Summer 1993

Law-Making Responsibility and Statutory Interpretation

William D. Popkin
Indiana University Maurer School of Law, popkin@indiana.edu

Follow this and additional works at: https://www.repository.law.indiana.edu/ilj

Part of the Legislation Commons

Recommended Citation
Available at: https://www.repository.law.indiana.edu/ilj/vol68/iss3/16

This Article is brought to you for free and open access by the Maurer Law Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact kdcogswes@indiana.edu.
The explosion of commentary about statutory interpretation in the 1980s has left judges without a common method for interpreting statutes. Text-, writer-, and reader-based approaches all have some credibility. This Essay suggests a common framework for analyzing these approaches to statutory interpretation within which they can be understood and their differences debated. That framework views all approaches to statutory interpretation as decisions about law-making responsibility.

I. INTERPRETIVE METHOD

Writer-based approaches treat statutes as expressions of the legislative writer's will and look for evidence of legislative intent beyond that found in the text. Text-based approaches treat statutes as text adopted through constitutional procedures and stick as closely as possible to the statutory language. There is also considerable variety within writer- and text-based approaches. Two writer-based approaches—traditional legal process and contemporary public choice—make very different demands on the judge. Text-based approaches also call for different judicial responses, ranging from the ideal drafter's approach to grammar and style to genuine attempts at understanding what a text means.

Writer- and text-based approaches share a common "Article I" perspective, tracing statutory meaning exclusively to the legislature—either by following legislative will or statutory text. Reader-based approaches lack this democratic pedigree. They treat statutes as material out of which the judicial reader makes sense. These methodologies are "Article III" approaches to determining statutory meaning, resting judicial authority on an independent judicial...
power. Reader-based approaches also vary, ranging from dynamic "updating" interpretation\(^5\) to a more eclectic "pragmatism."\(^6\)

The confusion over statutory interpretation contrasts with the three other major branches of law: common law, administrative law, and constitutional law. Judges know pretty much how to decide a common-law case. They are sensitive to precedent, dictum, holding, and the evolution of principle. Administrative law also has an organizing principle—procedural rule-making norms—that legislation lacks. The U.S. Constitution requires very few procedures for making federal statutes;\(^7\) Congress is free to disregard the procedural rules it adopts for itself;\(^8\) and constitutional rationality requirements impose very weak deliberation standards on Congress.\(^9\)

Constitutional law seems to have the most affinity with statutory law because it is a written source of law imposed on courts. Many of the same disputes about legal method arise: what is the role of original intent, of the original meaning of the text, and of the contemporary values discerned by the judge? Despite the wide range of approaches to constitutional interpretation, the Constitution has a unity which statutes lack. To be sure, constitutional provisions vary in the extent to which they evolve or are bound to their specific histories. But the variety of statutory subject matter imparts to statutory interpretation a disunity that has no parallel in constitutional adjudication.

This Essay adopts an Article III reader-based approach to statutory interpretation, which posits that all law—whether or not it originates in statutes—filters through the judicial decision-making process about where

---


Procedures required by the U.S. Constitution are justiciable. See, e.g., United States v. Munoz-Flores, 495 U.S. 385 (1990) (revenue-raising bills must originate in the House). State constitutional requirements are also justiciable unless the state follows the enrolled bill rule. 1 Sutherland Statutes and Statutory Construction § 15.03 (L. Dallas Sands ed., 4th ed. 1972).


9. See, e.g., United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980) (stating that the Court "historically [has] assumed that Congress intended what it enacted"). But cf. Schweiker v. Wilson, 450 U.S. 221 (1981) (demonstrating that majority and dissent are both concerned with congressional awareness when statute harms residents of public mental institutions; majority refers to Congress's deliberate, considered choice, id. at 235-37; dissent requires a higher standard of judicial review if the only evidence of legislative purpose is found in *post hoc* litigating position, id. at 243-45).
law-making responsibility lies. Writer- and text-based approaches are best understood as taking different positions about the respective law-making responsibilities of legislatures and courts and the circumstances under which that responsibility exists. When a court deals with a statute, the judicial reader asks whether evidence of legislative intent and the statutory text discharges the legislature's law-making responsibility or whether the court has a responsibility to consider additional evidence of statutory meaning.

The language of law-making responsibility contrasts with the conventional rhetoric of legal power, implying that courts have either (1) unlimited power within an appropriate sphere of activity or (2) only that power derived from a superior legislative authority. Neither implication captures the Article III perspective on statutory interpretation. A court's relationship to statutes is not the same as a common-law court's relationship to the common law. Statutes are not as malleable as common-law precedents. But neither is a court's relationship to a statute defined exclusively by what the legislature has done. Theories of judging, not just expressions of legislative will, determine the extent to which statutory material confines the judge. More specifically, the judge's responsibility to struggle with the statute in the context of deciding cases necessarily implies a law-making function beyond that which the legislature grants.¹⁰

The Article III law-making responsibility perspective on statutory interpretation has two major characteristics and, I would argue, advantages. First, it explains how all interpretive approaches, even those that are writer- and text-based, result from the exercise of judicial law-making choice. Second, the rhetoric of "responsibility" focuses the judge's attention on how interpretive choices should be made, reminding the judge that the choice is a responsible act.

Part II of this Essay deals with the writer-based approaches, legislative purpose and public choice. Part III discusses the text-based approaches, surface textualism and plain meaning. Part IV suggests additional ways a judge might exercise law-making responsibility: plain statement rules and the legislative reenactment and inaction doctrines.

