

ARTICLES

ON JUDICIAL DISCRETION IN STATUTORY INTERPRETATION

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Statutory interpretation is disagreeable. Judges complain about it; lawyers approach it with distaste; law students shy away. The problem has much to do with the conventional theories of statutory interpretation. According to these theories, courts are supposed to use certain interpretive methods to resolve statutory questions. Unfortunately, these methods are sometimes analytically insufficient. A conscientious judge may perform all of the conventional tasks: the judge may consider the objective meaning of the relevant text, the legislative intent reflected in the text or elsewhere, the general policies and purposes behind the legislation, the traditional canons of interpretation, the “rules of clear statement,” and so forth. On the basis of such considerations the judge may determine that the statute could be interpreted to mean either *A* or *B*, yet the judge may also determine that there is no persuasive conventional reason to prefer *A* over *B* or *B* over *A*. How, then, should the judge interpret the statute? Which interpretation should be preferred?

The conventional theories of statutory interpretation make no provision for cases of this kind. They implicitly assume that if a competent judge applies the conventional methods diligently and perceptively, the judge will be persuaded that interpretation *A* is legally preferable to interpretation *B*, or vice versa. The statute’s legal meaning will not remain in doubt. The judge will determine the statute’s meaning through a process of relentless legal reasoning grounded in conventionally prescribed considerations.

Yet refractory cases do occur. The conventional methods of statutory interpretation are analytically sufficient in most cases, to be sure, but in some cases even the most assiduous jurist will encounter frustration while attempting to find persuasive conventional reasons for preferring one interpretation of a statute over others, and in such cases the conventional theories of statutory interpretation are a fertile source of judicial embarrassment. In effect, they require honest judges to pretend that conventional methods of interpretation are decisive, even when they are not, and this encourages obfuscation and arbitrariness in the making of judicial decisions.

This Article examines this problem and proposes a modest cure—one that would require a small adjustment in the conventional theories of statutory interpretation. This Article argues that two things need to be done. First, the courts must recognize that there are cases in which the conventional methods of statutory interpretation are useful but analytically *insufficient*: The conventional methods almost always establish plausible boundaries for interpretation, but sometimes they fail to provide persuasive reasons for specific interpretive choices. Second, the courts must acknowledge that when the conventional methods are indeterminate, statutory interpretation requires the exercise of judicial discretion—prudent

choice within legal bounds.¹ That is to say, if a judge finds that a statute can be interpreted plausibly to mean either *A* or *B*, and if the judge is not persuaded on conventional grounds that one interpretation is preferable to the other, the judge must be free to declare that there are two interpretations of the statute which are equally defensible in law, and the judge must be permitted to make a prudent, discretionary choice between them. Our present theories of statutory interpretation do not expressly authorize decisionmaking of this sort. This Article argues that they should. Discretionary interpretation is inevitable in some cases, and the theories of statutory interpretation should recognize that fact.

In the end, the argument presented in this Article is simply a plea for greater realism in statutory interpretation. Even the most casual observer of judicial affairs understands that judges do exercise discretion in statutory interpretation from time to time. Discretionary interpretation is not rare. Yet the courts themselves are reluctant to admit that they ever exercise discretion when they interpret statutes,² and there is no established doctrine that defines (or confines) the practice. The absence of such a doctrine creates serious difficulties for the law, as will be shown.

In the discussion that follows, the conventional theories of interpretation are reviewed, their occasional insufficiency discussed, and some interesting cases that illustrate the point are examined. This Article describes how a doctrine of discretionary interpretation would work in actual practice and how it would improve the interpretive process. This Article argues that if the courts were willing to adopt a doctrine of discretionary interpretation for cases that cannot be resolved persuasively by conventional means, they would promote both clarity and rigor in statutory interpretation and strengthen the rule of law.

I. THE CONVENTIONAL THEORIES OF STATUTORY INTERPRETATION

The conventional theories of statutory interpretation are organized around three well-worn principles. The first is the concept of “legislative intent.” Many judges believe that statutes should be interpreted according to the legislature’s “intent” and that conscientious interpreters must therefore concern themselves with the legislative mind.³ These judges are

1. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 647 (2002) (defining *discretion* as a “power of free decision or choice within certain legal bounds”).

2. There are exceptions, of course. Judges sometimes concede, in moments of exceptional candor, that interpretive questions are not always questions of “law.” See *infra* text accompanying notes 62–70, 93–99.

3. The cases that reflect this idea are so numerous that it would be redundant to cite more than a few. The following cases are representative of the genre: *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975) (“Our objective . . . is to ascertain the congressional intent and give

not deluded. They understand that the concept of legislative intent is philosophically problematic and that the search for legislative intent is sometimes difficult, yet they believe that the ultimate purpose of statutory interpretation is to align judicial action with legislative will. Statutes, after all, are the work of the legislature. They express legislative power, not judicial power, and it is the legislature's judgment that counts. Courts must therefore make an honest effort to determine what the legislature wants, and they must resist the temptation to hijack the legislature's work under the guise of interpretation.

A second fundamental interpretive principle rests upon the assumption that statutory language has an "objective meaning." Some judges believe that statutes should be interpreted, not according to the intent of the legislative author, but according to the meaning that a reasonably intelligent reader would attribute to the statutory text, given the conventions of the English language and the relevant legal context. This objective meaning may or may not coincide with the meaning the legislature actually intended at the time of enactment, but it should be legally controlling in most instances.⁴ Judges who favor this theory deserve the benefit of the doubt. They do not claim that a statute's objective meaning is always easy to determine, and occasionally they demonstrate commendable flexibility by interpreting statutes according to other principles.⁵ But they insist that there are sound reasons for taking an objective approach to statutory interpretation generally, and they criticize the misguided souls who traffic in the loose currency of legislative intent.

A third fundamental principle of interpretation is the notion that preexisting law influences the legal meaning and the legal consequences of legislative action. For example, there are preexisting constitutional principles that impose substantive limitations on legislative power;⁶ there are preexisting statutory schemes with which new legislation must

effect to the legislative will."); *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 202–03 (1962) (where congressional intent is discernible, courts must give effect to that intent); *Flora v. United States*, 357 U.S. 63, 65 (1958) (courts must give effect to congressional intent); and *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 386 (1948) (statutory language must be construed to effectuate lawmakers' intent). See generally 2A STATUTES AND STATUTORY CONSTRUCTION § 45:05 (Norman J. Singer & J.D. Shambie Singer eds., 7th ed. 2007) (detailing the intent of the legislature as a method of statutory construction).

4. Justice Antonin Scalia explained this philosophy in a long essay. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION 3* (Amy Guttmann ed., 1997).

5. See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527–30 (1989) (Scalia, J., concurring) (holding that interpretation that departs from the ordinary meaning of text is justified where ordinary meaning is "unthinkable" and there is no indication that the legislature actually intended the "unthinkable").

6. See 2A STATUTES AND STATUTORY CONSTRUCTION, *supra* note 3, § 45:11.

sometimes be harmonized;⁷ there are preexisting rules of substantive common law that occasionally affect statutory interpretation in one way or another;⁸ and there are preexisting canons and principles of interpretation that are designed for use in the interpretive process itself.⁹ For “intentionalists” and “objectivists” alike, the ambient law—the law that envelopes legislative action—is an important factor in the interpretive process.

The dominant modern theories of statutory interpretation reflect various admixtures of these three elementary principles. For many years most judges embraced a soft version of intentionalism, with a drop of objectivism thrown in for good measure. They generally assumed that they were supposed to interpret statutes by determining and honoring legislative intent. They understood, of course, that cases would arise in which it would be impossible to discern specific legislative intent with respect to the specific issues they were called upon to resolve, yet they were convinced that they could deal with these cases responsibly by considering the legislature’s general policies and purposes and by interpreting statutes in such a way as to advance those policies and purposes. The absence of specific legislative intent with regard to a specific interpretive issue would not defeat the interpretive enterprise; instead, sufficient guidance could usually be found in general indications of legislative will.¹⁰

Judges who accepted this way of thinking scrutinized statutory texts to determine what the legislature’s intentions, policies, and purposes actually were, but in many cases they examined other things as well. For much of the twentieth century, especially in the federal courts, judges routinely reviewed legislative history and other extra-textual materials as they

7. See 2B STATUTES AND STATUTORY CONSTRUCTION §§ 51.01–51.03 (Norman J. Singer & J.D. Shambie Singer eds., 7th ed. 2008).

8. See *id.* §§ 50.1–50.5.

9. See, e.g., 2A STATUTES AND STATUTORY CONSTRUCTION, *supra* note 3, §§ 47:17, 47:23 (discussing the doctrines of *eiusdem generis* and *expressio unius est exclusio alterius*, respectively).

10. See *United States v. Bacto-Unidisk*, 394 U.S. 784, 799 (1969) (stating that where statutory language is “insufficiently precise,” the statute must be construed in light of statutory purpose); see also *United States v. Bornstein*, 423 U.S. 303, 310 (1976) (holding that courts must give faithful meaning to statutory language in light of evident statutory purpose); *Comm’r v. Bilder*, 369 U.S. 499 (1962) (asserting that statutes must be given effect in accordance with manifest congressional purpose). Indeed, during the middle decades of the twentieth century certain influential scholars came to believe that the concept of legislative “purpose” was so central to statutory interpretation that the interpretive process could best be described, not as a search for legislative “intent,” but as an attempt to determine and effectuate legislative “purposes.” See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1374–80 (1994).

attempted to understand the legislative mind.¹¹ In some instances, however, they adopted an objective, text-based approach to interpretive problems. Sometimes they found statutory language to be so plain, so specific, and so sensible that there was little room for argument about what the statute ought to mean. In such cases they were happy to honor the objective meaning of the text. The assumption here was that the objective meaning of the text probably coincided with the meaning the legislature actually had in mind.¹²

Over the last twenty years or so, more and more federal judges have adopted an objective approach to interpretive questions. Some of them profess to be largely unconcerned with actual legislative intent.¹³ They insist that most statutory questions can be resolved satisfactorily on the basis of an objective reading of the relevant language. They sometimes call themselves “textualists.” For them, the text, objectively considered, *is* the law. The legislative intent behind the text is irrelevant for most purposes.¹⁴

Other judges take a position that falls somewhere between thoroughgoing intentionalism on the one hand and thoroughgoing objectivism or textualism on the other. They profess to be concerned with actual legislative intent, but they are inclined to treat the objective meaning of the statutory text as a sufficient indicator of actual legislative intent, and they prefer to settle statutory questions on the basis of the text alone. Even in doubtful cases, they are reluctant for various reasons to accord legal weight to legislative history and other extra-textual evidence of legislative will.¹⁵

11. For a perceptive, contemporaneous account of mid-century practices concerning legislative history, see Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195 (1983).

