

Brooklyn Law Review

Volume 76

Issue 3

SYMPOSIUM:

Statutory Interpretation: How Much Work Does
Language Do?

Article 5

2011

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Recommended Citation

Eric Lane, *The Real Politik of Writing and Reading Statutes*, 76 Brook. L. Rev. (2011).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol76/iss3/5>

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The Real Politik of Writing and Reading Statutes

Eric Lane[†]

INTRODUCTION

How much work does language do in the interpretation of statutes? This symposium question returns me¹ to the persistent argument of Justice Antonin Scalia, now entering his twenty-fifth year on the Supreme Court, that statutory language should and can do almost all of the work for courts in statutory interpretation cases. I agree, constitutionally, with the “should.” But with respect to the “can”—as Part II of this article explores through the voices of selected judges—in most appellate court cases statutory language cannot provide the ergs needed to answer the litigated question, although courts often wish that it would provide further guidance.

I. THE SCALIA DOCTRINE OF LIMITING CONGRESSIONAL REACH

Justice Scalia ascended to the Court under the banner of *textualism*—an interpretive theory that demands that judges follow the law as it is written. This alone should have been no head-turner. The Constitution commands such loyalty from its judges. If the language of a statute provides a clear answer to a question or questions presented in a case, “the sole function of the courts is to enforce it according to its terms.”² And in the

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¹ See Abner J. Mikva & Eric Lane, *The Muzak of Justice Scalia’s Revolutionary Call to Read Unclear Statutes Narrowly*, 53 SMU L. REV. 121 (2000).

² *Caminetti v. United States*, 242 U.S. 470, 485 (1917); see also RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 265 (1990) (a statute is “a command issued by a superior body (the legislature) to a subordinate body (the judiciary)”).

overwhelming number of cases in which the meaning of the questioned statute is clear, the courts do apply the statutes as written. But the appellate courts' commitment to the application of a statute's clear meaning (the "clear" or "plain meaning" rule) is more of a rhetorical starting point than a reality. Cases that reach the Supreme Court or the states' highest courts typically involve complex questions of statutory interpretation that courts cannot always resolve by examining a statute's plain meaning.

Sometimes, even when a statute's language is clear, judges will ignore it. The primary reason for judges' dismissal of plain statutory language is almost always their distaste for the consequences of applying a statute as it was written. Often, a court is sympathetic (or unsympathetic) to the plight of a particular party or to the particular policy expressed in a statute. But for the most part, courts do not nakedly announce their disobedience to the law.³ They do not want to confess their constitutional sins. Rather, they dress up their decision in language intended to convince the public that, despite the particular law's clear command, the legislature never intended its application in this particular case.

Of course, this is a construct. If the language of a statute is clear, a court should never find that extratextual evidence is sufficient to support a contrary statutory meaning. But the Court has not always remained faithful to this principle. *Holy Trinity Church v. United States*⁴ is an archetypal example of judicial disregard for clear statutory language. In *Holy Trinity Church*, the Court decided whether a church that imported a foreign minister violated a statute that

³ Sometimes a judge will actually acknowledge that his refusal to apply the clear language of a statute is based on his or her own view of what is right. For example, in dissent in *United States v. Marshall*, Judge Richard Posner anchored his view in "natural law" or judicial authority "to enrich positive law with the moral values and practical concerns of civilized society." 908 F.2d 1312, 1335 (7th Cir. 1990) (Posner, J., dissenting). In *Marshall* the question was whether a statute establishing penalties for the distribution of "10 grams or more of a mixture or a substance containing a detectable amount of . . . LSD" really meant what it said. See 21 U.S.C. § 841(b)(1)(A)(v)-(B)(v) (2006). The problem for Posner was that the manner by which LSD was retailed might result in retailers being punished more seriously than suppliers or wholesalers. To Posner, this result was so unfair that he could not attribute it to any rational congressional intent, apparently never even imagining that Congress may have in fact wanted to strategically punish the lower, and more visible, end of the LSD marketing chain to reduce demand. What makes this case also very interesting is that only a year earlier in *United States v. Rose*, 881 F.2d 386, 387 (7th Cir. 1989), Judge Posner had applied the plain meaning of the same statute.