¹⁰ See John Choon Yoo, Marshall's Plan: The Early Supreme Court and Statutory Interpretation, 101 YALE L.J. 1607, 1630 n.135 (1992) ("The plenary power to decide rules of interpretation seems to draw its roots from the Marshall Court's suggestion that certain powers inhere in the courts qua courts.").
II. WRITER-BASED APPROACHES

A. Legislative Purpose

The dominant view throughout much of the twentieth century has been that statutes embody the legislative writer’s public purposes. Roscoe Pound articulated this view in his seminal 1908 article, *Common Law and Legislation*. Its best-known judicial advocates were Learned Hand and Felix Frankfurter. Judge Hand argued that

it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

Justice Frankfurter cautioned that

the notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification. A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute, like the one before us, is part of a legislative process having a history and a purpose.

Neither Hand nor Frankfurter completely neglected the text. As noted above, Learned Hand viewed the text as, ordinarily, the most reliable source of meaning. He also noted “that as the articulation of a statute increases, the room for interpretation must contract.” Justice Frankfurter rejected the view that statutory meaning was an “unexpressed spirit outside the bounds of the

---

12. Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.), aff’d, 326 U.S. 404 (1945); see also Gregory v. Helvering, 69 F.2d 809, 810-11 (2d Cir. 1934) (“[T]he meaning of a sentence may be more than that of the separate words, as a melody is more than the notes . . . .”), aff’d, 293 U.S. 465 (1935); Learned Hand, *Thomas Walter Swan*, 57 YALE L.J. 167, 171 (1947) (“[T]he judge’s task is no less than to decide how those who have passed the ‘enactment’ would have dealt with the ‘particulars’ before [the judge], about which they have said nothing whatever.”).
13. United States v. Monia, 317 U.S. 424, 431-32 (1943) (Frankfurter, J., dissenting); see also Keifer & Keifer v. Reconstruction Fin. Corp., 306 U.S. 381, 389 (1939) (“It is not a textual problem; for Congress has not expressed its will in words.”).
14. *Gregory*, 69 F.2d at 811. Despite the statutory detail, however, Judge Hand denied tax benefits sought by the taxpayer in *Gregory* by invoking the statute’s purpose that corporate readjustments must have a business purpose.
normal meaning of words.”15 Purpose was, however, the dominant partner in the purpose-text relationship. Text was evidence of purpose and had an interpretive veto, but purpose animated the judge’s view of statutory meaning.

The writer-based purposive view of statutes peaked in the 1958 Hart and Sacks *Legal Process* materials.16 Their recipe for statutory interpretation can be summed up as follows: (1) “[d]ecide what purpose ought to be attributed to the statute,”17 but “not in the mood of a cynical political observer [who takes] account of all the short-run currents of political experience that swirl around any legislative session”;18 (2) “unless the contrary unmistakably appears, [assume] that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably”;19 (3) let the words in historical context serve both as guides to identifying purpose and as limits on the meanings that can be attributed; and (4) do not give the words a meaning that violates “any established policy of clear statement.”20

The Legal Process approach requires a shared legislative/judicial law-making responsibility. The statutory text and legislative purpose provide the raw material, confining but not defining how a court interprets a statute. Statutory purpose is not an easily identified fact; the judge must “decide what purpose ought to be attributed to the statute.”21 Moreover, the limiting effect of the text on statutory meaning is itself a function of how judges understand the text’s potential meanings in light of the ought-to-be-attributed purpose.

**B. Public Choice**

Intellectual syntheses have a way of crumbling soon after their dissemination, and that is what happened with Legal Process. The assumption of reasonable legislative purposes collapsed under pressure from the “public

15. *Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 617 (1944). Justice Frankfurter continued: We should of course be faithful to the meaning of a statute. But after all Congress expresses its meaning by words. If legislative policy is couched in vague language, easily susceptible of one meaning as well as another in the common speech of men, we should not stifle a policy by a pedantic or grudging process of construction. To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another.

17. *Id.* at 1411.
18. *Id.* at 1414-15.
19. *Id.* at 1415.
20. *Id.* at 1411.
21. *Id.* (emphasis added).
choice” perspective on statutes. Public choice relies on an empirical model of legislation which leads to the conclusion that there is no legislative purpose from which courts can reason. Professor, now Judge, Frank Easterbrook relied on three “public choice” ideas to reach this conclusion. First, there is no legislative purpose because there are only indeterminate results made determinate through legislative agenda control. Second, legislation is the result of compromise, without energizing purpose. A statute does not merely have direction (purpose), but also length, limited by the political interests which compromised to produce the statute. Third, statutes result from private-interest bargaining in a public forum.

Like all generalizations about legislative intent, the empirical assumptions of the public choice model are often inaccurate. Its hard-nosed view of legislation may be no more correct than a “naive” legal process view that statutes are animated by a public purpose. Advocates of the public choice model tend to find the facts predicted by the model. Here are two examples. First, Easterbrook presumes that private interest rent seeking explains the prohibition of investment banking by commercial banks. But an exhaustive study of the statutory history by Donald Langevoort could not uncover supporting evidence. Second, Easterbrook cites approvingly a Supreme Court decision that rejected tort liability for a general contractor who purchased workers compensation, because it enforces the statutory compromise that employers accept no-fault workers’ compensation in exchange for eliminating tort liability. However, as the dissent in that case noted, the Court extended the statute to someone who was not a part of the original legislative bargain. The general contractor was not required by law to buy workers’ compensation unless the subcontractor refused, and the general contractor purchased workers’ compensation only because it could do so more cheaply than the subcontractor.

The empirical assumptions of the public choice model are necessary but not sufficient to determine the allocation of law-making responsibility between

23. In re Erickson, 815 F.2d 1090, 1094 (7th Cir. 1987).
25. Id. at 57-58.
29. Id. at 928-29.
legislatures and courts. Even if the public choice model provided a completely accurate picture of the legislative process, a pre-empirical decision about law-making responsibility determines whether courts should use that model to interpret statutes. Easterbrook is very explicit about the pre-empirical assumptions which underlie the public choice approach to statutory interpretation. These assumptions, in equal degree, prefer legislative law making and reject judicial law making. Easterbrook argues that the judicial re-creation of legislative purpose impinges on legislative law-making responsibility by, in effect, extending the legislature's life and making law without adhering to the constitutional requirement of passage by both houses of Congress and presentment to the President. Additionally, Easterbrook rejects judicial law making on its own merits, because it places too much strain on judicial ability to re-create historical purpose in a contemporary setting.

