2. Textualism

Some of the most prominent scholars and judges influenced by public choice have eschewed intentionalism as a hopeless endeavor that inevitably leads to unconstrained judicial interpretation They have embraced instead a second foundational theory of interpretation: textualism. Some defenders of textualism do so on formalist[6] grounds: The Constitution sets out the exclusive mechanism for enacting policy, and any legislative materials that have not gone through those procedural hoops cannot be given the status of legislation. That position, however, does not necessarily rule out using legislative materials that reveal the political context surrounding enactment as evidence of meaning when textual provisions are unclear. The textualist rejects even this use of legislative history for the reasons provided above: Legislative history is manipulated by strategic political actors who could not enact their preferences, and legislative materials provide clues only to the motivations of a few lawmakers, not the intent of a collective body, which itself is an inherently unintelligible concept.

Political science also casts some doubt on textualism, however. First, a sophisticated understanding of the legislative process throws into question one of the main goals of textualism: to provide incentives for Congress to legislate more precisely and clearly, thereby avoiding the need for extensive interpretation. Not only would this improve the quality of statutes and meet rule of law concerns, but also, textualists argue, more attention to memorializing the legislative deal clearly in the text would improve decision-making in the politically accountable branches. The realities of the legislative process cast serious doubt on whether this part of the textualists' project can succeed. The few empirical studies focused on determining how aware members of Congress and their staff are of statutory decisions and strategies suggest that awareness is relatively low, even among expert staff. . . .

Even if drafters are aware of textualism, they may rationally decide not to incur the costs of greater textual clarity—costs that can include failure to reach a compromise necessary for enactment—because they gamble that the provision will not be subject to litigation or, if it is, that the judge interpreting it will not be a textualist. Just like legislatures, courts comprise many judges who employ different approaches and reasonably reach different conclusions about difficult

[5] [Ed.: Legal Realism holds that adjudication is and should be similar to lawmaking by legislatures, i.e. in the range of considerations that are and should be taken into account when making a decision. For example, a legal realist account of statutory interpretation might hold that judges are necessarily aware of the possibility of legislative overruling, and appropriately take that possibility into account.

[6] [Ed.: Legal Formalism holds that adjudication is and should be different from lawmaking by legislatures, i.e. in the range of considerations that are and should be taken into account when making a decision.]

questions. The success of textualism's discipline depends on the strength of its incentive effect, and institutional realities suggest that effect will be weak. That has led some to argue that this justification for textualism is merely a veneer to cover the true objective of textualism: to allow conservative judges to constrain the legislature from pursuing a broad regulatory agenda[7]. . . .

3. Purposivism

The third foundational theory is purposivism, which has its roots in the "mischief rule" articulated in *Heydon's Case* (1584). Interpreters should identify both the mischief that prompted Parliament's action and the remedy chosen to attack the mischief. "[T]he office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy." The notion that interpreters should construe legislation so that it achieves its purpose is hardly controversial; all three foundational theories incorporate some purposive analysis. What distinguishes the theories is how the purpose is identified. For intentionalists, the relevant purpose is that of the enactors; for textualists, the purpose is determined by examining the language of the statute and how it fits into the body of law. Purposivists, writing in the Legal Process tradition, assume "unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably."[8] Inferring this purpose includes a close examination of text and other sources of meaning, although the process does not aim necessarily to capture the subjective intent of the enactors. Instead, purposivists create a "reasonable" legislator and determine how she might have attacked the mischief targeted by the legislature.

Just as the infusion of political science into the statutory interpretation literature undercut many of the assumptions of intentionalism, it also challenged the legitimacy of using the "reasonable legislator" as the focus for interpretation. Public choice led many to believe that the actual legislative process is not populated by reasonable legislators, and, even if it was, it is not likely to achieve reasonable results. The real legislative process was seen as a forum for rent-seeking by contending interest groups, which take advantage of the power of the agenda setter and legislative procedures to block laws that would harm them and obtain legislation that transfers benefits to them even if the result is not welfare-enhancing from society's perspective. Because the constellation of interest groups is disproportionately skewed to favor well-organized groups with money, laws serving the public interest are unlikely to emerge from the political process. Contrary to Hart and Sacks' rosy vision of a legislature pursuing reasonable goals reasonably, some viewed Congress as full of self-interested legislators sending government benefits to groups who in turn reward them with campaign funds, post-service employment, and lavish trips and gifts[9]. . . .

