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Article 7

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The Dynamic Judicial Opinion

William D. Popkin

Abstract

Eskridge's article on Dynamic Statutory Interpretation advances an aggressively pragmatic theory of interpretation but has had more influence among academics than judges because of a failure to attend to the problems of writing a candid, pragmatic and dynamic judicial opinion. This article argues that, although not free from doubt, a candid judicial opinion is preferable, and discusses how to write such an opinion – suggesting that judges rely on the “intent of the statute,” not legislative intent; and adopt a personal/exploratory style in presenting their views.

Bill Eskridge's article, *Dynamic Statutory Interpretation*,¹ is about interpretive theory but it leads directly to a consideration of the judicial opinion. This essay explains why. Section I explains how interpretive theory ranges from narrowly fundamentalist to broadly pragmatic. Section II suggests why legal academics, in contrast to judges, might lean toward the narrower fundamentalist approach and why Eskridge's concern with actual judging leads him to be more pragmatic and, eventually, to be concerned about the judicial opinion. Section III provides a brief historical and comparative perspective on how different legal cultures deal with judicial opinion-writing and with the problem of judicial candor. This brings us to Section IV, which discusses how United States judges might write "dynamic judicial opinions" -- achieving Eskridge's goal of bringing the content of the judicial opinion in line with its dynamic interpretive results.

I. How interpretative theory works

Interpretive theory -- whether textualist, purposivist, or dynamic -- comes in both narrower fundamentalist and broader pragmatic versions. This distinction is familiar in the conventional settings of textualism and purposivism.

Fundamentalist textualism focuses on one or a few words of the statute, taking account of additional interpretive criteria only if that language is unclear. This is fundamentalist in two senses -- (1) its focus on a narrowly defined text, and (2) its adoption of a linear approach to statutory interpretation whereby the judge moves on to other evidence of meaning only after the previously examined text proves inconclusive.

Focus on a single word is apparent in Justice Thomas' dissenting opinion in *Gustafson v. Alloyd Co., Inc.*,² where he states that the *noscitur a sociis* linguistic canon ("know a word by its neighbors") is only applicable to clear up uncertainty, not to create it. A broader conception of the text insists that the interpreter examine the "whole text,"³ including (in some instances) multiple statutory documents,⁴ whether or not the specific language is unclear in isolation.

The linear approach -- moving on to nontextual evidence of meaning only if the text (however defined) is unclear -- is also fundamentalist in its insistence on a rigid step-by-step approach to determining statutory meaning. It has a long pedigree -- found in Blackstone,⁵ Pound,⁶ and, more recently, in the Uniform Statute and Rule Construction Act.⁷ The linear approach contrasts sharply with a more pragmatic back and forth approach, whereby the judge explores all interpretive evidence until an interpretive equilibrium is reached that fixes statutory meaning.

¹ 135 U. Pa. L. Rev. 1479 (1987) (hereafter "Eskridge, Dynamic").

² 513 U.S. 561, 586 (1995) (Thomas, J., dissenting).

³ *United States National Bank of Oregon v. Independent Insurance Agents*, 508 U.S. 439, 454-55 (1993):

Along with punctuation, text consists of words living "a communal existence," in Judge Learned Hand's phrase, the meaning of each word informing the others and "all in their aggregate tak[ing] their purport from the setting in which they are used." Over and over we have stressed that "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." No more than isolated words or sentences is punctuation alone a reliable guide for discovery of a statute's meaning. Statutory construction "is a holistic endeavor," and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter.

⁴ See, e.g., *West Virginia Univ. Hospitals v. Casey*, 499 U.S. 83 (1991) (Scalia, J.) (the "text" includes statutes dealing with other areas of law passed at same time and statutes passed at other times dealing with same area of law; dissimilar texts produce dissimilar results). But cf. *Matter of Wagner*, 808 F.2d 542 (7th Cir. 1986) (statute book not the result of a "single omniscient drafter").

⁵ William Blackstone, *Commentaries on the Law of England*, Introduction, Sec. II, pp. 60 (moving beyond words when their meaning is "dubious" or they "bear either none, or a very absurd signification").

⁶ Roscoe Pound, *Spurious Interpretation*, 7 Colum. L. Rev. 379 (1907) (when primary indices of meaning and intention fail, the interpreter should move on to reason and spirit and intrinsic merit).