The public choice approach is not, however, single-mindedly opposed to judicial law making. A court considers two factors in deciding whether it can make law. First, a detailed text blocks further judicial exploration of legislative intent because the text is presumed to be the product of a legislative bargain. Second, an unclear text sends the court on a search in the legislative history for an underlying legislative bargain. If the text is precise or there is a constraining legislative bargain, there is no expansive legislative purpose for the court to apply. However, if an unclear text is not confined by a legislative bargain, the statute "plainly hands courts the power to create and revise a form of common law." The willingness to accept judicial law-making responsibility establishes the public choice approach as "moderate" on the question of judicial role. As a theory based on legislative intent, public choice accepts (though reluctantly) the legislature's decision to authorize judicial law making. A legislature can therefore discharge its law-making responsibility by delegating authority to the court.

30. Easterbrook, supra note 22, at 548-49.
31. Id. at 550-51.
32. Id. at 545-57.
34. Easterbrook, supra note 22, at 544.
III. THE TEXT

Textualism comes in two very different guises, based on two very different conceptions of law-making responsibility. First, "surface textualism" relies on grammar and style and is not genuinely concerned with how people communicate. The text is not so much an affirmative communication of legislative meaning as it is a repository of words whose meaning depends on an ideal drafter's set of rules. It is therefore a headlong flight from judicial law making, rather than an affirmative vision of the legislature's responsibility for making law. Second, the plain meaning approach is concerned with how people communicate through text. It looks for what the legislative writer and statutory audience are likely to share about the meaning of words and therefore rests on an affirmative conception of the legislative law-making responsibility, albeit one that is discharged by the text.

A. Surface Textualism

Surface textualism interprets a statute in light of an ideal drafter's conception of grammar and style. Despite protestations that this implements "natural" usage, surface textualism is not genuinely concerned with the meaning of language shared by writer and audience. Instead, it remains on the surface of the document, imposing standards of grammar and style without regard for the common understanding of language. The pre-textual assumption of surface textualism is the rejection of judicial law making. The text is the law, not for the purpose of deferring to plain meaning or to what a life-and-blood legislature wants, but to avoid judicial responsibility. It is the Pontius Pilate school of judging.

Surface textualism's lack of concern for how people really understand language is most apparent when the judge treats the entire body of statutory law as an integrated super text, by assuming that the same word has the same meaning throughout the statutory code. That assumption violates the conditions required for applying the plain meaning approach to language.

35. See Sullivan v. Everhart, 494 U.S. 83, 90 (1990) ("[I]t would have been more natural to refer to "the correct amount of any payment."); Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 126 (1989) (implying that anything other than consistent usage of phrase in the statute would be "unnatural"); Church of Scientology v. IRS, 792 F.2d 153, 157 (D.C. Cir. 1986) ("Such an intent would more naturally have been expressed not in an exclusion but in the body of the definition"), aff'd, 484 U.S. 9 (1987).

36. This may explain why a surface textualist like Justice Scalia also rejects judicial law making by adopting a super-deferential approach to agency rulemaking when the text is unclear. See INS v. Cardoza-Fonseca, 480 U.S. 421, 453-55 (1987) (Scalia, J., concurring in the judgment); Sullivan, 494 U.S. at 89-93 (Scalia, J.).
Meaning is plain when writer and audience share an understanding about the text's meaning (hence, "common understanding" is a synonym for "plain meaning"). But shared meaning occurs only when the writer and audience treat the document(s) as an integrated whole. Absent that condition, the writer and audience might not share a set of common assumptions about how the statutory language is understood. The audience may assume one thing and the writer another about the text's meaning, like two Peerless ships\textsuperscript{37} passing in the night.\textsuperscript{38}

The writer's and audience's understanding of language might diverge either because the document is a multi-part public law, drafted by different committees, or because public laws are written at different times. The mere fact that the text is codified in the same place does not guarantee a common origin. A judge could, of course, insist on treating material codified in the same place as if it were an integrated document to protect an audience's reliance interest or to force more careful drafting. Such insistence is, however, a reader-based approach, interpreting a statute to achieve important public values, not to implement the plain meaning shared by author and audience.

Two cases involving income maintenance illustrate how a surface textualist analyzes two public laws, codified in the same place, as an integrated document. In \textit{Sullivan v. Stroop},\textsuperscript{39} the Court dealt with 1984 amendments to Title IV-A of the Social Security Act,\textsuperscript{40} which permitted the disregard of "child support" in computing a welfare family's income. The disregard mitigated the hardship resulting from the 1984 adoption of automatic inclusion of the child's income in the computation of family wealth and the consequent reduction of AFDC benefits. The Court limited "child support" to parental support, ruling out disregard of Social Security payments to benefit the child. Another and earlier enacted section of the statute, Title IV-D,\textsuperscript{41} dealt with enforcing "child support" from absent parents. Obviously, "child support" in Title IV-D referred only to parental support. The Court concluded that "child support" in the more recent (1984) Title IV-A and the earlier Title IV-D had the same meaning, relying in part on the interpretive principle that the same phrase had the same meaning throughout the law,\textsuperscript{42} even though the provisions had been drafted at different times for different purposes. The Court

\textsuperscript{38} In the case \textit{In re Wagner}, 808 F.2d 542, 546 (7th Cir. 1986), Judge Posner rejected interpretation based on the assumption of a master drafter.
\textsuperscript{39} 496 U.S. 478 (1990).
\textsuperscript{42} \textit{Stroop}, 496 U.S. at 484.
adopted a super-text approach, requiring an interpretation that treated the two laws as an integrated document.