12. See, e.g., *United States v. Locke*, 471 U.S. 84, 95 (1985) (stating that a literal reading of Congress’s words is generally the only proper reading of those words).

13. See, e.g., *In re Sinclair*, 870 F.2d 1340 (7th Cir. 1989); see also Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL’Y 87 (1984).

14. Scalia, *supra* note 4, at 16–25.

15. This may well be the most widely accepted position today. As early as 1992, Justice Breyer sensed that judicial attitudes were shifting and that federal judges were placing less and less reliance on legislative history in their search for legislative intent. See Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 846 (1991) (noting the Court’s changing reliance on legislative history). During the 1990s, within the work of the Supreme Court itself, there was a precipitous decline in the number of cases in which the Justices relied on legislative history. See Michael H. Koby, *The Supreme Court’s Declining Reliance on Legislative History: The Impact of Justice Scalia’s Critique*, 36 HARV. J. ON LEGIS. 369 (1999). Today, in the lower federal courts, judges routinely emphasize the importance of the text and often find the text to be so “plain” that recourse to legislative history is unjustified. See, e.g., *In re Hart*, 328 F.3d 45 (1st Cir. 2003); *In re Kolich*, 328 F.3d 406 (8th Cir. 2003); *Cairns v. Franklin Mint Co.*, 292 F.3d 1139 (9th Cir. 2002); *Nat’l Pub. Radio, Inc. v. FCC*, 254 F.3d 226 (D.C. Cir. 2001); *Abdul-Akbar v. McKelvie*, 239 F.3d

II. THE OCCASIONAL INDETERMINACY OF CONVENTIONAL INTERPRETIVE METHODS

What is of interest is the implicit assumption upon which all of the conventional theories of interpretation rest. All of them require the courts to employ certain interpretive methods, and all of them assume that if the courts employ these methods competently and consistently, the answers to statutory questions can be found. Is this assumption valid?

Statutory interpretation, unlike literary or historical interpretation, is a governmental process. It must satisfy the needs of the government and comply with the principles that regulate governmental action. When a court is confronted with a statutory question, it must hear the contentions of the parties and make a decisive choice. It is not permitted to embrace all possible interpretations of the statute. It must choose a single interpretation and reject others as legally incorrect. Moreover, the preferred interpretation must be case-specific. The court is not called upon to say what the statute means in general. It must choose an interpretation that resolves the specific issue presented in the controversy before it. Finally, and above all, the court's interpretation of the statute must not be arbitrary. Due process forbids arbitrary governmental action. The court is not entitled to decide the case by flipping a coin, and it may not prefer one interpretation to another because the plaintiff is better looking than the defendant. The court must have a good reason for preferring one interpretation of the statute over other possible interpretations, and it must be willing to disclose that reason to the litigants and the world at large. This is what our legal traditions require.

To be successful, a general theory of statutory interpretation must provide the courts with a conceptual framework that will allow them to perform the function described above. A successful theory of statutory interpretation must help the courts find good reasons for adopting case-specific interpretations of statutory law, and it must allow the courts to disclose those reasons candidly. The conventional theories of statutory interpretation pass this test in most instances. Competent judges can usually find good reasons for interpreting statutes in decisive, case-specific ways, such as assessing the legislature's intentions, policies, and purposes, determining the objective meaning of the statutory text, consulting existing rules of law and interpretation, or doing some combination of these things.

Yet the conventional theories of statutory interpretation do not *always* pass this test. Sometimes the intended meaning of the relevant text is too unclear to provide solid ground for case-specific interpretation; sometimes

the objective meaning of the text is intractably ambiguous; sometimes the underlying legislative policies and purposes are too diffuse or contradictory to support persuasive, case-specific inferences; sometimes the ambient law and the traditional rules of interpretation have nothing definitive to say about the precise issue the court must decide. If a judge attempts to employ conventional interpretive methods in such a case, the judge will find no good reason to prefer one interpretation of the statute over other possible interpretations, and the judge will grasp at straws in the attempt to resolve the issue.

It is instructive to compare the conventional theories of statutory interpretation with the law of evidence. Was the traffic light red or green at the time of the accident? Did the shooter intend to kill the decedent? Did toxins in the groundwater cause the plaintiff's illness? The law of evidence establishes rules and procedures for deciding questions of this kind, yet it does not assume that the answers can always be found. Sometimes the evidence will be too scanty, too evenly balanced, too contradictory, or too obscure. Sometimes the finder of fact will be unable to draw a firm conclusion about the color of the traffic light, the shooter's intent, or the etiology of the disease. The law of evidence does not deny the possibility of uncertainty concerning factual questions in general, and it provides the courts with a principled way to deal with such uncertainty. It creates special rules that spell out the legal consequences of uncertainty in a comprehensive way. These rules are called "burdens of proof."¹⁶

The conventional theories of statutory interpretation are quite unlike the law of evidence in this respect. If the law of evidence recognizes that factual questions may sometimes be unanswerable, the conventional theories of statutory interpretation assume that the courts will almost always be able to resolve statutory questions through the application of conventional interpretive methods, and there is no general provision for cases in which statutory questions *cannot* be resolved in this way. The assumption here is that the conventional methods will work as long as the courts employ them consistently and competently. Yet, this assumption is belied by experience. Intractable statutory ambiguity is simply a fact of legal life. Indeed, it is constitutionally unavoidable, for various reasons.¹⁷

This problem is neither academic nor harmless. The occasional indeterminacy of conventional interpretive methods creates grave difficulties for the judiciary. Suppose that a competent judge is called upon to resolve a statutory question. Suppose that the judge considers all of the

16. See generally 2 MCCORMICK ON EVIDENCE §§ 336–349 (John W. Strong ed., 5th ed. 1999).

17. See *infra* text accompanying notes 104–06.

conventional arguments that can be made in the case, and suppose that none of the arguments are ultimately persuasive. How can the judge resolve the issue? Given the restrictions imposed by conventional interpretive theory, there are only two courses of action that the judge can take, and both of them are problematic. Both are discussed below.

A. Deciding Cases on Unconventional (and Undisclosed) Grounds

A conscientious judge who is not persuaded by conventional arguments about a statute's meaning may conclude that there are other reasons—unconventional reasons—for interpreting the statute in one way or another, and the judge may be willing to decide the case on that basis. In other words, if the conventional methods of statutory interpretation are indeterminate, the judge may allow a personal sense of justice, equity, practicality, or sound public policy to determine the outcome. This is a responsible way to decide such cases, but the conventional theories of statutory interpretation make no express provision for it. On the contrary, they assume that competent judges will be able to resolve statutory questions on the basis of a process of legal reasoning involving conventional considerations—legislative intent, the objective meaning of the text, the traditional rules of interpretation, and so forth. If a judge has unconventional reasons for preferring one interpretation of a statute to another, the judge must nevertheless mount a conventional defense of the decision and must downplay or conceal the real reasons for the ultimate interpretive choice.

An important recent case, *Ledbetter v. Goodyear Tire & Rubber Co.*, illustrates this phenomenon rather clearly.¹⁸ The case involved a sex discrimination claim under Title VII of the Civil Rights Act of 1964.¹⁹ The plaintiff, Lilly Ledbetter, had worked for the Goodyear Tire and Rubber Company (Goodyear) for a number of years. In 1998, shortly before her retirement, she filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging that Goodyear had paid her substantially less than similarly situated male employees. Eventually, she submitted her claim to the federal district court and won a jury verdict after a trial on the merits. The district court entered judgment against Goodyear for back wages and damages, and Goodyear appealed. The U.S. Court of Appeals for the Eleventh Circuit reversed the judgment, holding that Ledbetter had failed to file her complaint within the time allowed by Title VII. The Supreme Court granted certiorari and affirmed the decision of the court of

18. 550 U.S. 618 (2007).

