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A Matter of Interpretation

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FEDERAL COURTS AND THE LAW

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AN ESSAY BY

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Hence the technique—or the art, or the game—of "distinguishing" earlier cases. It is an art or a game, rather than a science, because what constitutes the "holding" of an earlier case is not well defined and can be adjusted to suit the occasion. At its broadest, the holding of a case can be said to be the analytical principle that produced the judgment—in *Hadley* v. *Baxendale*, for example, the principle that damages for breach of contract must be foreseeable. In the narrowest sense, however (and courts will squint narrowly when they wish to avoid an earlier decision), the holding of a case cannot go beyond the facts that were before the court. Assume, for example, that a painter contracts with me to paint my house green and paints it instead a god-awful puce. And assume that not I, but my *neighbor*, sues the painter for this breach of contract. The court would dismiss the suit on the ground that (in legal terminology) there was no "privity of contract": the contract was between the painter and *me*, not between the painter and my neighbor.[3] Assume, however, a later case in which a company contracts with me to repair my home computer; it does a bad job, and as a consequence my wife loses valuable files she has stored in the computer. *She* sues the computer company. Now the broad rationale of the earlier case (no suit will lie where there is no privity of contract) would dictate dismissal of this complaint as well. But a good common-law lawyer would argue, and some good common-law judges have held, that that rationale does not extend to this *new* fact situation, in which the breach of a contract relating to something used in the home harms a family member, though not the one who made the contract.[4] The earlier case, in other words, is "distinguishable."

It should be apparent that by reason of the doctrine of *stare decisis*, as limited by the principle I have just described, the common law grew in a peculiar fashion—rather like a Scrabble board. No rule of decision previously announced could be *erased*, but qualifications could be *added* to it. The first case lays

[3] *See, e.g.*, Monahan v. Town of Methuen, 558 N.E. 2d 951, 957 (Mass. 1990).

[4] *See, e.g.*, Grodstein v. McGivern, 154 A. 794 (Pa. 1931).

on the board: "No liability for breach of contractual duty without privity"; the next player adds "unless injured party is member of household." And the game continues.

As I have described, this system of making law by judicial opinion, and making law by distinguishing earlier cases, is what every American law student, every newborn American lawyer, first sees when he opens his eyes. And the impression remains for life. His image of the great judge—the Holmes, the Cardozo—is the man (or woman) who has the intelligence to discern the best rule of law for the case at hand and then the skill to perform the broken-field running through earlier cases that leaves him free to impose that rule: distinguishing one prior case on the left, straight-arming another one on the right, high-stepping away from another precedent about to tackle him from the rear, until (bravo!) he reaches the goal—good law. That image of the great judge remains with the former law student when he himself becomes a judge, and thus the common-law tradition is passed on.

DEMOCRATIC LEGISLATION

All of this would be an unqualified good, were it not for a trend in government that has developed in recent centuries, called democracy. In most countries, judges are no longer agents of the king, for there are no kings. In England, I suppose they can be regarded as in a sense agents of the legislature, since the Supreme Court of England is theoretically the House of Lords. That was once the system in the American colonies as well; the legislature of Massachusetts is still honorifically called the General Court of Massachusetts. But the highest body of Massachusetts judges is called the Supreme Judicial Court, because at about the time of the founding of our federal republic this country embraced the governmental principle of separation of powers.[5] That doctrine is praised, as the cornerstone of the

[5] *See* Plaut v. Spendthrift Farms, Inc., 115 S. Ct. 1447, 1453–56 (1995).

proposed federal Constitution, in *The Federalist* No. 47. Consider the compatibility of what Madison says in that number with the ancient system of lawmaking by judges. Madison quotes Montesquieu (approvingly) as follows: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul, for *the judge* would then be *the legislator*."[6] I do not suggest that Madison was saying that common-law lawmaking violated the separation of powers. He wrote in an era when the prevailing image of the common law was that of a preexisting body of rules, uniform throughout the nation (rather than different from state to state), that judges merely "discovered" rather than created. It is only in this century, with the rise of legal realism, that we came to acknowledge that judges in fact "make" the common law, and that each state has its own.