In *Sorenson v Secretary of Treasury*, the Court interpreted the word "overpayment" as it was used in the 1981 Omnibus Budget Reconciliation Act. The Act provided for intercepting refunds of tax "overpayments" owed by the Internal Revenue Service to a father who was delinquent in making child-support payments, and turning the funds over to the state that had previously supported the child. The 1981 intercept provision for "overpayments" appeared in the Internal Revenue Code right after the rules adopted in 1975, which provided for payment of an earned income credit to poor families based on a percentage of earnings. The earned income credit was paid to workers in the form of a refund for an "overpayment." This "overpayment" was not limited to cases where the credit reduced tax obligations below prior withholding of income taxes from wages. The "overpayment" could be created by pretending that the credit equaled previously withheld taxes, even though the worker's earnings were insufficient to create tax liability in the first place. The Court defined the "overpayment" for purposes of the 1981 intercept provision to include all "refunds" attributable to the earned income credit (whether or not they resulted from actual tax withholding), because the same intercept "overpayment" language was codified in the same section of the tax code that provided pretend "refunds" of the earned income credit. The super-text approach prevailed. But the 1975 and 1981 provisions served different purposes. One encouraged low-income workers to work, and the other helped the state recoup welfare costs from obligated fathers. As Justice Stevens noted in dissent in *Sorenson*, it defied belief to think that Congress realized that the 1981 intercept provision, in a vast, hurriedly enacted omnibus statute, changed the earned income credit program.

43. 475 U.S. 851 (1986).
45. *Sorenson*, 475 U.S. at 863-64 (stating that it "defies belief to argue that Congress [is] unaware" of similar wording). Other recent cases treating the body of statutory law as a super text include *Morales v. Trans World Airlines*, 112 S. Ct. 2031, 2037 (1992) (interpreting "relating to" the same way in airline regulation law as in ERISA), and *West Virginia Umv. Hosp. v. Casey*, 111 S. Ct. 1138 (1991) (interpreting statute not referring to expert's costs differently from statutes referring to both attorney's fees and expert's costs).
46. *Sorenson*, 475 U.S. at 867 (Stevens, J., dissenting).
B. Plain Meaning Textualism

Plain meaning textualism is very different from surface textualism. It relies on the meaning of language shared by the legislative writer and statutory audience, not on an ideal drafter's conception of grammar and style. It rests on an affirmative vision of legislative law-making responsibility, not on rejection of judicial law making, although its focus on the text allows less scope for judicial law making than a writer-based legislative purpose approach. The pre-textual political theory justifying deference to plain meaning is that law-making responsibility is exhausted by the text; the legislature is responsible for telling the judge if it wants something different from the text's plain meaning.

The plain meaning approach has trouble surviving in today's legal environment. First, surface textualism has given it a bad name. Second, plain meaning occurs much less often than judges let on. A meaning is plain only if a writer and audience have a common understanding of textual meaning. However, there is often more than one plausible audience for a text, at least one of which has a different understanding from the legislative writer. "Family" means one thing in traditional usage and another thing in the gay community;47 "mother" can refer to biological or birth mother;48 "race" can refer historically to ethnicity, whatever it might mean today49 Still, there often is a plain meaning about which author and audience agree. (Tomatoes are vegetables, as long as the audience is not a group of botanists.50) In such cases, the plain meaning has a strong claim to exhaust the meaning of the statute.

Despite plain meaning, however, the application of the text to the facts of a case may look strange, testing the strength of the plain meaning approach. The judge must then decide whether the legislature has the responsibility to write the text to prevent strange results, or whether the judge has the responsibility to decide the case other than in accordance with plain meaning. The criteria for making that choice are illustrated by the following three

49. Saint Francis College v. Al-Khazrjji, 481 U.S. 604, 610-12 (1987) (noting that in the 19th century "race" referred to ethnic groups such as Germans and Arabs); Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617 (1987) (holding that Jewish plaintiffs can bring a cause of action under 42 U.S.C. § 1982 because Jews were considered part of a distinct race when the statute was passed).
situations: (1) a drafting error; (2) changing circumstances which make historical plain meaning seem odd; and (3) absurd results. The central organizing principles are these. Legislatures have two major responsibilities: to convey meaning in language and to address political issues. A judge must, first, decide whether law-making responsibility is discharged by the text or whether the judge can look further; and, second, if the judge can look further, whether the political issues require legislative rather than judicial resolution.

1. Drafting Errors and Drafting Responsibility

In *United States v. Locke,* the Court dealt with a federal statute enacted to rid federal lands of stale mining claims by requiring the recording of ownership with the Bureau of Land Management. The statute required the claimant to file “prior to December 31.” This was a drafting error. Congress meant to say “on or before December 31,” and there was no significant political judgment which could support a legislative choice requiring a pre-December 31 filing. The Court held that dates have a plain meaning. It was the legislature’s responsibility to be more careful, not the court’s job to rescue Congress from its error.

What is a court’s role in correcting drafting errors from a law-making responsibility perspective? The argument for enforcing the drafting error as written views textual accuracy as one of the legislature’s primary responsibilities. The text is what legislators pass, and political language should therefore be respected, even if in a particular case it seems mindless. Indeed, texts are so important that the court should encourage legislative responsibility by not bailing out the legislature when it makes careless mistakes. Moreover, the court cannot be trusted to pierce the textual veil only when there are obvious careless mistakes. Disrespect for the text will encourage the judicial reader to undermine the text through a variety of techniques, such as speculating about legislative purpose, even when the statute is not carelessly drafted.