19. Civil Rights Act of 1964 §§ 703(a)(1), 706(e)(1), 42 U.S.C. §§ 2000e-2(a)(1), 2000e-5(e)(1) (2000).

appeals.²⁰

At the heart of the controversy was a provision of Title VII that required a claimant to file a complaint “within [180] days after the alleged unlawful employment practice occurred.”²¹ Ledbetter proved, and the jury found, that Goodyear had set her salary at a low level because of her sex, but she was unable to prove that Goodyear had made this decision within 180 days prior to the filing of her EEOC complaint. Instead, she proved that Goodyear had made discriminatory salary-setting decisions in previous years, outside the 180-day filing period, and that Goodyear had continued to pay her at a low level during the 180-day filing period as a result of those decisions.²²

Did the 180-day filing provision bar Ledbetter’s claim? Goodyear argued that it did. According to Goodyear, an unlawful employment practice “occurred” for purposes of the statute whenever an employer made a salary-setting decision on the basis of sex; therefore, the statute required the injured employee to file her complaint within 180 days after the salary-setting decision was made. Because Ledbetter had not filed her complaint within 180 days after Goodyear had made its unlawful decisions, her complaint was time-barred.²³ Ledbetter argued in opposition that the Court should interpret the statute more broadly. Perhaps it was true that an unlawful employment practice “occurred” when an employer made a salary-setting decision on the basis of sex, but it was also true that the unlawful “practice” continued to occur as long as the employer continued to make low payments in implementation of the original decision. Ledbetter had filed her complaint at a time when Goodyear’s unlawful pay practice was still continuing. The practice had not yet ceased to occur. Therefore, the complaint was timely.²⁴

A closely divided Supreme Court accepted Goodyear’s interpretation of the statute. Writing for a five-Justice majority, Justice Alito held that Goodyear’s discriminatory salary-setting decisions were discrete events, that the statutory filing period began to run with the occurrence of these events, and that Ledbetter’s complaint was untimely because it had not been filed within 180 days of the occurrence of these events. Accordingly, the Court affirmed the judgment of the court of appeals, and Ledbetter, who had suffered substantial financial losses because of unlawful conduct during the 180-day filing period, received nothing for her trouble.²⁵

20. *Ledbetter*, 550 U.S. at 621–23.

21. 42 U.S.C. § 2000e-5(c)(1).

22. *Ledbetter*, 550 U.S. at 624–25.

23. *Id.* at 622.

24. *Id.* at 624.

25. *Id.* at 632 (majority opinion), 643–44 (Ginsburg, J., dissenting).

Justice Ginsburg filed a vigorous dissent. She argued that Ledbetter's claim was timely because it had been filed while Goodyear was still paying her at a discriminatory rate. The unlawful pay practice was still occurring; therefore, Ledbetter's complaint was not late. Three Justices agreed with Justice Ginsburg.²⁶

One may sympathize with Ledbetter in this case, or one may sympathize with Goodyear, but conventional interpretive considerations did not clearly favor either party. There was no indication that Congress had actually considered the specific issue presented in the case, and it was impossible to argue the case one way or the other on the basis of clear evidence of specific legislative intent. The objective meaning of the relevant statutory language shed no light on the problem. A discriminatory salary-setting decision was clearly an unlawful employment practice within the objective meaning of the statute, and it surely occurred at the time it was made. Yet payments that were made pursuant to a discriminatory salary-setting decision were surely a continuation of the "unlawful employment practice," objectively speaking. The practice did not end with the initial decision. Thus, the question was this: Did the statute require the employee to file her complaint within 180 days after the practice *began* to occur, or did it allow her to file her complaint within 180 days after the practice *ceased* to occur? The language of the statute simply did not address this point. It provided only that the claimant was to file her complaint within 180 days after the practice occurred.

Nor was guidance to be found in the conventional rules of statutory interpretation. Justice Alito and Justice Ginsburg could cite only one conventional rule of interpretation in the course of their two opinions. It was the *Chevron* rule, which requires the courts to defer to certain administrative interpretations of ambiguous statutory language;²⁷ and Justice Alito cited this rule only for the purpose of noting that it did *not* apply to this case.²⁸

If the demonstrable intentions of Congress, the objective meaning of the statutory language, and the conventional rules of statutory interpretation did not favor either party, upon what considerations did Justice Alito and Justice Ginsburg rely? Both attempted to rely on the Court's prior decisions interpreting the filing provision, yet the precedents themselves were in conflict. The Court had previously held that the 180-day filing

26. *Id.* at 643–60 (Ginsburg, J., dissenting). The Court's decision proved to be controversial and efforts were made to overturn it by legislation. Those efforts recently succeeded. See Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (stating specifically that this legislation is a response to the Court's decision in *Ledbetter*).

27. *Ledbetter*, 550 U.S. at 643 n.11 (majority opinion), 656 n.6 (Ginsburg, J., dissenting).

28. *Id.* at 643 n.11 (majority opinion).

provision could be interpreted broadly, as Justice Ginsburg proposed, allowing complaints to be filed long after an employer had instituted an unlawful employment practice that continued to occur over time,²⁹ but the Court had also held that the filing provision could be interpreted strictly in certain instances, barring complaints that were filed more than 180 days after the occurrence of discrete discriminatory acts that had continuing effects.³⁰

And if the case law was in conflict, the relevant statutory policies were in conflict as well. Justice Alito's interpretation of the filing provision was consistent with the obvious statutory policy against litigating stale claims. His holding required each claimant to prove that the employer had instituted a discriminatory pay practice no more than 180 days prior to the filing of the complaint, and this tended to ensure that at the time of the filing of the complaint there would be fresh evidence of the employer's discriminatory intent, which was the central element in the employee's Title VII case. But Title VII also expressed a strong policy against sex discrimination in the workplace, and it created a remedial mechanism for the benefit of persons like Ledbetter, who had been injured by discriminatory conduct *within* the 180-day period. Justice Ginsburg's interpretation of the statute was clearly consistent with that policy. It validated the claims of employees who had been injured by discriminatory pay practices that continued during the 180-day filing period, even though the practices had begun more than 180 days prior to the filing of the complaint.

In sum, both Justice Alito's and Justice Ginsburg's interpretations of the statute were consistent with strong (and obvious) statutory policies. Nothing in the statutory text, the specific intentions of Congress, the conventional rules of interpretation, or the prior decisions of the Court required these Justices to favor one policy over the other. The legal calculations in the case were substantially in equipoise, and the Justices simply had to make a choice. But how were they to choose?

29. See *Bazemore v. Friday*, 478 U.S. 385, 407 (1986) (per curiam) (addressing an employment practice that had been implemented over ten years prior to the suit); see also *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117–18 (2002) (noting that an employee need only file a complaint within the statutory time period of any act that is part of the hostile work environment regardless of how long it has been since the hostile work practices in general began).

30. See, e.g., *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900 (1989) (pertaining to a suit by female employees who challenged employer's seniority system as discriminatory); *Del. State Coll. v. Ricks*, 449 U.S. 250 (1980) (addressing a professor's claim that he had been denied tenure on the grounds of national origin discrimination); *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977) (involving a suit by a female flight attendant who was forced to resign after getting married).

If I had been a Justice in *Ledbetter*, I would have concluded that conventional interpretive considerations were indeterminate, and I would have decided the case on unconventional grounds. There is no way to know whether any of the nine Justices who participated in *Ledbetter* were moved by unconventional considerations, as I would have been, but I suspect that some of them were, and the final vote in the case tends to confirm this suspicion. The Court split cleanly along ideological lines. Justices Alito, Roberts, Kennedy, Scalia, and Thomas, four conservatives and one moderate, adopted Goodyear's interpretation of the statute—the strict interpretation. The four Justices who accepted the more lenient interpretation of the statute—Justices Ginsburg, Stevens, Souter, and Breyer—are moderates or liberals who have shown some sensitivity to the interests of employees from time to time. If the legal ingredients in the case were evenly balanced, perhaps these nine Justices, or some of them, simply voted their predilections, and the five outvoted the four.

This interpretation of *Ledbetter* is not a criticism of the Court or of any of the Justices who participated in the decision, and to underscore this point, I must reiterate my fundamental contention: Conscientious judges cannot always resolve statutory questions on the basis of conventional interpretive considerations. In *Ledbetter* there were two plausible interpretations of the 180-day filing provision. Each found some support in convention, yet there was no persuasive conventional reason to prefer one over the other. This meant that the Court was confronted with a choice between alternatives that were in some sense equally lawful; and if a conscientious Justice accepted either one of these two interpretations because of his or her own sense of justice, equity, practicality, or sound public policy, he or she would have violated no law or judicial duty, in my opinion. The choice was essentially discretionary. Within the bounds created by the statute, the choice could have been made for any prudent, nonarbitrary reason.

I recognize that this way of thinking about statutory interpretation is inconsistent with conventional interpretive theory, but I believe that it makes sense. Indeed, it is the only realistic way to think about a case such as *Ledbetter*.

The principal problem with *Ledbetter*, in the end, was not the judgment itself but the opinions of the Justices—both the majority opinion and the dissenting opinion. These opinions presented conventional arguments about the statute's meaning, but the arguments were not persuasive. I do not fault Justice Alito or Justice Ginsburg for this. It was impossible to argue this case persuasively on the basis of conventional considerations, and if these Justices attempted to construct conventional arguments in support of their differing views of the case, they were simply doing what the conventional theories of statutory interpretation required them to do. They

were doing the best they could, given the restrictions imposed upon them by the conventional theories, which discourage judicial candor in cases that cannot be decided persuasively on conventional grounds.

B. Deciding Cases on Trivial Conventional Grounds

There is a second strategy that a judge can follow if the judge is initially unconvinced by conventional arguments about a statute's specific meaning. Instead of deciding the case on unconventional grounds, the judge can suppress doubts and proceed in the conventional way. The judge can refuse to accept the conclusion that conventional considerations are indeterminate, and can persist in the effort to find a conventional basis for preferring one interpretation over another.

This strategy is successful some of the time, but it carries a substantial risk. If a judge insists on finding a conventional reason to justify an interpretive decision in an evenly balanced case, the judge will be tempted to attribute legal significance to triviality. A stray comment buried in the legislative history here or there,³¹ or an obscure semantic distinction between one shade of objective meaning and another,³² can tip the scales of justice, or so the judges tell us. But when life, liberty, property, and public policy hang in the balance, triviality should not be decisive. If the consequences of a judgment are weighty, the reasons for the judgment should be weighty as well; and if the reasons for a judgment are thin, justice and the appearance of justice suffer.