I do suggest, however, that once we have taken this realistic view of what common-law courts do, the uncomfortable relationship of common-law lawmaking to democracy (if not to the technical doctrine of the separation of powers) becomes apparent. Indeed, that was evident to many even before legal realism carried the day. It was one of the principal motivations behind the law-codification movement of the nineteenth century, associated most prominently with the name of David Dudley Field, but espoused by many other avid reformers as well. Consider what one of them, Robert Rantoul, had to say in a Fourth-of-July address in Scituate, Massachusetts, in 1836:

> Judge-made law is ex post facto law, and therefore unjust. An act is not forbidden by the statute law, but it becomes void by judicial construction. The legislature could not effect this, for the Constitution forbids it. The judiciary shall not usurp legislative power, says the Bill of Rights: yet it not only usurps, but runs riot beyond the confines of legislative power.

[6] *The Federalist* No. 47, at 326 (James Madison) (Jacob E. Cooke ed., 1961) (emphasis in original). The reference is to Montesquieu, 1 *The Spirit of the Laws* 152 (Thomas Nugent trans., Hafner Pub. Co., N.Y. 1949).

> Judge-made law is special legislation. The judge is human, and feels the bias which the coloring of the particular case gives. If he wishes to decide the next case differently, he has only to distinguish, and thereby make a new law. The legislature must act on general views, and prescribe at once for a whole class of cases.[7]

This is just by way of getting warmed up. Rantoul continues, after observing that the common law "has been called the perfection of human reason":

> The Common Law is the perfection of human reason,—just as alcohol is the perfection of sugar. The subtle spirit of the Common Law is reason double distilled, till what was wholesome and nutritive becomes rank poison. Reason is sweet and pleasant to the unsophisticated intellect; but this sublimated perversion of reason bewilders, and perplexes, and plunges its victims into mazes of error.
>
> The judge makes law, by extorting from precedents something which they do not contain. He extends his precedents, which were themselves the extension of others, till, by this accommodating principle, a whole system of law is built up without the authority or interference of the legislator.[8]

The nineteenth-century codification movement espoused by Rantoul and Field was generally opposed by the bar, and hence did not achieve substantial success, except in one field: civil procedure, the law governing the trial of civil cases.[9] (I have always found it curious, by the way, that the only field in which lawyers and judges were willing to abandon judicial lawmaking

[7] Robert Rantoul, Oration at Scituate (July 4, 1836), *in* Kermit L. Hall et al., *American Legal History* 317, 317–18 (1991).

[8] *Id.* at 318.

[9] The country's first major code of civil procedure, known as the Field Code (after David Dudley Field, who played a major role in its enactment), was passed in New York in 1848. By the end of the nineteenth century, similar codes had been adopted in many states. *See* Lawrence M. Friedman, *A History of American Law* 340–47 (1973).

was a field important to nobody except litigants, lawyers, and judges. Civil procedure used to be the *only* statutory course taught in first-year law school.) Today, generally speaking, the old private-law fields—contracts, torts, property, trusts and estates, family law—remain firmly within the control of state common-law courts.[10] Indeed, it is probably true that in these fields judicial lawmaking can be more freewheeling than ever, since the doctrine of *stare decisis* has appreciably eroded. Prior decisions that even the cleverest mind cannot distinguish can nowadays simply be overruled.

My point in all of this is not that the common law should be scraped away as a barnacle on the hull of democracy. I am content to leave the common law, and the process of developing the common law, where it is. It has proven to be a good method of developing the law in many fields—and perhaps the very best method. An argument can be made that development of the bulk of private law by judges (a natural aristocracy, as Madison accurately portrayed them)[11] is a desirable limitation upon popular democracy. Or as the point was more delicately put in the late nineteenth century by James C. Carter of New York, one of the ardent opponents of Field's codification projects, "the question is, shall this growth, development and improvement of the law remain under the guidance of men selected by the people on account of their special qualifications for the work" (i.e., judges) or "be transferred to a numerous legislative body, dis-

[10] The principal exception to this statement consists of so-called Uniform Laws, statutes enacted in virtually identical form by all or a large majority of state legislatures, in an effort to achieve nationwide uniformity with respect to certain aspects of some common-law fields. *See, e.g.*, Uniform Commercial Code, 1 U.L.A. 5 (1989); Uniform Marriage and Divorce Act 9A U.L.A. 156 (1987); Uniform Consumer Credit Code, 7A U.L.A. 17 (1985).