A strong counterargument can be made that the legislature’s primary task is to deal with political controversy. When there is no political dispute and the drafting error is clear, judicial correction of a drafting error does not undermine the appropriate balance of law-making responsibility between courts and legislatures. Indeed, preventing mindless harm is an affirmative judicial responsibility. When a legislature carelessly harms someone through a drafting error, the court has a responsibility to go beyond the text’s plain

meaning. Moreover, it is naïve to expect that judicial refusal to correct errors will improve the legislative drafting process, given the pressures under which drafters already work.

2. Change and Political Responsibility

In 1935, Wisconsin adopted a statute exempting a farmer's "mower" from creditors' claims. Thereafter the haybine was invented, which did what the old mower did plus the additional task of binding the hay. Was the haybine a "mower"? Judge Easterbrook acknowledged that the plain meaning of the statute had been shattered by change and that the court must consider whether the new haybine was included in the old statutory term "mower." But why does the court have that responsibility?

Judge Easterbrook discussed three legislative purposes to decide whether the haybine is a "mower" (1) that something functioning like a mower should be exempt; (2) that basic farm implements should be free from creditors' claims; and (3) that the respective interests of debtors and creditors should be balanced. In his analysis, he relied on the first two purposes (that mower-like machines and basic farm implements should be exempt), but not the third (the debtor/creditor balance).

He concluded that the term "mower" includes the modern haybine, because the newer farm implement served the same function as a mower, in both the physical sense of mowing and the political sense of exempting basic farm implements. But why did he reach this conclusion? Given his reluctance to update statutes, why didn't he limit the word "mower" to its historical denotative meaning, rejecting an interpretation which included a machine that did more than the mower did in 1935? Why did he consider the mower's...
physical operation and the protection of basic farm implements from creditors, but refuse to evaluate how the statutory balance between creditor and debtor applied to the haybine? A law-making responsibility perspective provides an answer.

Balancing the interests of creditors and debtors in the context of the modern haybine requires judges to do the following: consider the value of a farmer’s assets as they change over time, which is administratively difficult; determine the true interests of debtors in exemptions, given the fact that an exemption may discourage an initial granting of credit; and re-create the historical legislature’s balancing of the respective interests of creditors and debtors, which is a difficult political judgment call. These judgments might plausibly be left to legislative law making. They involve complex and difficult political choices.

By contrast, it is not so difficult to decide that a haybine does what a mower does and that defining a “mower” to include a haybine serves the statutory purpose of protecting basic farm implements from creditors. Moreover, limiting a statutory term like “mower” to its historical denotative meaning would require legislatures to revisit a statute every time new facts arise, which is a poor way to allocate law-making responsibility. Some judicial law-making responsibility is, as a practical matter, desirable. It is especially appropriate when the facts to which the statute might be applied did not exist at the time of the statute’s adoption. In such cases, the legislature has not ducked its law-making responsibility. Admittedly, equating a haybine with a mower, when the haybine does more than the mower and is much more expensive, might unsettle the legislature’s decision to balance debtor and creditor interests. That is why Easterbrook’s decision displays all the anguish of a judge who would rather not decide the case: “This statute needs legislative attention; we cannot provide more than emergency care.”

But the alternative of forcing legislatures continually to revisit old statutes is the greater of two evils in the allocation of law-making responsibility.

---

become eligible to vote, were not included within a statute which defined potential jurors as voters because the statute was passed before women were given the right to vote) with Commonwealth v. Maxwell, 114 A. 825 (Penn. 1921) (contra).

57. See McBoyle v. United States, 283 U.S. 25, 26 (1931) (holding that statute referring to “self-propelled vehicle” did not apply to airplanes although airplanes were well known when the statute was passed).

58. In re Erickson, 815 F.2d 1090, 1095 (7th Cir. 1987).
3. Trumping the Text

Even the most confirmed textualist concedes that an absurd result trumps the text. "Absurdity" refers to the statute's substantive content; it does not mean textual gibberish, and it is not limited to cases in which the plain meaning would nullify the statute. In such cases, the legislature does not exhaust law-making responsibility through the text. The court has the responsibility to prevent absurd results, and the legislature has the responsibility to say that the absurdity was really intended, notwithstanding the statute's plain meaning.

This category of cases is important because it qualifies the claim that the legislature always has the responsibility to say what it means. Once the absurdity exception is conceded, the underlying issues of law-making responsibility must be confronted. Why shouldn't the legislature be held responsible for writing texts which avoid absurd substantive results? Although "absurdity" might be a clear enough standard to restrain judicial discretion, it might also place judges on the slippery slope towards judicial law making, by acknowledging that the plain meaning of the text is not paramount and by requiring courts to identify substantive policies that prevail over the text.

Some absurd results can be avoided by arguing that the text, properly understood, is not absurd. The famous Wittgenstein example, that telling a child to play a "game" excludes gambling, may be such a case. But extensive debate about whether the text does or does not produce absurd results usually ducks the critical question: Where does law-making responsibility lie? The famous Holy Trinity case is an example. The issue in Holy Trinity was whether a statute making it a crime to import aliens to perform "labor or service" applied to a rector. Every attempt to rewrite the text was unavailing. "Labor" might be limited to manual labor, but "service" is broader. "Service" could refer only to domestic household labor, but that is doubtful. The statute itself refers to "labor or service of any kind." The text also excludes skilled workers and nonmanual laborers in certain situations, which compounds the difficulty of limiting the text to manual labor. It is more honest to confront the fact that a text's plain meaning must sometimes be trumped to avoid its substantive impact and that resolving the confrontation

63. Id. at 458 (emphasis added).
depends on the respective law-making responsibilities of legislatures and courts.

IV. ACCEPTING LAW-MAKING RESPONSIBILITY

Explaining writer- and text-based approaches to statutory interpretation from a reader-based perspective does not necessarily give judges much to do. The "conservative" judicial reader might decide that the judge has just enough law-making responsibility to limit the court's interpretive role. The "conservative" judge would therefore admit to exercising a significant law-making choice by deferring to the legislative writer or the statutory text, but thereafter would withdraw from law making, like Ulysses ordering himself to be tied to the mast.