Consider *Chapman v. United States*.³³ The defendants in *Chapman* were convicted of distributing lysergic acid diethylamide (LSD). The case was a difficult one because of the imprecise language of the relevant statute and the peculiarities of the LSD trade. One dose of pure LSD is so light in weight that it must be sold on the street through the use of a carrier medium.³⁴ In some instances the pure drug is dissolved in a solvent, and the solvent is sprayed on blotter paper. The blotter paper is then cut into one-dose squares. Customers purchase the squares and ingest the drug by licking or swallowing the squares or by dropping them into beverages.³⁵ The defendants in *Chapman* were convicted of selling ten sheets of blotter paper bearing about fifty milligrams of pure LSD, in violation of 21 U.S.C.

31. See *Kosak v. United States*, 465 U.S. 848, 855 (1984) (relying on references in the legislative history, "though meager," as support for the Court's holding).

32. See *Chisom v. Roemer*, 501 U.S. 380 (1991) (examining the scope of coverage included in § 2 of the Voting Rights Act).

33. 500 U.S. 453 (1991).

34. *Id.* at 457.

35. *Id.*

§ 841(a).³⁶ The statute provided that the defendants should receive sentences of at least five years if they had distributed one gram or more of “a mixture or substance containing a detectable amount” of LSD.³⁷ The fifty milligrams that the defendants had distributed would *not* have subjected them to the mandatory five-year minimum, but the trial judge concluded that the blotter paper itself was a “mixture . . . containing a detectable amount” of LSD and that the weight of the paper (about 5.7 grams) should be added to the weight of the pure drug to determine the appropriate sentences. Accordingly, the defendants were sentenced to the mandatory minimum.³⁸

The defendants appealed their sentences to the U.S. Court of Appeals for the Seventh Circuit, and the case was argued three times before that court. After a rehearing en banc, the court of appeals affirmed the judgment of the district court, with five judges dissenting.³⁹ The court of appeals held that the blotter paper was a “mixture . . . containing a detectable amount” of LSD and that the weight of the paper should therefore be counted in determining the sentences.⁴⁰ On certiorari, the Supreme Court affirmed the decision of the court of appeals. Writing for a seven-Justice majority, Chief Justice Rehnquist held that blotter paper stained with LSD was indeed a “mixture” within the meaning of the statute, that the weight of the blotter paper should be taken into account in determining the sentences, and that the defendants were subject to the mandatory minimum.⁴¹ Justices Stevens and Marshall dissented.⁴²

Chapman is a disturbing case. The decision ultimately turned on the interpretation of a single word: mixture. Was blotter paper bearing crystals of LSD a “mixture” in the statutory sense? There was no indication that Congress was well versed in the esoteric practices of the LSD trade, and thus there was no evidence that Congress had specifically intended for the courts to treat LSD-stained blotter paper as a mixture for the purpose of applying the sentencing scheme. There was, however, abundant evidence of congressional intent concerning sentencing in general. The statute applied to a number of controlled substances, not to LSD alone, and it was clear from the language of the statute that in most cases involving mixtures, Congress intended for punishment to be determined by the gross weight of

36. *Id.* at 455.

37. 21 U.S.C. § 841(b)(1)(B)(v) (2000).

38. *Chapman*, 500 U.S. at 455–56.

39. *United States v. Marshall*, 908 F.2d 1312 (7th Cir. 1990) (en banc).

40. *Id.* at 1318.

41. *Chapman*, 500 U.S. at 462, 468.

42. *Id.* at 468–77 (Stevens, J., dissenting).

the mixture, not by the net weight of the pure drug;⁴³ however, this did not mean that blotter paper sprinkled with LSD was a mixture. With respect to that specific question, the intentions of Congress were utterly obscure.

If the intended meaning of the word mixture was uncertain, what was the objective meaning of the word? Chief Justice Rehnquist approached this question by invoking the well-settled rule that courts should interpret statutory language according to its “ordinary” meaning.⁴⁴ He then consulted certain dictionaries, and he discovered two definitions of the word mixture that seemed to fit the case. According to these dictionary definitions, a mixture was a portion of matter consisting of two or more components retaining a separate existence, even though the particles of one were diffused among the particles of the other. Blotter paper bearing crystals of LSD was arguably a mixture in that sense, and Chief Justice Rehnquist so held.⁴⁵

But this interpretation of the word was not the only plausible interpretation. A reasonably intelligent English speaker would not ordinarily use the word mixture to describe a necktie stained with soup or a napkin stained with cod liver oil, and a plausible argument could be made that a reasonably intelligent English speaker (or legislator) would not ordinarily use the word mixture to describe a piece of blotter paper stained with LSD. It would not be impossible to use the word mixture in that way, but such a usage would be unusual. It would not be ordinary. More appropriate language could easily be found; and if the rules of statutory interpretation require the courts to read statutes in the light of ordinary English usage, as Chief Justice Rehnquist suggested, then a plausible argument could have been made that blotter paper sprinkled with LSD was not a mixture in the statutory sense.

Thus, there were two plausible interpretations of the statute. There was Chief Justice Rehnquist’s interpretation, which depended on certain dictionary definitions of the word mixture, and there was a contrary interpretation, which depended on an understanding of ordinary English usage. The Court’s task was to choose between these two interpretations. At common law, the “rule of lenity” would have tilted the analysis in the defendants’ favor,⁴⁶ yet the rule of lenity has apparently lost its force in federal jurisdictions. The present Supreme Court applies the rule

43. See, e.g., 21 U.S.C. § 841(b)(1)(A)(i), (ii)(I), (III), (iii), (iv) (2000).

44. *Chapman*, 500 U.S. at 462 (majority opinion).

45. *Id.* at 461–62.

46. See *United States v. Bass*, 404 U.S. 336, 347–48 (1971) (cautioning against the punishment of criminal defendants when resolving statutory ambiguity); *United States v. Fisher*, 6 U.S. (2 Cranch) 358 (1805). See generally Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57 (1998).

erratically or not at all, and Chief Justice Rehnquist simply refused to apply it in *Chapman*.⁴⁷

The defendants in *Chapman* made one additional argument that deserves to be mentioned here. They claimed broadly that the statutory scheme was so problematic that major surgery was required. As written, the statute was likely to produce irrational disparities in sentencing. Two drug dealers who sold precisely the same number of doses of LSD might receive substantially different sentences, depending on the weight of the mixtures they chose to employ, and drug kingpins who sold significant quantities of the pure drug might receive lesser sentences than street-level pushers who sold the drug at retail diluted in heavy mixtures of one kind or another. The defendants argued that these potential disparities were so irrational that the constitutionality of the statute was in doubt, and they invited the Court to interpret the statute in such a way as to avoid the constitutional issue. In effect, they asked the Court to read the word mixture out of the statute in cases involving LSD, so that punishment in such cases would turn on the net weight of the pure drug, not the gross weight of any mixture with which the drug was connected.⁴⁸ This interpretation would have made it unnecessary for the Court to decide whether blotter paper sprinkled with LSD was a mixture in the statutory sense. The dissenting judges in both the Supreme Court and the court of appeals were inclined to adopt this approach,⁴⁹ but a majority of the judges in both courts were unimpressed by the constitutional argument, and left the statute as they found it.⁵⁰

At the end of the day, with the constitutional question pushed conveniently to one side, the Court was obliged to make an unappealing choice between two equally plausible interpretations of an awkward statutory text. According to one interpretation, blotter paper sprinkled with LSD was a mixture. According to another interpretation, blotter paper sprinkled with LSD was not a mixture. Given the demise of the rule of lenity, there was no persuasive conventional reason to prefer either of these interpretations over the other, yet seven Justices suppressed all doubt and insisted that blotter paper was a mixture, even though the defendants' liberty hung in the balance. The reasons given by the Court for preferring this interpretation were so thin that the judgment looks almost arbitrary. Indeed, if the Court had simply flipped a coin and decided the case on that basis, the result would have been just as convincing, and the process would have been far more efficient. *Chapman* dishonors the law because it allowed

47. *Chapman*, 500 U.S. at 464.

48. *See id.* at 464–67.

49. *See id.* at 473–77 (Stevens, J., dissenting); *United States v. Marshall*, 908 F.2d 1312, 1333 (7th Cir. 1990) (en banc) (Posner, J., dissenting).

50. *Chapman*, 500 U.S. at 468 (majority opinion).

momentous consequences to turn upon an utterly trivial calculation.

III. ALTERNATIVES TO THE CONVENTIONAL THEORIES

There are powerful reasons to resist any change in the conventional way of thinking about statutory interpretation. People who believe in the rule of law take comfort in the grand propositions upon which the conventional theories rest: that a statute's meaning is determined primarily by the form of the statutory text or by the legislature's intentions, policies, and purposes, or by both; that the courts should interpret statutes by giving weight to these legislatively created things, together with preexisting rules of law and interpretation; and that the process of statutory interpretation, which inevitably involves judgment, is nonetheless a process of legal reasoning, which is grounded ultimately in a set of legally prescribed considerations.

Just as there are powerful reasons to resist any change in the conventional way of thinking, there are powerful reasons to press for change. The twin problems of arbitrariness and obfuscation, which are exemplified dramatically in cases such as *Chapman* and *Ledbetter*, are very grave indeed. The rule of law would be substantially strengthened, not weakened, if a way could be found to ameliorate these difficulties.

It would be useful to reexamine the core proposition stated above—that statutory interpretation is “a process of legal reasoning, grounded in a set of legally prescribed considerations.” This proposition is a fair description of what statutory interpretation is and ought to be in most cases, but it overstates the power of conventional interpretive methods. In some cases, conventional methods do not support case-specific interpretation. They may establish boundaries for choice, but they do not always determine the choice itself. In such cases, the courts must rely on something other than legal reasoning in the conventional sense, and our theories of statutory interpretation should grant them the liberty to do precisely that. Indeed, there are precedents for a more flexible conception of the interpretive function in certain contexts, and it would be useful to take note of them before developing the argument further.