[11] "The [members of the judiciary department], by the mode of their appointment, as well as by the nature and permanency of it, are too far removed from the people to share much in their prepossessions." *The Federalist* No. 49, at 341 (Jacob E. Cooke ed., 1961).

qualified by the nature of their duties for the discharge of this supreme function?"[12]

But though I have no quarrel with the common law and its process, I do question whether the *attitude* of the common-law judge—the mind-set that asks, "What is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded?"—is appropriate for most of the work that I do, and much of the work that state judges do. We live in an age of legislation, and most new law is statutory law. As one legal historian has put it, in modern times "the main business of government, and therefore of law, [is] legislative and executive. . . . Even private law, so-called, [has been] turning statutory. The lion's share of the norms and rules that actually govern[] the country [come] out of Congress and the legislatures. . . . The rules of the countless administrative agencies [are] themselves an important, even crucial, source of law."[13] This is particularly true in the federal courts, where, with a qualification so small it does not bear mentioning, there is no such thing as common law. Every issue of law resolved by a federal judge involves interpretation of text—the text of a regulation, or of a statute, or of the Constitution. Let me put the Constitution to one side for the time being, since many believe that that document is in effect a charter for judges to develop an evolving common law of freedom of speech, of privacy rights, and the like. I think that is wrong—indeed, as I shall discuss below, I think it frustrates the whole purpose of a written constitution. But we need not pause to debate that point now, since a very small proportion of judges' work is constitutional interpretation in any event. (Even in the Supreme Court, I would estimate that well less than a fifth of the issues we confront are constitutional issues—and probably less than a twentieth if you exclude criminal-law cases.) By far the greatest part of what I

[12] James C. Carter, *The Proposed Codification of Our Common Law* 87 (New York: Evening Post Printing Office 1884).

[13] Friedman, *supra* note 9, at 590.

and all federal judges do is to interpret the meaning of federal statutes and federal agency regulations. Thus the subject of statutory interpretation deserves study and attention in its own right, as the principal business of judges and (hence) lawyers. It will not do to treat the enterprise as simply an inconvenient modern add-on to the judge's primary role of common-law lawmaker. Indeed, attacking the enterprise with the Mr. Fix-it mentality of the common-law judge is a sure recipe for incompetence and usurpation.

THE SCIENCE OF STATUTORY INTERPRETATION

The state of the science of statutory interpretation in American law is accurately described by a prominent treatise on the legal process as follows:

> Do not expect anybody's theory of statutory interpretation, whether it is your own or somebody else's, to be an accurate statement of what courts actually do with statutes. The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.[14]

Surely this is a sad commentary: We American judges have no intelligible theory of what we do most.

Even sadder, however, is the fact that the American bar and American legal education, by and large, are unconcerned with the fact that we have no intelligible theory. Whereas legal scholarship has been at pains to rationalize the common law—to devise the *best* rules governing contracts, torts, and so forth—it has been seemingly agnostic as to whether there is even any such thing as good or bad rules of statutory interpretation. There are few law-school courses on the subject, and certainly no required

[14] Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process* 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

ones; the science of interpretation (if it is a science) is left to be picked up piecemeal, through the reading of cases (good and bad) in substantive fields of law that happen to involve statutes, such as securities law, natural resources law, and employment law.