Judges are unlike Ulysses, however, because they must remain engaged in the decision-making process; they must come ashore. Their law-making responsibility cannot stop with the adoption of writer- and text-based approaches, but must confront the interaction of statute, facts, and background considerations to decide the case. That is why Easterbrook, confronted by the modern haybine, had to choose whether or not to extend the statute's reach beyond the historical "mower" in light of various statutory purposes. Judge Easterbrook could not adhere to Professor Easterbrook's advice about limiting the judge's role. The nature of judging and, therefore, the judge's constitutional role in deciding cases require that judges remain so engaged.

Two sets of rules—plain statement rules, and the rule in which legislative reenactment and inaction incorporates intervening judicial and agency interpretations—illustrate how judges exercise law-making responsibility beyond that which is implicit in adopting a writer- or text-based Article I approach.

A. Plain Statement Rules

A plain statement rule (in its strongest version) rejects interpretation of a statute that overrides substantive values embodied in the rule, unless the statute explicitly so provides. Not even a general text is sufficient to override those values. In weaker versions of a plain statement rule, substantive values enter into the mix of text, purpose, and background considerations to break

64. See Easterbrook, supra note 22, at 549-51 (arguing that 19th-century liberalism and judicial shortcomings justify limiting the court's interpretive role).

65. See supra text accompanying notes 53-58.
ties or to raise the burden of proof before the judge interprets a statute as rejecting a specific substantive value.

Statutory interpretation has known many plain statement requirements, although it is not always clear how strong a version the court imposes. They include narrow interpretation of statutes in derogation of common law, application of the rule of lenity regarding penal statutes, and the interpretation of tax statutes to favor taxpayers. Recent attention has focused on the plain statement rule against burdening the states.

Plain statement rules are usually not Article I approaches to statutes in court. By definition, they do not defer to the statutory text. But neither are they likely to defer to probable legislative intent (except perhaps in some applications of the rule of lenity). They embody strong substantive values whose rejection can only be achieved explicitly, regardless of the legislature's probable intent. As Justice Scalia notes: "[O]ur jurisprudence abounds with rules of 'plain statement,' 'clear statement,' and 'narrow construction' designed variously to ensure that, absent unambiguous evidence of Congress's intent, extraordinary constitutional powers are not invoked, or important constitutional protections eliminated, or seemingly inequitable doctrines applied."

If plain statement rules are not Article I approaches to statutory interpretation (that is, if they are not deferential to the legislature), what is their origin? They fit easily within an Article III approach; the judge exercises law-making responsibility to force the legislature to make certain decisions carefully. They are applications of a deliberative model of legislation, whereby a statute overrules certain substantive values only if it results from careful legislative consideration, evidenced by an explicit statutory text.


67. See 3 SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION, supra note 7, § 59.03. Compare United States v. Kozminski, 487 U.S. 931 (1988) (applying the rule of lenity since the crime of holding workers in involuntary servitude was not proven by a showing of psychological coercion) with Evans v. United States, 112 S. Ct. 1881 (1992) (interpreting federal Hobbs Act to apply to bribery of state officials although dissent would apply rule of lenity).

68. 3 SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION, supra note 7, § 66.01.

69. See infra text accompanying notes 73-83.

70. When substantive values influence statutory interpretation on an ad hoc basis, rather than through a general plain statement rule, they are more likely to identify legislative intent accurately. See, e.g., Church of the Holy Trinity v. United States, 143 U.S. 457, 465-72 (1892) (holding that commitment to religion precludes interpretation of statute criminalizing importation of rector from England to the United States).

The exercise of judicial law-making responsibility through plain statement rules is an obvious threat to Article I writer- and text-based approaches to statutory interpretation. An attempt is therefore made to minimize this threat by grounding at least some plain statement rules in constitutionally inspired values. First, a constitutional source is supposed to give the rules a superior legal pedigree, not traceable to judicial choices. Second, the scope for judicial law making is reduced because a constitutional source guarantees widespread judicial agreement. Of course, neither argument works very well, and for the same reason—the constitutional source of the plain statement rules is too uncertain to confine judicial choice.

But there is a more fundamental problem with the claim that plain statement rules are grounded in the Constitution. Constitutional inspiration for a plain statement rule is different from interpreting a statute to avoid potential unconstitutionality. There is, for example, no doubt that a federal statute can burden states by abolishing state sovereign immunity, but a plain statement rule nonetheless requires that this be done explicitly. Drawing inspiration from the Constitution requires the judge to make choices that extend well beyond the uncertainty of constitutional interpretation, explicitly recognizing that judges can imply that which the Constitution does not require.

Plain statement rules against burdening the states illustrate how judges must take responsibility for interpretive choices. First, the core plain statement rule against burdening states preserves state sovereign immunity in federal court and is based on federalism principles inferred from the Eleventh Amendment. Federalism principles conflict, however, with values embodied in the Supremacy Clause affirming the application of federal law. The plain statement rule reflects judicial choice to favor federalism principles.