⁴ 143 U.S. 457 (1891).

prohibited U.S. employers from paying for or assisting in the importation of foreigners “to perform labor or service of any kind” in U.S. territory.⁵ Although the clear language of the statute indicated that Holy Trinity Church was liable for importing the English minister, the Court could not bring itself to find that Congress had meant to include a minister within the definition of foreigners imported “to perform . . . service of any kind.” Reading the statute through the screen of its own Christian vision of America, the Court found this outcome distasteful and absurd, and rationalized its disregard of the statute’s clear language under the guise of preserving the statute’s legislative intent: “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.”⁶ The Court did not even consider the possibility that, although Congress clearly did not intend to restrict Christianity in the United States, it explicitly intended to provide an incentive for the employment of American citizens, including American ministers. Justice Scalia rightly characterizes this decision as “nothing but an invitation to judicial lawmaking.”⁷

Despite notable cases like *Holy Trinity Church*, courts have generally honored their duty to apply clear statutory language as it was written, even prior to Scalia’s appointment to the bench. Yet, at the time of Scalia’s first judicial post in 1982, public perception, fueled by Ronald Reagan’s first presidential campaign in 1980, fomented the belief that judicial activism was a widespread problem.⁸ These exaggerated claims of pervasive judicial lawmaking were, to a large extent, referring to the Court’s 1979 decision in *United Steelworkers of America, AFL-CIO-CLC v. Weber (United Steelworkers)*.⁹ In *United Steelworkers*, the Court held that the Civil Rights Act of 1964 allowed a racially based job preference against a white person. The majority claimed that the antidiscriminatory

⁵ *Id.* at 458.

⁶ *Id.* at 459.

⁷ ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 21 (1998).

⁸ See Sondra Hemeryck et al., Comment, *Reconstruction, Deconstruction and Legislative Response: The 1988 Supreme Court Term*, 25 HARV. C.R.-C.L. L. REV. 475, 501-02 (1990); Emmanuel O. Iheukwumere & Philip C. Aka, *Title VII, Affirmative Action, and the March Toward Color-Blind Jurisprudence*, 11 TEMP. POL. & CIV. RTS. L. REV. 1, 8-10 (2001).

⁹ 443 U.S. 193, 197 (1979).

purpose of the Civil Rights Act was limited to protecting minorities, and that this perceived limitation trumped the statute's broad, inclusive, and clear anti-discriminatory language, because the complainant in *United Steelworkers* was white.¹⁰ The Court also disregarded the legislative record of the Civil Rights Act of 1964, which evidenced a strong legislative commitment against affirmative action.¹¹ This decision undermined the fundamental compromises that undergirded the passage of the Civil Rights Act and partially fueled the explosion of social opposition to affirmative action that helped blast Reagan into office in 1980.¹²

For the type of judicial overreaching exemplified by *United Steelworkers*, Scalia's commitment to textualism was and is a corrective approach. And over the years, it has had the positive effect of limiting courts' occasional desire to reach beyond clear statutory text.¹³ But it is not Scalia's textualism that has made him unique. Rather, it is his persistent refusal to use legislative history as a source for statutory meaning in situations where the statute itself does not provide a clear answer to the question before the Court. The litany of disavowals is familiar to even casual readers of the Court's opinions: "I join the opinion of the Court [or the dissent], excluding, *of course*, its resort . . . to what was said by individual legislators and committees of legislators . . ." ¹⁴ Or, as he declared in his concurrence in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, "[i]t is utterly impossible to discern what the Members of Congress intended except to the extent that intent is manifested in the *only* remnant of 'history' that bears the unanimous endorsement of the majority in each House: the text of the enrolled bill that became law."¹⁵

Scalia's stated objection to legislative history is not the product of the entire legislature, but rather the product of a lesser body within the legislature (committees) or even of

¹⁰ *Id.* at 201-04.

¹¹ *See id.* at 238 (Rehnquist, J., dissenting) (quoting 110 CONG. REC. 6564 (1964)) ("Senator Kuchel emphasized[,] . . . 'Employers and labor organizations could not discriminate *in favor of or against* a person because of his race, his religion, or his national origin. In such matters . . . the bill now before us . . . is color blind.'").

¹² *See* Hemeryck et al., *supra* note 8, at 501-02; Iheukwumere, *supra* note 8, at 8-10.

¹³ *See, e.g.,* Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205.

¹⁴ *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 344 (1999) (Scalia, J., concurring) (emphasis added).