There is to my knowledge only one treatise on statutory interpretation that purports to treat the subject in a systematic and comprehensive fashion—compared with about six or so on the substantive field of contracts alone. That treatise is Sutherland's *Statutes and Statutory Construction*, first published in 1891, and updated by various editors since, now embracing some eight volumes. As its size alone indicates, it is one of those law books that functions primarily not as a teacher or adviser, but as a litigator's research tool and expert witness—to say, and to lead you to cases that say, why the statute should be interpreted the way your client wants. Despite the fact that statutory interpretation has increased enormously in importance, it is one of the few fields where we have a drought rather than a glut of treatises—fewer than we had fifty years ago, and many fewer than a century ago. The last such treatise, other than Sutherland, was Professor Crawford's one-volume work, *The Construction of Statutes*, published more than half a century ago (1940). Compare that with what was available in the last quarter or so of the nineteenth century, which had, in addition to Sutherland's original 1891 treatise, a *Handbook on the Construction and Interpretation of the Laws* by Henry Campbell Black (author of *Black's Law Dictionary*), published in 1896; *A Commentary on the Interpretation of Statutes* by G. A. Endlich, published in 1888, an Americanized version of Sir Peter Maxwell's 1875 English treatise on the subject; the 1882 *Commentaries on the Written Laws and Their Interpretation* by Joel Prentiss Bishop; the 1874 second edition of Sedgwick's *A Treatise on the Rules Which Govern the Interpretation and Construction of Statutory and Constitutional Law*; and the 1871 Potter's *Dwarris on Statutes*, an Americanized edition by Platt Potter of Sir Fortunatus Dwarris's influential English work.

"INTENT OF THE LEGISLATURE"

Statutory interpretation is such a broad subject that the substance of it cannot be discussed comprehensively here. It is worth examining a few aspects, however, if only to demonstrate the great degree of confusion that prevails. We can begin at the most fundamental possible level. So utterly unformed is the American law of statutory interpretation that not only is its methodology unclear, but even its very *objective* is. Consider the basic question: What are we looking for when we construe a statute?

You will find it frequently said in judicial opinions of my court and others that the judge's objective in interpreting a statute is to give effect to "the intent of the legislature." This principle, in one form or another, goes back at least as far as Blackstone.[15] Unfortunately, it does not square with some of the (few) generally accepted concrete rules of statutory construction. One is the rule that when the text of a statute is clear, that is the end of the matter. Why should that be so, if what the legislature *intended*, rather than what it *said*, is the object of our inquiry? In selecting the words of the statute, the legislature might have misspoken. Why not permit that to be demonstrated from the floor debates? Or indeed, why not accept, as proper material for the court to consider, later explanations by the legislators—a sworn affidavit signed by the majority of each house, for example, as to what they *really* meant?

Another accepted rule of construction is that ambiguities in a newly enacted statute are to be resolved in such fashion as to make the statute, not only internally consistent, but also compatible with previously enacted laws. We simply assume, for purposes of our search for "intent," that the enacting legislature was aware of all those other laws. Well of course that is a fiction,

[15] *See* 1 William Blackstone, *Commentaries on the Laws of England* 59–62, 91 (photo. reprint 1979) (1765).

and if we were really looking for the subjective intent of the enacting legislature we would more likely find it by paying attention to the text (and legislative history) of the new statute in isolation.

The evidence suggests that, despite frequent statements to the contrary, we do not really look for subjective legislative intent. We look for a sort of "objectified" intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*. As Bishop's old treatise nicely put it, elaborating upon the usual formulation: "[T]he primary object of all rules for interpreting statutes is to ascertain the legislative intent; *or, exactly, the meaning which the subject is authorized to understand the legislature intended.*"[16] And the reason we adopt this objectified version is, I think, that it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated. That seems to me one step worse than the trick the emperor Nero was said to engage in: posting edicts high up on the pillars, so that they could not easily be read. Government by unexpressed intent is similarly tyrannical. It is the *law* that governs, not the intent of the lawgiver. That seems to me the essence of the famous American ideal set forth in the Massachusetts constitution: A government of laws, not of men. Men may intend what they will; but it is only the laws that they enact which bind us.