⁷ Uniform Statute and Rule Construction Act, sec. 19 ("The text of a statute or rule is the primary, essential source of its meaning"); sec. 20(c) ("If after considering the text of a statute or rule in light of [various aids to construction], the

Purposivism can also be applied in a narrow fundamentalist way or as part of a broader pragmatic effort to determine statutory meaning. A more fundamentalist purposivism might pay little attention to the text or historical setting in which the statute was adopted.⁸ But a more pragmatic purposivist would worry about both the text and any historical background that suggests a restraining legislative compromise limiting the reach of statutory purpose. Justice Stevens, for example, is a pragmatic purposivist, indulging concerns that civil rights purposes be implemented to protect voting rights,⁹ but not applying an expansive purpose (even to protect voting rights) when there is evidence of a restraining legislative compromise.¹⁰

As with textualism and purposivism, dynamic interpretation comes in narrower fundamentalist and broader pragmatic versions, but the fundamentalist approach is even more controversial than it is in the more familiar settings of textualism and purposivism. Dynamic statutory interpretation allows the judge to adapt a statute to fit the contemporary legal landscape, or (put differently) to make sense of the contemporary corpus juris.¹¹ Although Eskridge justifies a dynamic judicial role with powerful and (in my view) persuasive arguments based on interpretive theory and constitutional structure,¹² this is a controversial type of judging¹³ because it does not rely on the two familiar foundations of statutory meaning -- the text and legislative intent -- both of which give a reassuring if misleading image of the judge deferring to the legislature. Instead, dynamic statutory interpretation acknowledges a creative lawmaking role for judges outside of the areas of common law and constitutional law where judicial lawmaking has traditionally been accepted.

A fundamentalist dynamic interpreter would update the law without paying too much attention to the text or to the limiting nature of the historical compromise -- for example, by finding it just as easy to update a narrow text (so that a "carriage" could include a bicycle),¹⁴ as a broadly denotative text (so that an "elector" -- that is, a "voter" -- could include women who were given the vote after adoption of the statute dealing with "electors").¹⁵ Although identifying when a text is narrow or broad is less easy than it sounds -- e.g., does a "mower" include a haybine;¹⁶ does

meaning of the text or its application is uncertain, the following aids to construction may be considered in ascertaining the meaning of the text: (1) the circumstances that prompted enactment or adoption of the statute or rule; (2) the purpose of the statute or rule as determined from the legislative or administrative history of the statute or rule;" etc.) (1995).

⁸ See, e.g., *Western Union Telegraph Co. v. Lenroot*, 323 U.S. 490, 509 (1945) (Murphy, J., dissenting).

⁹ *Chisom v. Roemer*, 501 U.S. 380 (1991).

¹⁰ See *U.S. v. Board of Com'rs. of Sheffield, Ala.*, 435 U.S. 110, 149 (1978) (Stevens, J., dissenting) (refusing to interpret the coverage of the Voting Rights Act broadly, because the statute "was, perhaps, the product of a legislative compromise"). See also *Landgraf v. USI Film Products*, 511 U.S. 244, 286 (1994) (Stevens, J.) (civil rights statute not retroactive; "legislator who supported a prospective statute might reasonably oppose retroactive application of the same statute"); *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980) (Stevens, J.) (civil rights plaintiff failed to meet statutory deadlines; the dates were the result of carefully worked out legislative compromise).

¹¹ Cf. *West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 101 (1991) (Scalia, J.); *United States v. Fausto*, 484 U.S. 439, 453 (1988) (Scalia, J.).

¹² Eskridge, *Dynamic*, pp. 1497-1538.

¹³ Eskridge, *Dynamic*, p. 1554 (dynamic statutory interpretation is a "significant departure from current doctrine").

¹⁴ Compare *Richardson v. Town of Danvers*, 57 N.E. 688 (Mass. 1900) (bicycle not a "carriage" in statute making government responsible for making roads safe for "carriages") with *Geiger v. Turnpike Road*, 31 Atl. 918 (Pa. 1895) (bicycle is a "carriage" in statute imposing tolls).

¹⁵ Compare *Commonwealth v. Maxwell*, 114 A. 825 (Penn. 1921) (yes) with *People v. Barnett*, 150 N.E. 290 (Ill. 1925) (no).