¹⁵ 130 S. Ct. 1396, 1411 (2010) (Scalia, J., concurring).

individual members of Congress.¹⁶ First, this reliance on committee reports offends his view of the Constitution's Presentment Clause and of Article I generally.¹⁷ Second, Scalia complains that committee reports, overall the most probative evidence of legislative meaning short of statutory language, are unread by members of Congress and are the products of their unsupervised staff.¹⁸ His basis for this determination is hard to find. In fact, rather than even look for empirical support, he effectively takes judicial notice of the verity of his own conclusion:

As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases [in this particular example] were inserted, at best by a committee staff member on his or her own initiative, and at worst . . . at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform Members of Congress . . . but rather to influence judicial construction.¹⁹

Both criticisms are wrong. Constitutionally, Article I is not a barrier to the use of legislative history in cases of statutory interpretation. As Professor James Brudney has rightly written,

Article I of the Constitution authorizes Congress to organize itself in fulfillment of its legislative mission and requires Congress to publish a record of its legislative proceedings. . . . [D]ating from the earliest Congresses, were the determination to favor detailed public reporting of floor debates and the decision to create permanent standing committees that produced oral and then written committee reports. Taken together, these innovations led to the development of legislative history as a means of informing and persuading members of Congress regarding the bills on which they were to vote.²⁰

Scalia's second criticism of committee reports is strange, particularly given the absence of any evidence that it is true. While statistically it must be assumed that there are instances in which legislative staffers insert unauthorized material into legislative committee reports, as both Professors Victoria Nourse and James Brudney (both Senate staff alumni) reported at this symposium, such conduct is rare and would

¹⁶ See SCALIA, *supra* note 7, at 35.

¹⁷ See *id.*

¹⁸ *Blanchard v. Bergeron*, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring).

¹⁹ *Id.*

²⁰ James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CAL. L. REV. 1199, 1200-01 (2010) (footnotes omitted).

most likely end in the offender's termination. On this front, perhaps we would all be better served by Justice Scalia's reaction to Judge Posner's informed observation about judges delegating too much authority to law clerks.²¹

The use of probative legislative history—legislative history on which Congress relies to establish meaning²²—is both constitutional and, in Justice Stephen Breyer's words, "natural." "Legislative history helps a court understand the context and purpose of a statute."²³

Legislative history also limits judicial law making (although Justice Scalia would disagree). Courts use legislative history to inform their understanding of statutes' intended legislative meanings—a process that enhances, rather than inhibits, judicial deference to Congress's law-making authority. The choice before courts in such cases is not between clear text and probative legislative history. Rather, the choice is almost always between probative legislative history and "whatever." For Scalia, the "whatever" is either selected canons of statutory construction (including one principle that Abner Mikva and I characterized some years ago as "ambiguous statutes should be read narrowly"), or a form of the "reasonable man test," through which he hopes to find a meaning that is "reasonable, consistent, and faithful to [the statute's] apparent purpose."²⁴ Of course, legislative history cannot be employed in this effort. Scalia characterizes this approach as a theory of statutory construction that gives meaning to the phrase "a government of laws."²⁵ But, in practice, this characterization is false.

Rather, Justice Scalia's aversion to the use of legislative history is, to paraphrase Judge Posner, more political than epistemological, more about freedom from "the fetters of text and legislative intent in applying statutes"²⁶ than about finding the meaning of a statute. His goal is not merely to find the meaning of a statute in a particular case; more broadly, it is to systematically limit the legislative reach of statutes. It is the latter that necessitates Scalia's canon of reading statutes narrowly. The review of cases that Mikva and I published in

²¹ RICHARD A. POSNER, *THE FEDERAL COURTS* 225 (1985).

²² See generally Tiefer, *supra* note 13; Mikva & Lane, *supra* note 1, at 848.

²³ Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848 (1992).

²⁴ *Blanchard v. Bergeron*, 489 U.S. 87, 99 (1989).

²⁵ SCALIA, *supra* note 7, at 17.

²⁶ RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 271 (1990).

1999 evidence this point,²⁷ and my review of cases from the Court's last term, for the most part, confirms this perspective.

II. THE REAL WORK OF READING STATUTES

Most judges do not think that their work is so revolutionary. Years ago, I had the opportunity to explore this observation. The occasion was a panel that I was asked to plan and moderate for the U.S. Judicial Conference for the District of New Jersey.²⁸ Among the panelists were former (then current) governor of New Jersey and former member of Congress, James Florio; circuit court Judge Robert Cowen; U.S. District Court judges for the District New Jersey Nicholas Politan and Stephen Orlofsky; prominent practitioners Fred Becker and Michael Cole; and finally, former member of Congress, former chief judge of the U.S. Court of Appeals for the D.C. Circuit, and former counsel to the President of the United States, Abner J. Mikva.

I recount below much of the relevant exchange to show the inapplicability of Scalia's theory of interpretation to unclear statutes, and to show what judges actually do to interpret statutes in the context of a particular case.