A. *The “Portal-to-Portal” Case*

During the early decades of the twentieth century there was a bitter dispute between iron miners and the owners of iron mines in the southeastern United States.⁵¹ The dispute concerned the method by which the owners calculated the miners' wages. The miners began work each day

51. See *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 592–97 (1944).

by arriving at the mine, changing into working clothes, and collecting tools and equipment. They then proceeded to the “portal” of the mine, and from there they were transported underground to the “working face” of the mine, where they performed mining operations. At the end of the day they were transported back to the surface of the mine, where they stowed their tools, bathed, changed clothes, and returned to their homes. The mining companies followed the practice of paying the miners only for the work performed on the working face of the mine. They did not pay the miners for activities at the surface of the mine, and they did not pay them for the time they spent traveling within the mine to and from the working face. The miners, for their part, wanted to be paid for all of their activities and all of their time at the mine, and as a result, there was substantial unrest within the mining industry in the Southeast during the early decades of the twentieth century.⁵²

The Fair Labor Standards Act (FLSA), enacted in 1938, provided that if an employee’s “workweek” exceeded a certain maximum number of hours (forty-four, forty-two, or forty, depending on the circumstances), the employee was entitled to receive overtime pay at a rate of one and one-half times the employee’s ordinary rate of compensation.⁵³ How did this requirement affect the wage-payment practices in the iron mines? The miners usually spent about eight hours a day on the working face of the mine. If, for purposes of the FLSA, their workweek included only the hours they spent on the working face, then they were entitled to receive no overtime compensation; but if their workweek included the time they spent in activities at the surface of the mine, or if it included the time they spent traveling within the mine to and from the working face, then the statutory maximum would be exceeded, and they would be entitled to receive overtime pay.

The Tennessee Coal, Iron, and Railroad Company and other mining companies brought a declaratory judgment action against certain mining unions to determine the effect of the FLSA on pay practices in the mining industry.⁵⁴ The companies argued that it was customary within the industry to measure the miners’ workweek by the time spent on the working face of the mine, that this custom had guided wage negotiations in the industry for a number of years, and that Congress must have intended to affirm this custom when it enacted the FLSA.⁵⁵ The unions argued that for purposes of the FLSA the miners’ workweek included all of the time the

52. *Id.* at 601–02.

53. Fair Labor Standards Act of 1938 § 7(a), 29 U.S.C. § 207(a)(1) (2006).

54. *Tenn. Coal, Iron & R.R. Co.*, 321 U.S. at 592.

55. *Id.* at 600–01.

miners spent at the mine, not just the time they spent on the working face.⁵⁶ The unions insisted that the miners were therefore entitled to overtime pay.

After a lengthy trial, the district court ruled in favor of the miners. Sitting without a jury, the district court found that the miners' travel time, as well as the time they spent at the surface of the mine obtaining and returning equipment, should be counted in determining the length of their workweek under the FLSA.⁵⁷ The companies appealed. The U.S. Court of Appeals for the Fifth Circuit partially affirmed and partially reversed the district court's judgment. The court of appeals agreed that travel time within the mine should be included in the calculation of the miners' workweek, along with the time the miners spent on the working face of the mine, but the court of appeals held that the time the miners spent obtaining and returning tools and equipment at the surface of the mine should be excluded from the calculation. In short, the court of appeals held that the miners' workweek should be calculated on a "portal-to-portal" basis.⁵⁸

Thus, three different interpretations of the FLSA emerged over the course of the litigation. The unions claimed, and the district court found, that the miners' workweek included most of the time the miners spent at the surface of the mine and all of the time they spent within the mine. The court of appeals excluded the time the miners spent at the surface of the mine but included everything else. The mine owners took the most restrictive view: The workweek included only the time the miners spent on the working face of the mine. When the case reached the Supreme Court, the problem was to determine which one of these interpretations of the FLSA was correct.⁵⁹

Seven of the nine Justices who heard the case took a conventional approach to the problem. Five of the Justices held that the portal-to-portal concept was consistent with the statutory language and the intentions and policies of Congress.⁶⁰ Two of them argued, to the contrary, that Congress must have intended for the FLSA to confirm the traditional pay practices in the iron mines, which credited the miners only for work done on the working face of the mine. These two Justices dissented.⁶¹

The two remaining Justices, Justices Frankfurter and Jackson, concurred

56. *Id.* at 592–93.

57. *Id.* at 593.

58. *Id.*

59. After the case reached the Supreme Court, the unions abandoned their claim that the "workweek" included time spent on the surface of the mine. Thus, the Court was called upon to decide between the "portal-to-portal" concept adopted by the court of appeals and the mine owners' contention that the "workweek" included only time spent on the "working face." *See id.* at 593 n.4.

60. *Id.* at 602.

61. *Id.* at 606–19 (Roberts, J., dissenting).

in the judgment, and they took an unconventional approach to the problem. Justice Frankfurter noted that the concept of a workweek was colloquial and that the term had no technical meaning.⁶² He observed with apparent regret that Congress had created no administrative agency with authority to resolve interpretive issues arising under the FLSA.⁶³ This meant that the task of applying the imprecise language of the statute to “the multifarious situations in American industry” inevitably fell to the courts.⁶⁴ He then opined, remarkably, that even though the meaning of the word workweek had to be determined through “judicial proceedings,” the question was *not* one of law; instead, it was one of fact.⁶⁵ The composition of the miners’ workweek was to be determined in the lower courts as a matter of fact, and the findings of the lower courts as to the facts were not to be disturbed on appeal as long as they were supported by the evidence. The district court had conducted an extensive trial and had made careful findings with respect to the question of travel time. Those findings, which the circuit court had substantially approved, were supported by the evidence, and they were conclusive. Therefore, according to Justice Frankfurter, the judgment below must be affirmed.⁶⁶

Justice Jackson agreed with Justice Frankfurter. He said that the case probably did not present “any question of law.”⁶⁷ When Congress enacted the FLSA, it probably considered that “a workweek in fact should be a workweek in law”; therefore, any judicial determination of the issue was factual in nature and case-specific.⁶⁸ A decision in one case would not govern any other case, “for each establishment and industry stands on its own conditions.”⁶⁹ Justice Jackson then noted that the district court had made extensive findings of fact that were supported by the evidence. He said that he would affirm the judgment below on the basis of these “controlling facts.”⁷⁰

In other words, Justice Frankfurter and Justice Jackson did not attempt to define the word *workweek* as a matter of law. In the opinion of these Justices, the usual considerations—the objective meaning of the statutory language, the legislature’s intentions, policies, and purposes, and the traditional rules of interpretation—were apparently indeterminate in this case. This did not mean that the statute was an empty vessel. Frankfurter

62. *Id.* at 604 (Frankfurter, J., concurring).

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* (Jackson, J., concurring).

68. *Id.* at 605.

69. *Id.*

70. *Id.* at 606.

and Jackson surely would have objected if the lower courts had found that the miners' workweek included leisure time spent at home. But they granted the lower courts considerable latitude within the limits established by the general concept of a workweek, and they agreed that the lower courts could resolve the issue on the basis of considerations that did not involve legal reasoning in the conventional sense.

B. Administrative Discretion in Statutory Interpretation

Justices Frankfurter and Jackson did not invent the idea that the conventional methods of statutory interpretation are sometimes indeterminate and that the precise meaning of a statute may sometimes depend on something other than legal reasoning. Indeed, there is an important field of law in which this idea, or something very much like it, has been accepted for a very long time. Within the field of administrative law, there are various doctrines that sometimes make statutory interpretation a matter of administrative discretion.

These doctrines were first introduced into American law as a critique of traditional interpretive methods. Consider, for example, an early trade regulation case, *FTC v. Gratz*.⁷¹ During the 1910s the firm of Warren, Jones & Gratz (WJ&G) was in the business of selling various materials that were used in the marketing of cotton fiber, including steel "ties," which were used to bind cotton bales, and jute "bagging," which was used to wrap cotton bales. The Carnegie Steel Company manufactured the steel ties, and WJ&G was the Carnegie Steel Company's exclusive selling agent nationwide. WJ&G required its customers to purchase a prescribed quantity of jute bagging with every purchase of steel ties. In other words, if a customer wanted to buy steel ties, it had to buy a certain quantity of jute bagging as well.⁷²

WJ&G led a quiet life until Congress passed the Federal Trade Commission Act (Act) in 1914.⁷³ The Act declared that "unfair methods of competition" were "unlawful," and it created a new administrative agency, the Federal Trade Commission (FTC), to enforce its provisions.⁷⁴ It authorized the FTC to issue complaints against persons who employed "unfair methods of competition in commerce,"⁷⁵ and in 1917 the FTC issued such a complaint against WJ&G and others, alleging that WJ&G had

71. 253 U.S. 421 (1920).

72. *Id.* at 428.

73. *Id.* at 422; *cf.* 15 U.S.C. §§ 41–45 (2006) (current version of the Federal Trade Commission Act).

74. *Gratz*, 253 U.S. at 422 (quoting the original Federal Trade Commission Act).

75. *Id.*

violated the Act by tying the sale of steel ties to the sale of jute bagging. The FTC conducted an administrative hearing, as the Act required. It made detailed findings concerning WJ&G's policy, and on the basis of these findings it issued a cease and desist order requiring WJ&G to abandon its policy.⁷⁶

Seeking relief from the FTC's order, WJ&G petitioned the U.S. Court of Appeals for the Second Circuit. The Second Circuit annulled the order, and the FTC then appealed to the Supreme Court. The Supreme Court affirmed the Second Circuit's decision. It held that the FTC's complaint against WJ&G was insufficient on its face and that the cease and desist order therefore lacked a proper legal foundation.⁷⁷ Justice McReynolds, a notable conservative, delivered the opinion of the Court. Justice Brandeis, a formidable progressive, filed a lengthy dissent.