¹⁶ *Matter of Erickson*, 815 F.2d 1090 (7th Cir. 1987).

a “family” include a gay family;¹⁷ does a “person” include an unborn but viable fetus¹⁸ -- the more pragmatic interpreter will be sensitive to the differences between narrower and broader texts.

A more pragmatic dynamic interpreter will also be concerned with the restraining impact of the original legislative bargain than a fundamentalist dynamic interpreter (although it may be difficult to determine how restraining the historical compromise is). For example, in *United States v. Perryman*,¹⁹ the Court did not automatically limit the statutory phrase “white person” in a pre-Civil War statute to white people, as a modern textualist would insist. The statute provided government indemnity to Indians whose property was stolen by an impecunious “white person” and the Court was willing to consider whether that phrase should be updated to mean any “non-Indian” (including Blacks) after the Civil War. The Court eventually rejected that dynamic interpretation, but only because the statute had been explicitly amended in 1834 to replace the word “person” with “white person” so that fugitive Black slaves in areas controlled by friendly Indians would not be treated hospitably.²⁰

II. Academics and judges

A. In general

Legal academics are less likely to adopt a pragmatic approach than judges, because their institutional role does not require them to decide cases and write judicial opinions. First, an academic is less concerned with reaching an accommodation among the multiple approaches that exist in the legal tradition and in the views of judicial colleagues (either on the same court or reviewing tribunal). It is not that judges are never fundamentalist, but that this is more likely to occur in concurrences and dissents than in majority opinions of the court.²¹ Second, an academic is less beset by the doubts and uncertainties that inevitably confront the judge who must relate legal texts to the facts of the case and to the changing legal background in which the texts exist.

Third, academics often adopt a narrower fundamentalist approach in order to establish a counterweight to traditional doctrine, leaving it to judges to figure out how to make an adjustment that abandons or moderates the prior tradition. For example, modern purposivism achieved dominance as the preeminent interpretive approach during the 20th Century, speaking most eloquently through the writings of Judge Learned Hand.²² To counteract this tradition,

¹⁷ *Braschi v. Stahl Associates Co.*, 543 N.E.2d 49 (N.Y. 1989).

¹⁸ William Popkin, *Materials on Legislation*, pp. 416-421 (3d ed. 2001) .

¹⁹ 100 U.S. 235 (1879).

²⁰ The problem with this conclusion is that the explicit assumption underlying the 1834 legislation was itself grounded in circumstances made obsolete after the Civil War -- the disappearance of fugitive Slaves.

²¹ In recent experience, this is most clearly illustrated by Justice Scalia’s concurring opinions rejecting use of legislative history. See, e.g., *Dunn v. Commodity Futures Trading Com’n.*, 519 U.S. 465, 480-81 (1997) (Scalia, J., concurring in part and concurring in the judgment); *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279 (1996) (Scalia J., concurring in part and concurring in the judgment). See also *Associates Commercial Corp. v. Rash*, 520 U.S. 953, 955 (1997); *National Credit Union Administration v. First National Bank & Trust Co.*, 522 U.S. 479, 482 (1998); *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 28 (1998), in which Justice Scalia joined opinions except for those portions dealing with legislative history.

²² *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945) (“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.”); *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 552 (2d Cir. 1914) (“It is true that the statute uses the word ‘employed,’ but it must be understood with reference to the purpose of the act, and where all the conditions of the relation require protection, protection ought to be given.”); *Guisseppi v. Walling*, 144 F.2d 608, 624 (2d Cir. 1944) (Hand, J., concurring) (“There is no surer way to misread any document than to read it literally * * *.”); *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) (rejecting “relentless literalism”).

The Supreme Court put it this way in *United States v. American Trucking Associations, Inc.*, 310 U.S. 534, 543-44 (1940):

modern textualists sometimes advance an over-simplified version of the text and the legislative process. At least one modern textualist (Professor Easterbrook) has argued, as an academic, that statutory texts are either clear (precluding judicial discretion), or open-ended (delegating a “common law” power to courts), with nothing in between.²³ Similarly, he has also argued for the judge to look “pervasively” for the bargain underlying a statute, in effect creating a presumption that legislation is a product of limiting compromise, rather than expansive purpose.²⁴