In reality, however, if one accepts the principle that the object of judicial interpretation is to determine the intent of the legislature, being bound by genuine but unexpressed legislative intent rather than the law is only the *theoretical* threat. The *practical* threat is that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in

[16] Joel Prentiss Bishop, *Commentaries on the Written Laws and Their Interpretation* 57–58 (Boston: Little, Brown, & Co. 1882) (emphasis added) (citation omitted).

fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field. When you are told to decide, not on the basis of what the legislature said, but on the basis of what it *meant*, and are assured that there is no necessary connection between the two, your best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean—which is precisely how judges decide things under the common law. As Dean Landis of Harvard Law School (a believer in the search for legislative intent) put it in a 1930 article:

> [T]he gravest sins are perpetrated in the name of the intent of the legislature. Judges are rarely willing to admit their role as actual lawgivers, and such admissions as are wrung from their unwilling lips lie in the field of common and not statute law. To condone in these instances the practice of talking in terms of the intent of the legislature, as if the legislature had attributed a particular meaning to certain words, when it is apparent that the intent is that of the judge, is to condone atavistic practices too reminiscent of the medicine man.[17]

CHURCH OF THE HOLY TRINITY

To give some concrete form to the danger I warn against, let me describe what I consider to be the prototypical case involving the triumph of supposed "legislative intent" (a handy cover for judicial intent) over the text of the law. It is called *Church of the Holy Trinity* v. *United States*[18] and was decided by the Supreme Court of the United States in 1892. The Church of the Holy Trinity, located in New York City, contracted with an Englishman to

[17] James M. Landis, *A Note on "Statutory Interpretation,"* 43 Harv. L. Rev. 886, 891 (1930).

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

come over to be its rector and pastor. The United States claimed that this agreement violated a federal statute that made it unlawful for any person to "in any way assist or encourage the importation or migration of any alien . . . into the United States, . . . under contract or agreement . . . made previous to the importation or migration of such alien . . . , to perform labor or service of any kind in the United States . . . ." The Circuit Court for the Southern District of New York held the church liable for the fine that the statute provided. The Supreme Court reversed. The central portion of its reasoning was as follows:

> It must be conceded that the act of the [church] is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words labor and service both used [in the statute], but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added "of any kind;" and, further, . . . the fifth section [of the statute], which makes specific exceptions, among them professional actors, artists, lecturers, singers and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section. While there is great force to this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case. 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 Court proceeds to conclude from various extratextual indications, including even a snippet of legislative history (highly unusual in those days), that the statute was intended to apply only to *manual* labor—which renders the exceptions for actors, artists, lecturers, and singers utterly inexplicable. The Court then shifts gears and devotes the last seven pages of its opinion to a lengthy description of how and why we are a religious

[19] *Id.* at 458–59.

nation. That being so, it says, "[t]he construction invoked cannot be accepted as correct."[20] It concludes:

> It is a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute.[21]

Well of course I think that the act was within the letter of the statute, and was therefore within the statute: end of case.[22] Congress can enact foolish statutes as well as wise ones, and it is not for the courts to decide which is which and rewrite the former. I acknowledge an interpretative doctrine of what the old writers call *lapsus linguae* (slip of the tongue), and what our modern cases call "scrivener's error," where on the very face of the statute it is clear to the reader that a mistake of expression (rather than of legislative wisdom) has been made. For example, a statute may say "defendant" when only "criminal defendant" (i.e., not "civil defendant") makes sense.[23] The objective import of such a statute is clear enough, and I think it not contrary to sound principles of interpretation, in such extreme cases, to give

[20] *Id.* at 472.

[21] *Id.*

[22] End of case, that is, insofar as our subject of statutory construction is concerned. As Professor Tribe's comments suggest, see *post*, at 92, it is possible (though I think far from certain) that in its application to ministers the statute was unconstitutional. But holding a provision unconstitutional is quite different from holding that it says what it does not; constitutional doubt may validly be used to affect the interpretation of an ambiguous statute, *see* United States v. Delaware & Hudson Co., 213 U.S. 366, 407–08 (1909), but not to rewrite a clear one, *see* Moore Ice Cream Co. v. Rose, 289 U.S. 373, 379 (1933).

[23] *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989).

the totality of context precedence over a single word.[24] But to say that the legislature obviously misspoke is worlds away from saying that the legislature obviously overlegislated. *Church of the Holy Trinity* is cited to us whenever counsel wants us to ignore the narrow, deadening text of the statute, and pay attention to the life-giving legislative intent. It is nothing but an invitation to judicial lawmaking.