Justice McReynolds's majority opinion was entirely traditional in terms of interpretive methodology. After stating the case, he made three quick points. First, he said that it was necessary for the Court to determine the meaning of the statutory phrase "unfair methods of competition." In his view the Court, not the FTC, should have the last word concerning that issue.⁷⁸ Second, he said that the phrase *unfair methods of competition* referred to practices that were condemned by the common law; it did not refer to methods of competition "never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly."⁷⁹ Third, he said that the FTC's complaint contained no allegation of deception, misrepresentation, or oppression, and no allegation of monopoly with respect to the sale of steel ties or jute bagging—in short, no allegation of anything that would constitute an "unfair method of competition" in the common law sense.⁸⁰ Thus, the complaint was flawed, the administrative procedure was defective, and the cease and desist order was invalid.

Embedded in this argument was the ancient assumption that courts should interpret statutory language in light of the common law. Justice McReynolds believed that the phrase *unfair methods of competition* had a specific common law meaning and that the FTC's jurisdiction therefore extended only to practices that constituted "unfair competition" in the common law sense. Furthermore, he thought that the Act should be interpreted to require the FTC to follow a procedure akin to that which

76. *Id.* at 429–30 (Brandeis, J., dissenting).

77. *Id.* at 429 (majority opinion).

78. *Id.* at 427.

79. *Id.*

80. *Id.* at 428.

was followed in the common law courts. At common law, according to traditional principles, it was necessary for a complaint to contain specific factual allegations showing that a cause of action existed. If a complaint simply gave notice of a claim without alleging facts sufficient to constitute a cause of action, it was legally defective. The FTC's complaint against WJ&G was insufficient when viewed in that light. It simply stated that the tying policy was "an unfair method of competition." It did not allege facts sufficient to establish a cause of action for monopoly, fraud, or oppression.

If Justice McReynolds's opinion was traditional in terms of its methodology, Justice Brandeis's dissenting opinion was a model of modernity. It resolved every interpretive issue by referring neither to the statutory text nor to the common law, but to the legislative history of the Act and to the decisions, interpretations, and customary practices of federal administrative agencies.⁸¹ Justice Brandeis relied extensively on the reports of the relevant congressional committees, the publications of the Federal Bureau of Corporations, and the procedures of the Interstate Commerce Commission, and he made four main points. First, he said that Congress intended the Act to create a *novel* procedure that could address trade practices that were beyond the reach of traditional law.⁸² Second, he said that the Act did not explicitly or implicitly require an FTC complaint to contain specific factual allegations such as those required in pleadings at common law. An administrative complaint under the Act would be sufficient, in his view, if it contained "a plain statement of the thing claimed to be wrong so that the respondent may be put upon his defence."⁸³ Third, he said that the Act did not define *unfair methods of competition* but left that matter to be determined by the FTC, *not* by the courts.⁸⁴ Finally, and most importantly, he said that if the FTC had decided in a formal trial-type hearing that a certain trade practice constituted an unfair method of competition, the role of the courts was simply to determine whether the FTC's decision was reasonable in light of the FTC's findings of fact. It was not for the courts to decide the matter anew through a process of legal reasoning.⁸⁵ The FTC had discretion to determine the effective legal meaning of the Act within appropriate legal bounds.

Justice Brandeis's argument was essentially an argument about the delegation of legislative or quasi-legislative power to the FTC. The operative statutory language—"unfair methods of competition"—had a common law meaning, to be sure, but Justice Brandeis believed that

81. *Id.* at 431–41 (Brandeis, J., dissenting).

82. *Id.* at 432.

83. *Id.* at 430.

84. *Id.* at 436.

85. *Id.* at 437–38.

Congress intended to give the FTC power to go beyond the common law to deal with problems that the common law did not adequately address. According to Justice Brandeis, Justice McReynolds's opinion was in error because it mistook the legislative purpose. The Act was designed to promote reform, and the job of defining *unfair methods of competition* therefore fell to the new administrative agency, not to the courts. The courts' role was simply to review the FTC's decisions under the Act to determine whether they were generally within the scope of the statutory grant and supported by the administrative record. The effective meaning of the statute was to be determined by the FTC in the exercise of sound administrative discretion.

Of course, Justice Brandeis lost the argument in *Gratz* and the conservatives won the day, but Brandeis's dissent was a harbinger of things to come. Within a generation or two, as the administrative state grew and matured, Brandeis's way of thinking about the relationship between the federal courts and the federal administrative agencies began to dominate the new field of administrative law. During the middle decades of the twentieth century, the federal courts began to accept the idea that they should defer to administrative interpretation of statutory law in certain circumstances. Moreover, they discovered that there were justifications for judicial deference that did not necessarily involve arguments about delegated legislative power. For example, if it was clear that Congress had considered an agency's interpretation of a statute and had implicitly ratified it through subsequent legislative action or inaction, judicial deference was sometimes appropriate;⁸⁶ and if a question of interpretation involved a technical matter within the agency's field of expertise, judicial deference was appropriate as a matter of simple prudence.⁸⁷

Two decades ago, in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,⁸⁸ the Supreme Court considered and restated the general principles governing judicial deference to administrative interpretation. *Chevron* involved the Clean Air Act Amendments of 1977, which required various states to establish programs to regulate "new and modified major stationary sources" of air pollution.⁸⁹ During the Administration of President Reagan, the Environmental Protection Agency (EPA) promulgated regulations

86. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 575 (1983) (stating that subsequent congressional action and inaction implicitly ratified IRS's interpretation of the concept of "charity" under the Internal Revenue Code).

87. See, e.g., *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111 (1944) (in light of NLRB's expertise, courts should defer to NLRB's interpretation of word *employee* in National Labor Relations Act). See generally *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

88. 467 U.S. 837 (1984).

89. 42 U.S.C. § 7502(c)(5) (2006).

implementing this part of the statute.⁹⁰ These regulations allowed the states to treat multiple pollution-emitting devices (e.g., multiple smokestacks) as a single “stationary source” if they were located within the same plant or installation, and this had the effect of making it easier for polluting companies to comply with the relevant regulatory standards.⁹¹ The National Resources Defense Council challenged the EPA’s interpretation of the phrase *stationary source*, and when the case came before the Court, the question was whether the Court was obliged to accept the agency’s interpretation of the statute or whether it was free to adopt an interpretation of its own.⁹²

Writing for a unanimous Court, Justice Stevens held that judicial deference to the EPA’s interpretation was warranted, and in the course of his opinion he proposed a general theory of judicial deference to administrative interpretation which drew on traditional doctrines, even as it appeared to plow new ground. Justice Stevens reasoned that when a litigant questions an agency’s interpretation of the statute the agency administers, two issues may arise. The first is “whether Congress has directly spoken to the precise question at issue.”⁹³ If the reviewing court finds that “Congress *has* directly spoken to the precise question at issue” (if the court finds that the legislative intent with respect to that issue is “clear”), then the inquiry comes to an end, “for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”⁹⁴ The second issue arises if the court determines that Congress has *not* “directly spoken to the precise question at issue.” In that event, according to Justice Stevens, “the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation.”⁹⁵ Instead, the court asks whether the agency’s interpretation is “permissible.”⁹⁶ To affirm the agency, the court need not conclude that the agency’s interpretation is the only permissible one or that the court itself would have adopted the agency’s interpretation “if the question initially had arisen in a judicial proceeding.”⁹⁷ Rather, the court must defer to the agency’s interpretation if the court finds the interpretation to be reasonable.⁹⁸

Justice Stevens explained that judicial deference to the agency’s

90. *Chevron*, 467 U.S. at 840.

91. *Id.*

92. *Id.* at 842–43.

93. *Id.* at 842.

94. *Id.* at 842–43 (emphasis added).

95. *Id.* at 843 (citation omitted).

96. *Id.*

97. *Id.* at 843 n.11.

98. *Id.* at 844–45.

interpretation is appropriate in such a case because the court is being asked to decide a question that the law itself does not resolve. Because Congress has *not* directly spoken to the precise question at issue, the question is essentially one of policy, according to Justice Stevens, and questions of policy are best resolved, not by judges, but by political officers in the Executive Branch.⁹⁹

It is easy to quibble with Justice Stevens's opinion. His analysis of the general issue of judicial deference is reductive and stark.¹⁰⁰ Yet his central contention is clearly correct. Like Justice Frankfurter and Justice Jackson in the portal-to-portal case, and like Justice Brandeis in *Gratz*, Justice Stevens recognized that legislative action sometimes creates not a specific rule but a framework for choice, and he was right to insist that such choices must sometimes be made on grounds that are not legally prescribed. In such cases, when an administrative agency has resolved the matter in a reasonable way, the courts are wise to defer to the agency determination.

But how should the courts proceed if there is *no administrative interpretation* of the statute to which they can defer?

IV. A PROPOSAL

Consider the hypothetical posed at the beginning of this Article. A court is presented with a difficult question of statutory interpretation. There are two plausible interpretations of the statute, *A* and *B*. Conventional interpretive considerations are in equipoise, and the court cannot persuade itself that either interpretation is preferable to the other on conventional grounds. Assume further that there is no reasonable administrative interpretation of the statute to which the court can defer, as in *Chevron*, and that the question cannot properly be treated as a one of “fact,” to be decided by the finder of fact on a case-by-case basis, as Justices Frankfurter and Jackson proposed in the portal-to-portal case. How should the court resolve the issue? Which interpretation of the statute should the court prefer, *A* or *B*?

Only two courses of action are open to the court in such a case, given the

99. *Id.* at 865–66.