However, Judge Easterbrook does not appear to be as rigid as Professor Easterbrook. As a judge, Easterbrook adopted a purposive and dynamic approach to decide whether an older 1935 statute exempting a farmer’s “mower” from creditors applied to a modern haybine that did not exist in 1935 and that did much more farm work than the historic 1935 mower.²⁵ His opinion did the following: (1) concluded that change prevented the court from applying a “plain meaning” approach; (2) relied on the structure and function of the statute (a synonym for “purpose”) to update the statute; (3) toyed with the possibility that the “remedial” canon might be invoked to expansively interpret the text; and (4) gave some weight to the modern law and economics view that a pro-farmer statute would not include excessively broad exemptions for farmers because that would dry up credit, even though the statute was passed in the Depression when farmer exemptions were likely to be the legislature’s focus of attention. In textualist terms, the word “mower” neither clearly handed courts a common law power nor was it so clear that the judge could unproblematically apply the statutory language to the facts. Change inevitably unsettled statutory meaning and forced the judge to make pragmatic choices.²⁶

B. Eskridge’s pragmatic tilt

Eskridge takes the harder route for academics -- eschewing a narrow fundamentalism in favor of a more pragmatic approach to dynamic statutory interpretation. He favors a cautious “dynamism,”²⁷ sensitive to a multiplicity of interpretive criteria -- what Eskridge would later describe (borrowing from Gadamer) as a “fusion of horizons”²⁸ and, with Frickey, practical reasoning.²⁹ When Eskridge says (1) that the text and historical legislative understanding “usually” or “normally” prevail; (2) that a broad text *and* change together provide the strongest case for dynamic statutory interpretation; and (3) that the courts should adopt a linear approach, looking first to the text and history, before reaching for the dynamic solution³⁰ -- he is describing a pragmatic judicial dynamism.

Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one plainly at variance with the policy of the legislation as a whole this Court has followed that purpose, rather than the literal words.

²³ Frank Easterbrook, *Statutes’ Domains*, 50 U.Chi.L.Rev. 533, 544 (1983).

²⁴ Frank Easterbrook, *The Court and the Economic System*, 98 Harv. L. Rev. 4, 14-18 (1984).

²⁵ *Matter of Erickson*, 815 F.2d 1090 (7th Cir. 1987).

²⁶ Judge Calabresi is also less willing to apply Professor Calabresi’s approach to obsolete statutes. In his book, *A Common Law for the Age of Statutes* (1982), Professor Calabresi favored a common law doctrine declaring a statute obsolete, without invoking the Constitution. However, in *Quill v Vacco*, 80 F.3d 716 (2d Cir. 1996), reversed, *Vacco v. Quill*, 521 U.S. 793 (1997), Judge Calabresi relied on the Equal Protection Clause to strike down what he identified as an obsolete statute dealing with assisted suicide. Nonetheless, Judge Calabresi still followed an approach suggested in his book, arguing that the constitutional decision should only be provisional -- to be reviewed if the legislature revisited the issue and was able to provide a modern justification for the statute.

²⁷ Eskridge, *Dynamic*, pp. 1481, 1484, 1537, 1543, 1555.

²⁸ William Eskridge, *Gadamer/Statutory Interpretation*, 90 Colum. L. Rev. 609, 623 (1990).

²⁹ William Eskridge & Philip Frickey, *Statutory Interpretation as Practical Reasoning*, 42 Stan. L. Rev. 321, 321-22 (1990).

³⁰ Eskridge, *Dynamic*, pp. 1481-84, 1494-95.

Eskridge's commitment to pragmatism is closely linked to his concern with actual judging. Part III of his article describes how courts in fact rely on dynamic statutory interpretation³¹ and, as noted earlier, a focus on actual judging leads to a more pragmatic and less fundamentalist approach. Moreover, Eskridge's description of actual judging is meant as an argument in favor of the judge's interpretive practice. This link between a sophisticated understanding of what judges really do and a normatively favorable view of the judicial work-product is very much in the Anglo-American common law tradition, most famously put in Lord Mansfield's praise of the common law as "work[ing] itself pure."³²

What is especially noteworthy for our purposes is that Eskridge's concern with actual judging leads him directly to a consideration of the judicial opinion, advocating a greater correspondence between what judges say and do -- that is, judicial candor.³³ This is also very much in the Anglo-American legal tradition, in which the judicial opinion is expected to provide an accurate explanation of the judge's reasoning process. Following Eskridge's lead, I therefore turn our attention to whether judges should candidly explain dynamic statutory interpretation and, if so, what a dynamic judicial opinion would look like. I do this in two steps. Section III discusses the role of the judicial opinion -- presenting a brief historical and comparative overview of how the judicial opinion functions in different legal cultures and the case for and against judicial candor. Section IV discusses how a judge might write a candid dynamic judicial opinion.