The topic for the panel was the drafting and application of unclear statutes. For this topic, I chose section 703 of Title VII of the Civil Rights Act of 1964 and the problem of determining which party has the burden of persuasion in disparate impact cases in which defendants assert the defense of business justification. The statute was silent on this point, and that silence created a serious litigation problem for potential plaintiffs. As Mr. Cole noted, "if you place the burden on the plaintiff we might as well not have adopted this statute because nothing will change. It is an impossible burden."²⁹ In fact, this concern was so prevalent that the Supreme Court addressed it twice. The first time, in *Griggs v. Duke Power Co.*,³⁰ the Court placed the burden on employers. But eighteen years later, in *Wards Cove Packing Co. v. Atonio*,³¹ a far more

²⁷ See generally Mikva & Lane, *supra* note 1.

²⁸ The Twenty-First Annual United States Judicial Conference for the District of New Jersey, Mar. 13, 1997 [hereinafter Conference Transcript].

²⁹ *Id.* at 42.

³⁰ 401 U.S. 424 (1971).

³¹ 490 U.S. 642 (1989). This decision was almost immediately reversed by the Congress through the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

conservative Court reversed *Griggs* by placing the burden of proof on the plaintiff employees.

Just the mention of these two cases to the panel elicited an interesting exchange between Judges Mikva and Cowen regarding the role of the Supreme Court. Mikva saw the reversal as “cardinal sin” of statutory interpretation—judicial “policymaking in the worse sense of the word.”³² But Judge Cowen, for better or worse, believed that the role of the Supreme Court was fundamentally different, which was evidenced when he replied, “I want to slightly disagree with you Abner. . . . We have to recognize that the Supreme Court is really not a court. . . . It is a policy and social institution They are not, like a District Court or a Court of Appeals, bound by what they conceive to be the law.”³³

At the panel, the first question asked was why Congress would fail to address such an important issue. Florio responded that, while sometimes omissions were a matter of oversight, in this case it was more likely “a conscious policy by the legislature to make sure that something is ambiguous, because failure to have that ambiguity would result in no legislative outcome.”³⁴ Mikva was blunter. He believed that for Congress, “[t]he easiest answer was to punt.”³⁵ He later added a basic principle of legislative logic to his analysis—“a half a loaf is always better than nothing.”³⁶

Judges, at least those in this group, do not appreciate this logic. Ambiguity shifts the work of policy making to the courts, no matter how much they try to gussy up that fact. It is now up to the judge to decide the breadth of the statute in a particular case. And there are of course consequences for the losing party. Reflecting on that point, Judge Politan argued the following in response to the explanation provided by Florio and Mikva:

[I] think they should not punt. This is not a game of punting. It is not a game of positioning. It is a game of discharging your legislative responsibility no matter how hard it may be. You have to respond to the people who vote for you. And don't do that and switch it around,

³² Conference Transcript, *supra* note 28, at 44.

³³ *Id.* at 45.

³⁴ *Id.* at 27.

³⁵ *Id.* at 28.

³⁶ *Id.* at 61.

punt it, throw it to the judiciary and then get up in Congress and say, they are legislating in the judiciary, they shouldn't be doing that.³⁷

Judge Politan's frustration perhaps could be eased if he had a better understanding of the legislative process. As was well established in Professor Nourse and Schacter's article, *The Politics of Legislative Drafting: A Congressional Case Study*,³⁸ legislators and their staff have different missions, and operate under far different pressures and circumstances than judges. The most obvious difference is that, for a bill to become a law, it must have the support of at least a majority of members of each house—often a supermajority in the Senate—and the support of the President. As a result, the last thing that legislators and legislative staffers are worried about as they try to build supportive coalitions is whether a court will have a hard time applying the statute in the future. It is unknown whether Congress omitted specific regulation of the burden of proof for the business justification defense due to lack of foresight or as part of a legislative compromise. But from a legislative perspective, it was the enactment of the Civil Rights Act of 1964 that mattered, regardless of the potential problems that the courts or Congress may have later confronted.

But judicial annoyance over legislative drafting does not remove a court's duty to resolve the issue. The court has to make a decision. It cannot remand the case to the legislature or, as Judge Easterbrook has suggested, simply ignore the unclear statute.³⁹ And to provide such answers, legislative history was the first place that at least two judicial members of the panel said they would look. In particular, Judge Orlofsky stated,

I think that you have [to] sift through the history, and there is . . . good legislative and bad legislative history. The bad history is the kind . . . that you see on C-Span where someone is speaking to an empty chamber and has carte blanche to revise his or her remarks to say anything at all. Good legislative history or better legislative

³⁷ *Id.* at 48.