There are more sophisticated routes to judicial lawmaking than reliance upon unexpressed legislative intent, but they will not often be found in judicial opinions because they are too obvious a usurpation. Calling the court's desires "unexpressed legislative intent" makes everything seem all right. You will never, I promise, see in a judicial opinion the rationale for judicial lawmaking described in Guido Calabresi's book, *A Common Law for the Age of Statutes*. It says:

> [B]ecause a statute is hard to revise once it is passed, laws are governing us that would not and could not be enacted today, and . . . *some* of these laws not only could not be reenacted but also do not fit, are in some sense inconsistent with, our whole legal landscape. . . .
>
> . . . . There is an alternate way of dealing with [this] problem of legal obsolescence: granting to courts the authority to determine whether a statute is obsolete, whether in one way or another it should be consciously reviewed. At times this doctrine would approach granting to courts the authority to treat statutes as if they were no more and no less than part of the common law.[25]

Indeed. Judge Calabresi says that the courts have already, "in a common law way, . . . come to the point of exercising [the law-revising authority he favors] through fictions, subterfuges, and indirection,"[26] and he is uncertain whether they should continue

[24] *Id.* at 527 (Scalia, J., concurring).

[25] Guido Calabresi, *A Common Law for the Age of Statutes* 2 (1982) (emphasis in original).

[26] *Id.* at 117.

down that road or change course to a more forthright acknowledgment of what they are doing.

Another modern and forthright approach to according courts the power to revise statutes is set forth in Professor Eskridge's recent book, *Dynamic Statutory Interpretation*. The essence of it is acceptance of the proposition that it is proper for the judge who applies a statute to consider "'not only what the statute means abstractly, or even on the basis of legislative history, but also what it ought to mean in terms of the needs and goals of our present day society.'"[27] The law means what it ought to mean.

I agree with Judge Calabresi (and Professor Eskridge makes the same point) that many decisions can be cited which, by subterfuge, accomplish precisely what Calabresi and Eskridge and other honest nontextualists propose. As I have said, "legislative intent" divorced from text is one of those subterfuges; and as I have described, *Church of the Holy Trinity* is one of those cases. What I think is needed, however, is not rationalization of this process but abandonment of it. It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is.

It may well be that the statutory interpretation adopted by the Court in *Church of the Holy Trinity* produced a desirable result; and it may even be (though I doubt it) that it produced the unexpressed result actually intended by Congress, rather than merely the one desired by the Court. Regardless, the decision was wrong because it failed to follow the text. The text is the law, and it is the text that must be observed. I agree with Justice Holmes's remark, quoted approvingly by Justice Frankfurter in his article on the construction of statutes: "Only a day or two ago—when counsel talked of the intention of a legislature, I was indiscreet enough to say I don't care what their intention was. I

[27] William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 50 (1994) (quoting Arthur Phelps, *Factors Influencing Judges in Interpreting Statutes*, 3 Vand. L. Rev. 456, 469 (1950)).

only want to know what the words mean."[28] And I agree with Holmes's other remark, quoted approvingly by Justice Jackson: "We do not inquire what the legislature meant; we ask only what the statute means."[29]

TEXTUALISM

The philosophy of interpretation I have described above is known as textualism. In some sophisticated circles, it is considered simpleminded—"wooden," "unimaginative," "pedestrian." It is none of that. To be a textualist in good standing, one need not be too dull to perceive the broader social purposes that a statute is designed, or could be designed, to serve; or too hidebound to realize that new times require new laws. One need only hold the belief that judges have no authority to pursue those broader purposes or write those new laws.

Textualism should not be confused with so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute. I am not a strict constructionist, and no one ought to be—though better that, I suppose, than a nontextualist. A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means. The difference between textualism and strict constructionism can be seen in a case my Court decided four terms ago.[30] The statute at issue provided for an increased jail term if, "during and in relation to . . . [a] drug trafficking crime," the defendant "uses . . . a firearm." The defendant in this case had sought to purchase a quantity of cocaine; and what he had offered to give in exchange for

[28] Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 538 (1947).

[29] Oliver Wendell Holmes, *Collected Legal Papers* 207 (1920), *quoted in* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 397 (1951) (Jackson, J., concurring).

[30] Smith v. United States, 508 U.S. 223 (1993).