Second, when the issue involves the state as a defendant, but not state

72. See supra text accompanying note 70.
74. "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any of the United States by Citizens of another State." U.S. CONST. amend. XI. The Eleventh Amendment has been interpreted to prohibit suits by citizens against their own state in federal court. Hans v. Louisiana, 134 U.S. 1 (1890).
75. See Atascadero, 473 U.S. at 247-48 (Brennan, J., dissenting) (rejecting the view that the Eleventh Amendment is grounded in "principles essential to the structure of our federal system").
sovereign immunity in federal court, judges make different choices about how much inspiration to draw from constitutionally based federalism principles. For example, when the question was whether a federal statute provided a cause of action against the states, Justice White (in dissent) denied that the Eleventh Amendment was implicated, even though he agreed with the majority in *Atascadero* about applying a plain statement rule against overriding state sovereign immunity in federal court. When the issue was whether state sovereign immunity applies in state court proceedings, a majority of the Court adhered to precedent and interpreted a federal statute to reject state sovereign immunity. The Court rejected the view that the Constitution supported a plain statement rule protecting states when the proceedings were in state court. The dissent argued, however, that such a plain statement rule "protects the balance of power between the States and the Federal Government struck by the Constitution" and that "[a]lthough the Eleventh Amendment spells out one aspect of that balance of power, the principle of federalism underlying the amendment pervades the constitutional structure."

When the state is not a defendant but federal law might interfere with the states, judicial law-making choices are even more apparent. First, despite frequent application of plain statement rules to protect the states, the Court recently applied a federal statute to intrude into what the dissent called "a field traditionally policed by state and local laws—acts of public corruption by state and local officials." The Court interpreted the Hobbs Act to cover bribery of state officials, disregarding the dissent's invocation of federalism principles to deny federal coverage. Second, when pre-emption of state law is the issue, Justice Scalia is willing to imply pre-emption, despite his enthusiastic adherence to plain statement rules against burdening the states.

---

78. *Id.* at 566.
79. *Id.* at 567 (O'Connor, J., dissenting).
81. *Id.* at 1901-03.
Justice Stevens would invoke a plain statement rule against additional pre-emption of state law when the statute already contains an express pre-emption clause, despite his dissenting view that a plain statement is not required to override state sovereign immunity in federal court.

In sum, plain statement rules about burdening the states cannot be traced to an easy-to-apply constitutional pedigree, but instead function as judicially chosen reader-based background considerations for interpreting statutes. Relying on constitutional inspiration is not simply an example of judges engaging in uncertain constitutional interpretation, but reflects judicial choices about when the Constitution inspires what it does not require.

Constitutional cover is, moreover, unavailable for the many plain statement rules which are not constitutionally inspired. Such rules include interpreting statutes to favor Indians, preserving the common law, and applying “the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries’ favor.” Some of these plain statement rules may be of the weaker tie-breaker or burden-of-proof variety, resolving close cases or making it harder to prove that the statute impinges on substantive values embodied in the rules. Weak or strong, however, plain statement rules derive from the judge’s decision to ask the legislature whether it really means to reject certain substantive values.

B. Legislative Reenactment and Inaction

The legislative reenactment and inaction doctrines state that an intervening interpretation of a statute by a court or agency becomes law following statutory reenactment or legislative inaction. These doctrines are often criticized, with good reason, on the ground that legislative intent to ratify intervening interpretations cannot be inferred from reenactment or inaction.

84. Cipollone, 112 S. Ct. at 2618 (plurality opinion).
87. See supra note 66.
The legislature is often unaware of judicial and agency interpretations and, in any event, it is difficult to interpret reenactment or inaction as legislative approval.91 Reenactment often focuses on issues that were not the subject of the intervening interpretation,92 and there are too many possible reasons for legislative inaction.93

Nonetheless, the persistence of the reenactment and inaction doctrines needs explaining. One explanation is cynical. Courts that are too timid to justify results on other grounds seek a legislative pedigree for their decisions and therefore claim that legislative reenactment or inaction ratifies an intervening interpretation. Another explanation, applicable to intervening judicial decisions, interprets the decisions as examples of super-strong stare decisis for statutory interpretation;94 and many cases upholding agency interpretations could be precursors of a strong Chevron-like deference to agency rules.

A "law-making responsibility" perspective suggests yet another way to explain many of these cases. Statutory interpretation requires judges to decide how best to allocate institutional law-making responsibility. Many difficult interpretive issues are technically complex or politically controversial. If there is genuine awareness of an issue within the legislature, the court might reasonably decide that it is the legislature's responsibility to decide whether to reject intervening judicial or agency interpretations, relying on the reenactment or inaction doctrines to achieve that result.96

1. Politically Controversial Agency Interpretation

In Bob Jones University v. United States,97 the Internal Revenue Service (IRS) had issued rules denying tax exemption to schools which discriminated on the basis of race. Congress was very aware of these

---

93. Johnson v. Transportation Agency, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting) (arguing that possible reasons for legislative inaction include: inability to agree upon how to alter the status quo; unawareness of the status quo; indifference to the status quo; or political cowardice).
96. Sometimes the legislature has the responsibility to make certain decisions, regardless of awareness. That seems to be Justice Stevens' point in St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 791 (1981) (Stevens, J., concurring) ("Congress has a special duty to choose its words carefully when it is drafting technical and complex laws; we facilitate our work as well as that of Congress when we adhere closely to the statutory text in [such] cases.").
controversial rulings; numerous bills overturning the rulings had died in committee. Two conventional approaches to interpreting the statute were unavailable. First, the agency rules were not regulations and were therefore not entitled to the usual deference accorded agency rulemaking. Second, legislative inaction in the face of the agency rules could not be equated with legislative approval; the committees where the bills were bottled up might have been to the political left of Congress. But the issue bristled with political controversy; the government had filed a brief opposing the IRS position. In that context, it made sense for the Court to rely heavily on the inaction doctrine. Given heightened legislative awareness of such a politically controversial subject, the Court could reasonably decide to let the agency rule stand, unless the legislature exercised its responsibility to reject the agency position.