³⁸ Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 575-76 (2002).

³⁹ Frank H. Easterbrook, *Statutes Domain*, 50 U. CHI. L. REV. 533 (1983). As Judge Politan aptly noted at the conference, "you can't do that because you have litigators in front of you, you have people who want [and have a right to] answers to their problem." Conference Transcript, *supra* note 28, at 34.

history . . . is to look at the sponsor of a bill, or some of the major players who are involved in passing a particular bill⁴⁰

For Politan, the task was similar: “to sift through it, determine what is hot stuff, what is good stuff, what is bad stuff . . . and then make a judgment.”⁴¹

Without legislative history, the judges saw the job for what it is: policy making cabined by the alternative choices presented in the cases. Judge Orlofsky did make reference to those nasty little judicial constructs of legislative intent known as “canons of statutory construction,” but quickly labeled them as a “dangerous approach,” because each side in the battle usually can find an equal number of canons to support its position.⁴² But ultimately Judge Orlofsky concluded that his role was to make a “judgment call.”⁴³ Judge Politan had a broader view of the role of legislative history in the process of statutory interpretation: “You bring to that decision your own background, your own thoughts about the matter, and in essence perhaps you do put yourselves in the position of being the super legislators. Somebody had to do it. The buck stops with the judiciary.”⁴⁴ And as for Judge Cowan, the senior judge on the panel, he reflected that Scalia’s textualism had informed his own decision-making process: “In most legislative interpretation [cases] I’m pretty much a follower of Justice Scalia You look at the text and decide what to do.”⁴⁵ But Judge Cowan noted that, in some cases, judges are forced into the role of “playing God.”⁴⁶ And by “playing God,” Judge Cowan meant that a judge’s primary objective should be to reach a just decision:

I think I have to be brutally honest with you and say the unspeakable, that I would decide the case based on what I perceive to be the most just manner of resolving the matter before me, and that all of these tools of legislative history, canons and so forth, would merely be techniques that I would employ to write a decision. . . . I think that’s what Courts do and I think we have to say it as it is, and that’s how I would resolve the matter.⁴⁷

⁴⁰ Conference Transcript, *supra* note 28, at 37.

⁴¹ *Id.* at 35.

⁴² *Id.* at 38.

⁴³ *Id.* at 38.

⁴⁴ *Id.* at 35.

⁴⁵ *Id.* at 59.

⁴⁶ *Id.* at 59-60.

⁴⁷ *Id.* at 43-44.

The conversation then turned to the Civil Rights Act of 1991, through which Congress explicitly overruled the *Ward's Cove* decision and placed the burden of persuasion for the business defense on employers.

The 1991 provision led almost immediately to litigation over whether the new law would apply retroactively to plaintiffs with pending claims. On this point, the statute was silent. The Senate had discussed the retroactivity of the law, but it could not reach an agreement.⁴⁸ Ultimately, the Senate reached an impasse over the legislation on this timing issue and agreed to punt.⁴⁹ As a Senate staff member remarked, "We didn't have the votes on the left [for retroactivity]. . . . The deal was cut to . . . leave it to the courts to pound out the issue."⁵⁰ And that is exactly what the courts did, until the matter finally reached the Supreme Court in *Landgraf v. USI Film Products*,⁵¹ in which the Court decided against retroactivity on the basis of a canon that required explicit statutory language for retroactive application.

I asked each of the judges at the conference how they would have decided this case. Politan and Cowen voted against retroactivity; Orlofsky favored it.

CONCLUSION

What I think we can learn from the above exchanges is that it is impossible to establish a law-based rule, in the way Scalia suggests, for the interpretation of unclear statutes. While clear language should always govern, in most cases, the language of the statute is not clear. Unclear statutes inevitably place a policy decision on the judiciary. Probative legislative history reduces that burden and, most importantly, reflects legislative meaning. Without legislative history, it is always a judgment call. The "intelligible theory" that Scalia champions just doesn't cut it. That is what each of the judges above tells us in describing their personal experiences with statutory interpretation.

⁴⁸ *Id.* at 50.

⁴⁹ *Id.*

⁵⁰ *Dispute over Retroactivity of Civil Rights Act Stems from Legislative History, Hill Staffer Says*, DAILY LAB. REP. (BNA) NO. 14, Jan. 22, 1992, at A-13.

⁵¹ 511 U.S. 244, 286 (1994).