The leading modern judicial proponent of an interpretive method similar to Hart and Sacks' purposivism is Justice Breyer. Breyer argues that interpretation should be viewed primarily as a way to ensure that legislation meets the general purpose underlying it because that is consistent

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[7] Andrei Marmor, *The Immorality of Textualism*, 38 Loy. L. Rev. 2063, 2063–79 (2005).

[8] H.A. Hart, Jr. and A.M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1378 (1994).

[9] W.N. Eskridge, Jr., P.P. Frickey & Elizabeth Garrett, *Legislation and Statutory Interpretation* (2006).

with our "delegated democracy" where legislators, as the representatives of the people, determine policy. Norms of accountability are also served because citizens think broadly in terms of general purposes and do not focus on the precise details of the legislative language. Breyer's justification for purposive interpretation seems to depend crucially on a link between the purpose that would drive a reasonable legislator and the purpose that drives the actual legislator—a link undermined by public choice, decision theory, and interest group realities. . . .

With the increasing awareness of the large gap between the purposivist's reasonable legislator and the real lawmaker, many view purposivism as a judicial power grab. The malleable concept of "reasonableness" allows an extraordinary range of judicial discretion. Judges construct the fiction of reasonable legislators, and judges determine what purposes are reasonable. Although Hart and Sacks emphasized that the text of the statute should cabin the range of the discretion, vague or ambiguous language often provides no substantial restriction. Given human nature, it should not surprise us that a judge, faced with determining what a reasonable legislator might have intended with unclear statutory language, often relies on what the judge himself thinks is the right answer. Purposivism allows him to cloak a decision to implement his own policy objectives in the language of obedience to Congress, albeit to a fictive legislature characterized by reasonableness. Textualism is a reaction to this formulation of purposivism and an attempt to constrain judges by focusing on the enacted text and denying access to legislative history materials.

Disillusionment with the ability of Congress to behave reasonably led those writing in the public choice tradition to different approaches. Some, in addition to being attracted by textualism as a way to constrain willful judges and ensure the primacy of the elected branches, advocated narrow constructions of statutory language. If legislation is merely a deal among interest groups and unlikely to enhance social or economic welfare, then statutes should be narrowly construed to limit their effects as much as the text makes possible. Courts should acknowledge the reality that, in many cases, legislation is a contract between interest groups and legislators; therefore, an interpreter should seek to implement only the terms of the deal. Often Congress seeks to hide the reality of interest group deals by using language that invokes the public interest; [Judge Frank] Easterbrook argues that courts should disregard these broad statements of principles and hew to the terms of the deal. Other scholars contend that the way to discourage private-regarding deals is to adopt purposive methods of interpretation that discourage rent-seeking and do not necessarily stick to the terms of the legislative bargain. Thus, [Prof. Jonathan] Macey, who accepts the economic vision of legislation, concludes that judges should interpret statutory language in a public-regarding way where possible—even if the underlying legislation is purely an interest group bargain—because by denying the interest groups the deal they "bought," interpreters will discourage future rent-seeking. Only if interest groups can convince Congress to legislate their deals clearly will they be sure to reap the benefits they seek, and lawmakers will be loath to enact such explicit bargains because of fear of voter backlash. . . .

**Notes**

1. Garrett's exposition of intentionalism and textualism is relatively uncontroversial, but her discussion of purposivism is subject to disagreement. Some scholars would not classify

purposivism as a third foundational theory. To the extent that the interpreter looks to the statutory text to discern the purpose, purposivism is a type of textualism. If the interpreter looks to legislative history to determine statutory purpose, then purposivism is a type of intentionalism. Only when the interpreter looks elsewhere—for example to the hypothetical intentions of a reasonable legislator—is purposivism distinct from intentionalism or textualism.