100. His distinction between two kinds of cases—those in which Congress has “directly spoken to the precise question at issue,” and those in which Congress has *not* “directly spoken to the precise question at issue”—is too simplistic. Even when Congress has not “directly spoken to the precise question at issue,” it is sometimes possible to find persuasive legal reasons to interpret a statute one way or another. The absence of evidence of specific legislative intent does not inevitably convert a question of interpretation into a question of “policy,” as Justice Stevens seems to suggest. Persuasive *legal* interpretation can still occur. That, at any rate, has been the traditional assumption, and it is a valid assumption, in my view.

constraints of conventional theory. If there are unconventional reasons for preferring one interpretation of the statute over the other, the court may elect to decide the case on that basis, while constructing a conventional defense of the decision and sacrificing candor in the process. (*Ledbetter* provides a clear example of this approach.) Alternatively, the court may prefer to make a quasi-arbitrary choice between *A* and *B*, preferring one interpretation over the other for conventional reasons that are thin and unconvincing. (This is surely what happened in *Chapman*.)

Yet if our theories of statutory interpretation were adjusted, the court could approach the case in a more sensible way. The court could declare that there are two plausible interpretations of the statute, *A* and *B*, and that the court finds no persuasive conventional reason to prefer *A* over *B* or *B* over *A*. The court could then hold that the statute creates a framework for judicial choice among legally permissible alternatives, in much the same way that the statute in *Chevron* created a framework for administrative choice among legally permissible alternatives, and the court could make a prudent discretionary choice between the permissible alternatives. The court would not be required to pretend that conventional considerations were determinative. The court would be required, however, to disclose fully the reasons for its choice, whatever they might be.

To understand how this approach would work in an actual case, consider both *Ledbetter* and *Chapman*. In *Ledbetter*, the plaintiff complained about an allegedly unlawful pay practice that began with discriminatory salary-setting decisions and continued for a period of years thereafter. The relevant statute required the plaintiff to file her complaint within 180 days after the alleged unlawful practice “occurred.” The question was whether the 180-day filing period ran from the time the unlawful practice began to occur or from the time it ceased to occur. A conscientious judge might have concluded that there were two plausible interpretations of the statute. One would have required the plaintiff to file her complaint within 180 days after the unlawful practice began; the other would have required her to file the complaint within 180 days after the alleged unlawful practice ended. If this Article’s proposal were accepted, a judge who believed that these two interpretations were equally plausible on conventional grounds would be allowed to declare her opinion openly, and would be permitted to choose between the alternative interpretations for any prudent unconventional reason while making full disclosure in the process. Such a judge might reason, for example, that a lenient interpretation of the statute would expose the employer unfairly to liability for stale claims. In that event, the judge might adopt the strict interpretation of the statute. On the other hand, the judge might adopt the lenient interpretation in the belief that a strict interpretation would be impractical and unfair to the employee, given

the realities of the workplace and the difficulty of detecting discriminatory decisionmaking by employers. In no event, however, would the judge be obligated to pretend that the final decision resulted from legal reasoning, that is to say, from conventional interpretive considerations (from an assessment of the legislature's actual intentions, policies, or purposes, from an assessment of the objective meaning of the text, from an assessment of precedent, or from an application of settled rules of interpretation), and the judge would not be obligated to pretend that the preferred interpretation was the only plausible or permissible one. The judge's only obligation would be to explain candidly why the case was ultimately decided as it was, in the exercise of interpretive discretion.

In *Chapman*, the question was whether blotter paper stained with LSD was a "mixture" for purposes of a statute that made a defendant's sentence a function of the weight of the illicit material he had distributed. A conscientious judge might well have concluded that there were two plausible interpretations of this statute. One interpretation would have treated blotter paper sprinkled with LSD as a mixture; the other would not have treated it as a mixture. If this Article's proposal were accepted, a judge who believed that these two interpretations were equally plausible would be allowed to say so, and the judge would be allowed to choose between them for any prudent reason. For example, the judge might choose not to treat blotter paper sprinkled with LSD as a mixture because the resulting sentences under the statute would then be roughly in line with the sentences imposed on distributors of other similar drugs, e.g., heroin and cocaine.¹⁰¹ Alternatively, the judge might treat blotter paper sprinkled with LSD as a mixture on the ground that this treatment would tend to establish rough equality between defendants who used blotter paper as a carrier medium for LSD and defendants who used other carrier media for LSD. In no event would the judge be obliged to pretend that the preferred interpretation turned on considerations that were legally prescribed. Instead, the judge would be allowed to make a prudent, discretionary choice between the conventionally plausible alternatives and would be required to disclose fully the reasons for his choice.

A number of important benefits would flow from a doctrine that explicitly recognized the discretionary character of statutory interpretation in cases such as these. A doctrine of discretionary interpretation would encourage both rigor and clarity in judicial decisionmaking because it would require the courts to identify and explain the plausible alternative interpretations of the statute in question and the actual reasons for

101. See *United States v. Marshall*, 908 F.2d 1312, 1335 (7th Cir. 1990) (en banc) (Posner, J., dissenting).

preferring one interpretation over others. It would discourage obfuscation because it would not require the courts to construct a conventional defense of an interpretive decision that did not actually turn on conventional calculations. Finally, and perhaps most importantly, it would discourage arbitrariness, because it would relieve the courts of the obligation to attribute decisive legal force to conventional considerations that were trivial and unpersuasive in the circumstances.

The philosophical adjustment advocated in this Article is both modest and broad. The argument is not that courts should be given “discretion” to revise legislation to meet the needs of changing times, as some scholars have suggested,¹⁰² and it is not that courts should be given a roving commission to exercise discretion in statutory interpretation in any and every case for the purpose of doing justice. Courts do not, and should not, possess that kind of power. Instead, the argument is that courts must have power to resolve uncertainty concerning the meaning of statutory texts, *and that they must have this power even in cases in which they find the conventional determinants of statutory meaning—legislative intent, objective meaning, and the like—to be indeterminate*. In such cases, for the reasons given above, the conventional theories of statutory interpretation should be adjusted to recognize that statutory interpretation sometimes requires the exercise of judicial discretion. The specific interpretive choices made in such cases cannot turn upon conventional considerations; instead, they must turn upon the court’s understanding of what justice, equity, practicality, or sound public policy require in the circumstances, within the framework established by the legislative act.

Finally, it should be clear that when this Article refers to discretionary interpretation, it is referring to a power that is vested in the Judicial Branch as a whole. Like any power to interpret law, it must be exercised ultimately by the highest court in the relevant jurisdiction. Discretionary interpretive judgments made in the lower courts would be subject, under this proposal, to de novo review on appeal, just as conventional interpretive judgments are. Only in cases in which the question was essentially one of fact would the lower court’s judgment be entitled to deference.¹⁰³

V. SOME FINAL REFLECTIONS ON FUNDAMENTALS

It has never been generally recognized in theory that statutory interpretation involves discretion, as that term is used here. Moreover, the conventional theories of statutory interpretation are sensible enough, as far as they go. Surely a statute’s legal meaning must depend upon the intended

102. See, e.g., GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

103. See *supra* text accompanying notes 62–70.

meaning of the text, the objective meaning of the text, reasonable inferences concerning legislative policies or purposes, existing rules of law and interpretation, or some combination of these things. And in any case, there is something disturbing about a claim that statutory interpretation may sometimes involve free judicial choice. Legislative action is supposed to create law by giving it definite form, and the courts are supposed to give legal effect to that form through the process of interpretation. The idea that a statute may have a meaning that the courts are free to create in their discretion is inconsistent with this general understanding. It suggests a kind of formlessness contrary to the general nature of legislation, and it suggests a judicial function in relation to legislation quite different from the one the courts ordinarily perform. It suggests that the courts have a lawmaking power akin to their power to create retrospective common law rules, yet it claims that this power exists in connection with the legislative process itself, which is supposed to be generally prospective in operation, and which legislators, not judges, are supposed to control.

The strength of these objections must be acknowledged, yet there are powerful countervailing arguments. Some of the benefits that would flow from explicit recognition of discretionary interpretation have already been described. In the paragraphs below, this Article will briefly describe some constitutional considerations that should encourage the courts to embrace these benefits wholeheartedly.

A. Interpretive Discretion and the Constitutional Origins of Statutory Uncertainty

Consider the separation of legislative and judicial institutions. The framers of our state and federal constitutions were not interested in promoting communication between the legislative and judicial branches, and they did not make it easy for the legislature to anticipate and control judicial behavior in particular cases. They intended to create division. In the federal system, the Constitution gives lawmaking authority to a bicameral assembly that has no single intellect, no single set of intentions. The Constitution requires this assembly to act according to a cumbersome bill-making procedure that is designed to produce a fixed form of words for the approval of 535 different congressional minds, plus the approval of the President; and it assigns to a separate branch of government, the Judicial Branch, the responsibility for interpreting and enforcing these words in particular cases. It does not allow legislators to hold judicial office.¹⁰⁴ It gives the courts no power to interrogate the legislature concerning its intentions, policies, or purposes or to remand statutory questions to the

104. U.S. CONST. art. I, § 6, cl. 2.

legislature for resolution. It imposes general limits on the legislature's power to deal retroactively and prospectively with specific cases and controversies,¹⁰⁵ and it creates no administrative mechanism by which the legislature can control judicial decisionmaking before or after the fact. Nor does it create any intermediary institution with power to reconcile and coordinate legislative and judicial decisions.¹⁰⁶ In short, the Constitution does nothing to ensure that the two departments will work together.

Given these constitutional structures, practices, and principles, it would be astonishing if Congress could communicate its will to the courts so precisely and effectively that the courts would always be in a position to resolve interpretive issues persuasively by appealing to demonstrable legislative intentions, policies, and purposes. It would be equally astonishing if Congress could produce statutory texts so precise and clear in their application to particular cases that the courts would always be in a position to resolve interpretive issues persuasively by appealing to the objective meaning of those texts. The Constitution itself prevents this from happening. The normal operation of the constitutional system guarantees that the intended meaning and the objective meaning of statutory texts, and the adjudicatory implications of legislative policies and purposes, will ultimately be uncertain in relation to specific statutory issues in some cases some of the time.