2. Politically Controversial Judicial Interpretation

The classic statement of the reenactment doctrine involving both a politically controversial issue and prior judicial interpretation appears in Chief Justice Stone's dissent in *Girouard v. United States.* The case involved reenactment of the naturalization laws after the Court had interpreted them to require a naturalized citizen to take an oath committing him or her to bear arms in defense of the country. Chief Justice Stone relied explicitly on the concept of legislative responsibility, stating:

It is the responsibility of Congress, in reenacting a statute, to make known its purpose in a controversial matter of interpretation of its former language, at least when the matter has, for over a decade, been persistently brought to its attention. In any case it is not lightly to be implied that Congress has failed to perform that duty and has delegated to this Court the responsibility of giving new content to language deliberately readopted after this Court has construed it.

---

98. *Id.* at 585 n.9 (noting that government says IRS lacks authority to issue ruling denying tax exemption).

99. *Id.* at 599-601. The Court also emphasized that the statute incorporated common-law public policy standards into the tax exemption rules. *Id.* at 585-96. The problem for the Court was that the literal text allowed exemption disjunctively for "charitable" or "educational" institutions, but its holding imposed public policy standards on both categories.

For Justice Powell, though, legislative acquiescence was of "critical importance." *Id.* at 607 (Powell, J., concurring in part and concurring in the judgment).

100. 328 U.S. 61, 70 (1946).

101. *Id.* at 76 (emphasis added).
3. Technically Complex Agency Interpretation

American Automobile Association v. United States\textsuperscript{102} is an example of deferring to the legislature on a technical tax issue after an intervening agency interpretation and legislative inaction. The Commissioner of Internal Revenue refused to allow the taxpayer to use a method of accounting that deferred tax on prepaid membership dues. The Court upheld the agency's decision, relying on the fact that Congress has long been aware of the problem this case presents. Congress has authorized the desired accounting only in the instance of prepaid subscription income. It has refused to enlarge [this provision] to include prepaid membership dues. At the very least, this background indicates congressional recognition of the complications inherent in the problem and its seriousness to the general revenue. We must leave to the Congress the fashioning of a rule which, in any event, must have wide ramifications. The Committees of the Congress have standing committees expertly grounded in tax problems\textsuperscript{103}

On such technically complex issues of which "Congress has long been aware," rejection of the agency rule is the legislature's responsibility.

4. Technically Complex Judicial Interpretation

Justice Black's dissent in James v. United States\textsuperscript{104} argues explicitly that the legislature is responsible for rejecting an intervening judicial decision of which it was aware when it dealt with a technical tax issue (whether embezzlement income is exempt from income tax). Justice Black stated:

All of us know that the House and Senate Committees responsible for our tax laws keep a close watch on judicial rulings interpreting the Internal Revenue Code. Each committee has one or more experts at its constant disposal. It cannot possibly be denied that these committees and these experts are, and have been, fully familiar with the [Court's decision exempting embezzlement income]. In the Eighty-sixth Congress and in the present Eighty-seventh Congress bills have been introduced to subject embezzled funds to income taxation. They have not been passed. This is not an instance when we can say that Congress may have neglected to

\textsuperscript{102} 367 U.S. 687 (1961).
\textsuperscript{103} Id. at 697.
\textsuperscript{104} 366 U.S. 213 (1961).
change the law because it did not know what was going on in the courts.

What we have here instead is a case in which Congress has not passed bills that have been introduced to make embezzled funds taxable.

A judicial decision to allocate law-making responsibility to the legislature makes sense when the legislature is aware of a technically complex or politically controversial issue. Rather than approving prior judicial or agency interpretations of a statute, through stare decisis or deference to agency rules, the court takes a middle position. Judges allocate law-making responsibility to the legislature so it may decide whether the intervening judicial or agency interpretation is good law, while the issue is on the legislative agenda. If, at a later date, the legislature stops paying attention to the issue, the court may then properly reconsider how the statute should be interpreted.

The Court expressed such a wait-and-see attitude in a constitutional case involving the Commerce Clause. The Court decided to follow prior precedent which prohibited state requirements that out-of-state sellers collect tax on mail order purchases. It noted that Congress has both the power and superior competence to solve the problem, and that Congress may have withheld action because it mistakenly thought the Due Process Clause prohibited it. These considerations strengthened the Court's view that it should "withhold[] [its] hand, at least for now" and let Congress act.

When a court decides that legislative awareness in reenactment and inaction cases justifies support for an intervening interpretation, it often decides, at least for the present time, to leave technically complex or politically controversial issues to the legislature.

CONCLUSION

Predictions about the future of statutory interpretation are hazardous. We cannot anticipate the politics of elected officials who appoint federal judges. Although political contingencies might be overwhelmed by legal culture, it is difficult to prophesy how the legal culture will evolve.

105. Id. at 230-32 (emphasis added).
Forced to predict, I see textualism's recent ascendance as temporary. Its current prominence is due in part to the inability of all writer-based approaches to explain what a legislature has done. Under scrutiny, however, the statutory text will prove too fragile to survive as the paramount criterion of statutory meaning. Uncertainties about defining the text's audience, the pressures of change, the problem of legislative errors, and the questionable assumptions that underlie surface textualism will render text-based approaches suspect.

Public choice and textualist approaches will nonetheless have an impact, fueled in large part by suspicion of both legislative and judicial law making. Deferring to legislative bargains will not be systematically dismissed as the perspective of a "cynical political observer." Plain meaning (but not surface) textualism will seem attractive, not primarily because it implements the likely intent of author and audience, but because it provides a fallback position for judges who are not confident about enlarging on legislative purpose. Somewhat chastened by public choice, textualism, and their own self-doubts, judges will be unable to return enthusiastically to the "reasonableness" approach of Legal Process, but will instead search for new ways to justify their reader-based role in statutory interpretation.

The crystal ball begins to fade at this point, but I expect law-making responsibility to be the organizing principle around which judges define the interaction of writer, text, and judicial reader. The imperatives of judging force the judge to acknowledge that all approaches to statutory interpretation depend on theories about law-making responsibility, determining who should decide what issues and when.

109. See supra note 7 and accompanying text.