2. Garrett uses purposivism as a rubric to discuss a number of theories of statutory interpretation, including Easterbrook's view that judges should interpret statutes in accordance with the terms of the legislative deal between interest groups and Macey's view that, where possible, statutes should be interpreted in a public-regarding way to undermine and discourage special interest deals. Others might classify such theories as economic approaches, because they are derived from a view of legislators as rational actors who respond to interest group pressures.

3. Another approach to statutory interpretation is sometimes called the pragmatic approach. This approach starts from the position that statutory text and legislative history are frequently ambiguous and thus that statutes have gaps that judges must fill as best they can. In filling those gaps, some pragmatists assert that judges should take into account the real-life consequences of various interpretations. Other pragmatists suggest that statutory interpretation requires considerations of multiple values— including what the text says, what members of Congress intended, and what would make the most sense in current conditions.

4. In thinking about statutory interpretation, it is helpful to take both an *ex ante* and an *ex post* perspective. The *ex post* perspective is the most familiar. It asks, "what interpretation is most fair or just to the parties to the case"? The *ex ante* perspective asks, which approach would give parties the best incentives for future cases? Often, the *ex ante* approach asks what interpretation would give citizens, who are subject to the law, the best incentives. For example, in the context of a torts case, the *ex ante* approach would ask what rule would give the parties the best incentives to avoid accidents in the future. For some theories of statutory interpretation, the relevant question is what method of statutory interpretation gives lawmakers the best incentives when drafting statutes. For example, textualists adopt an *ex ante* perspective when they argue that textualism provides "incentives for Congress to legislate more precisely and clearly, thereby avoiding the need for extensive interpretation." Similarly, Macey take an *ex ante* perspective when he argues that interpreting ambiguous statutes in public-regarding ways will discourage special-interest legislation. McNollgast's pivotal legislator variant of intentionalism also takes an *ex ante* perspective when it argues that only lawmakers can only assemble the coalitions necessary to pass legislation in the first place if pivotal legislators are confident that courts will honor their intentions.

**Questions**

1. Which method of statutory interpretation is most consistent with democracy?

2. Which method of statutory interpretation is most likely to result in interpretations that promote social goals such as justice, efficiency, or fairness?

3. Which method of statutory interpretation is most likely to constrain judges so that a judge's ideology or policy preferences have the least effect on judicial decisions?

4. Which method of statutory interpretation is likely to give citizens and corporations the clearest notice of their obligations?

5. Which method of statutory interpretation is likely to give legislators the best incentives to draft statutes carefully?

6. The readings refer to a theory of statutory interpretation which states that the relevant intentions are those of "pivotal lawmakers whose support is necessary for enactment." Consider the following drastic simplification of the debate over Title VII. Congress was composed of three groups. 35% were Southern Democrats. They were racists who opposed equal treatment for African Americans. They would vote against any civil rights bill. 35% were Northern Democrats. They were ardent advocates of civil rights, who favored not only equal treatment, but affirmative action, quotas, and other means of swiftly integrating African Americans into the mainstream of American life. Although ardent advocates of civil rights would favor a bill which allowed affirmative action, they would support a bill which required only equal treatment. 30% were Republicans. They were moderates who favored color-blind decisionmaking and equality of opportunity, but who opposed (and would vote against any bill that permitted or required) affirmative action or quotas. In this situation, the pivotal lawmakers are the Republican moderates. So, according to the theory that statutes should be interpreted in accordance with the intentions of the pivotal lawmakers, Title VII should have been interpreted to forbid affirmative in *United Steelworkers* v, *Weber*. Does it make sense to interpret Title VII this way, even though most of those who supported the statute would have favored a contrary outcome?

7. In what way is the simplification of the debate over Title VII in question 6 accurate? In what way is it inaccurate?

8. Which method of statutory interpretation would you adopt if you were a judge?