In light of the separation of legislative and judicial institutions, and in light of the inevitable consequences of that separation, it is remarkable that, except in the field of administrative law, the conventional theories of statutory interpretation make no general provision for cases in which the meaning of a statute is ultimately uncertain in relation to the specific issue to be decided. This omission does not necessarily make the conventional theories unconstitutional, but it surely makes them constitutionally awkward. In very difficult cases, because of the conventional theories, the courts must pretend that they are able to resolve statutory issues on the basis of legislative will or the objective meaning of the text, or on the basis of other conventional considerations, even when they are in no position to do so. The courts must resort to a kind of fiction, yet this fiction threatens justice in some cases and results in outright judicial subterfuge in others. It would be far better to recognize the problematic situation that the Constitution itself creates. On the one hand, it assigns to the courts the task of resolving uncertainty concerning the meaning of statutory texts; on the

105. See, e.g., U.S. CONST. art. I, § 9, cl. 3 (Bill of Attainder and Ex Post Facto Clause); U.S. CONST. amend. V (Due Process Clause).

106. See JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 39–42 (2d ed. 1985) (discussing attempts in civil law countries to create intermediary institutions for the interpretation of statutes).

other hand, it establishes a structure that sometimes makes it impossible for the courts to perform this task consistently according to the theories of interpretation upon which they traditionally rely. Because of the separation of powers, the conventional theories of statutory interpretation are not, and cannot be, analytically sufficient all of the time.

Our theories of statutory interpretation would be more consistent with the constitutional structure if they recognized the discretionary character of statutory interpretation in very hard cases. One is tempted to say that the constitutional structure delegates to the Judicial Branch the power to exercise discretionary interpretive judgment in such cases, but it would be better to use other words to describe the constitutional situation. The power to exercise discretionary interpretive judgment in very hard cases is inherently and necessarily a judicial power. It does not involve a delegation from the legislature. The Constitution necessarily assigns this power to the Judiciary, and our theories of statutory interpretation should recognize this power explicitly.

B. Interpretive Discretion and Five Judicial Virtues

Thus far, the argument for interpretive discretion has been largely negative in character. In some cases statutory interpretation should be regarded as discretionary because it cannot be otherwise and because bad things happen when courts pretend that it can be otherwise. There are positive reasons, however, for recognizing the discretionary character of statutory interpretation in some cases. When the courts, in their discretion, resolve uncertainty concerning the meaning of statutory texts, they are in some respects in a better position than the legislature itself to make judgments about what the law ought to be. They have institutional strengths that can and should be brought to bear to improve statutory law when the usual determinants of statutory meaning leave the legal consequences of legislative action in doubt. Five of these judicial virtues are discussed below.

1. Hindsight

The legislature generally makes policy for the future. It attempts to anticipate how law will affect future events, and it acts on the basis of prediction. Yet legislative foresight is imperfect, and future events can frustrate even the best laid legislative plans. The legislature's inability to foresee the future accurately is one of the causes of uncertainty in statutory law. If the legislature fails to anticipate the cases to which its statutes may apply, there is a possibility that its intentions, purposes, and language will fail to address those cases clearly. The courts, by contrast, enjoy the luxury

of hindsight. They decide cases involving historical facts that are subject to proof, and they can adjust their decisions to produce specific effects in known circumstances. In this respect, they are well positioned to compensate for deficiencies in legislative foresight. Using hindsight and prudent judgment, they can determine the legal consequences of legislative action when the legislature, looking forward, has failed to make those consequences clear.

2. *Particularity*

If legislative action tends to be forward looking, it also tends to be categorical. Indeed, there are constitutional principles and political realities that tend to discourage case-specific legislation.¹⁰⁷ If the failure of legislative foresight is one cause of uncertainty in statutory law, the categorical nature of legislative action is another. Legislative pronouncements that are models of clarity in their assertion of general rules and policies are sometimes remarkably uncertain in their bearing on particular cases and issues.¹⁰⁸ Here again, the courts are well positioned to compensate for an intrinsic legislative deficiency. The nature of the judicial function is such that the courts are obliged to come to terms with the particular. Even when categorical legislative action is uncertain in its relation to a particular case, the courts can and must say what the statute means in that case. The prudent resolution of uncertainty with respect to the particular case is a necessary and desirable aspect of the judicial office.

3. *Detachment*

When judges interpret statutes, they deal with the work of another branch of government. They usually have no institutional or personal investment in the words that appear on the pages of the statute book, no inside knowledge of the politics that supported the legislative action, and no professional commitment to the success or failure of the legislative act, aside from their general commitment to the rule of law. Judicial detachment is constitutionally valuable because, in cases of substantial uncertainty concerning either the objective or the intended meaning of a statute, it allows the courts to exercise independent judgment on the question of what the law ought to be. Sound public policy emerges over time through a process of interdepartmental dialogue, refinement, and correction, and this

107. See U.S. CONST. amend. V (Due Process Clause); U.S. CONST. amend. XIV, § 1 (Due Process and Equal Protection Clauses as they apply to the individual states).

108. See, e.g., 15 U.S.C. § 1 (2006) (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”).

requires that the legislature and the courts maintain independent points of view. The Framers built upon this principle when they separated the legislature and the courts in the first instance. Judicial independence in statutory interpretation contributes to the health of the democratic system. The point here is simply that law benefits in the long run from multiple decisionmakers in dialogue with one another.

4. *Rational Explanation*

Anglo-American lawyers have long believed that law should express practical reason. Blackstone asserted that reason was the essence of law: “[W]hat is not reason is not law.”¹⁰⁹ Arbitrary action, or action which the government cannot adequately explain, has long raised suspicion in the Anglo-American legal mind. A penchant for rational explanation was characteristic of Anglo-American legal institutions at a very early date, and the process of explaining the reasons for governmental action is now an ingredient of legitimacy itself.

The legislature often attempts to explain its decisions in a general way; yet legislative decisions need to be explained precisely at the point at which they impinge on particular cases, and as a practical matter the legislature is in no position to do this comprehensively. The explanatory function belongs primarily to the courts. Statutory interpretation is essentially a process of explanation—a process by which judges explain the connection between legislative action and judicial or administrative decisions in particular cases. Through the process of interpretation—through the process of explaining the effect of legislation on particular cases—judges add value to statutory law by supplying an ingredient of legitimacy which the legislature itself is usually in no position to supply.

As noted above, there are many cases in which the modern theories of statutory interpretation actually interfere with the process of explanation. It is sometimes difficult to provide a convincing or even a minimally rational account of the legal effect of a statute in a particular case if the explanation must depend on bald assertions about legislative intent, legislative purpose, or the objective meaning of the statutory text. Yet a well-constructed theory of statutory interpretation would facilitate explanation. It would grant the courts the freedom to acknowledge the occasional indeterminacy of the elementary determinants of statutory meaning, and it would allow the courts to give other reasons for their interpretive decisions when the conventional reasons did not suffice. In this way arbitrariness would be defeated and legitimacy enhanced.

109. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 70 (1765).

5. *Consistency and Justice*

The judicial process is designed to promote consistency in decisionmaking. The elementary notion that like cases should be treated alike is the bedrock principle, and the courts are organized in such a way that judges are supported when they adhere to this principle and corrected when they do not. To be sure, the judicial process sometimes operates inconsistently, as most human systems do, but consistency is the dominant ideal, and within the Judicial Branch there are various internal checks that tend to ensure that a measure of consistency is actually achieved. Consistency nurtures justice. It allows the governed to develop rational expectations about governmental action, it discourages arbitrary decisionmaking, and it promotes equal protection under the law. To be sure, consistency can also be the enemy of justice, especially when it discourages necessary innovation; but consistency is so closely linked with the limitation of arbitrary power, the protection of rational expectations, and the promotion of equality that the courts should not be faulted for their devotion to it.

Here again, the contrast between the legislative process and the judicial process is striking. Within the Legislative Branch there are few, if any, internal controls that promote consistency in legislative decisionmaking. Subject only to external constitutional constraints, legislative decisionmaking can be as irregular as the wind. It can, and often does, reflect political considerations that are irrelevant to the merits of the questions under consideration, and it can be haphazard and piecemeal. Judicial decisionmaking can sometimes exhibit similar qualities, but in the Judicial Branch there are traditions, procedures, and principles that guard against this.

The great virtue of the legislative process is its commitment to *inconsistency* over time, i.e., innovation. In an open society, justice can be achieved through innovation, and it is good that one branch of government is involved in the business of engineering change. But the judicial commitment to consistency in the pursuit of justice can complement the legislative commitment to innovation in the pursuit of justice, and this can occur precisely at the point where the judicial mind engages the legislative text. When the meaning of a statute is substantially in doubt, and when judges must determine the connection between the statute and a particular case, the judicial commitment to consistency can improve the legal consequences of legislatively mandated change.

CONCLUSION

In most cases it is realistic to suppose that statutes have a fairly precise,

judicially determinable meaning and that the courts are in a position to discover and declare that meaning through a process of legal reasoning. Yet there are cases in which this concept is simply unworkable. Not every question of statutory interpretation can be resolved persuasively through a process of legal reasoning, and to pretend otherwise is to perpetuate a fiction. Some legal fictions are useful; this one is not. It degrades, confuses, and corrupts the interpretive process.

Conventional interpretation is likely to fail in cases such as the ones described in this Article. Sometimes a conscientious judge will examine the relevant statute and conclude that more than one interpretation is possible and that conventional considerations do not favor a particular interpretive choice. In such a case, the judge should be free to declare that the statute creates a framework for choice, and the judge should be allowed to exercise prudent judgment within the statutory framework by preferring one permissible interpretation or another, while explaining candidly the reasons for the preference. In such a case the interpretive process is essentially a discretionary process, and it should be theorized as such.

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