III. The role of the judicial opinion

A. Historical and comparative overview

A legal culture requires judicial opinions to serve two political objectives -- (1) to project judicial authority to the external public and (2) to perform the task, internal to the profession, of applying the law to the specific case and adapting the law to change. These external and internal objectives are often in tension. The judge who tries to do a good professional job often runs the risk that the public will accuse the judge of overstepping the boundaries of legitimate judging. Modern judges are especially concerned with public perceptions of what they do, because they lack the conventional modern source of authority in a democracy (that is, political election) and, even when elected, they are reluctant to ground their authority on an electoral base for fear that it would encourage popular review of their work product.

These political objectives work themselves out in the legal culture through a conception of *the law* and of *the role of judges*. The conception of *the law* is a function of its source -- which may be either (1) custom or the legal landscape, both of which are substantive law understood as existing outside of the institutions which give voice to the law; or (2) an institution, such as (a) the judiciary or (b) the legislature. The *judicial role* is discharged by one or more of the following: (1) experts in the law, (2) passive civil servants, or (3) political officials.

The dominant historical theme in the evolution of judicial opinions is that the law originally emerged from the work of a professional and self-confident bench and bar, but that the pressures of popular democracy and the rise of legislation prevented law from being trusted to the internal practices of professional experts; judicial law had to go "public," either to project judicial authority to the people or to account to the people for how judges exercised authority, or both. This shift in how judicial law was presented took very different forms in England, France, and the United States, as the judges tried both to maintain their public authority and to do their professional job well.

The early English legal culture assumed that law was the common law -- a body of custom accessible to the expertise of English judges. The institutional environment in which this view thrived was a small tightly-knit bench and bar, all drawn from the same social and political class within which the law was uttered and developed. Although Parliamentary sovereignty at the end of the 17th Century was, in theory, a challenge to the idea of law as a body of custom and principle external to political institutions, the actual practice of lawyers and judges declaring the law survived long after 1689.

The English adopted a judicial opinion-writing style suited to this legal culture. Each named judge gave his own expert oral opinion of the law. There was no opinion of the court as an institution because courts were not the source of law. There was, moreover, no need for judges to project authority or to account to the public through written published opinions because judges were a self-confident group of experts who knew the common law and whose

³¹ Eskridge, *Dynamic*, pp. 1481-82, 1543, 1548, 1554.

³² *Omychund v. Barker*, 26 Eng. Rep. 15, 23 (1744).

³³ Eskridge, *Dynamic*, pp. 1548-49.

shared educational experience in the Inns of Court gave them a common sense of professional expertise. Publication of judicial opinions -- when it occurred -- was sporadic and unofficial, serving the internal needs of the profession by providing lawyers and judges with information, rather than serving the external objectives of accounting to the public or projecting judicial authority.

The French experience was completely different.³⁴ The Revolution swept away the pre-existing authority of judges. Pre-Revolution French judges were powerful -- they served in decentralized local parlements, had broad powers to deny enforcement of national law and to issue legally effective regulations, operated in complete secrecy, and did not reveal the grounds for their decisions. As such, they attracted widespread criticism, both from the monarchy whose laws were not implemented and from local residents whose customs might be disregarded in the exercise of equitable judgment.

Consequently, the Revolution totally replaced judicial power with the sovereignty of the people, speaking through the legislature. The French constitution did not mince words in degrading judicial power. It established a strong version of separation of powers, not merely giving legislatures the power to override judicial lawmaking, but totally denying judges any power to make law; judges were even required during the early 19th Century to refer all matters of "interpretation" to the legislature on the theory that there was no better interpreter than the author. This French conception of law, which persists today, is implemented by a judiciary who are members of the civil service whose educational and career paths diverge sharply from practicing lawyers.

The contrast with the English conception of law and judging is striking. In England, the law was a body of custom and principle, known to expert members of the bench and bar. In France, law came from an institution -- the legislature. French judges were passive civil servants rather than members of an ancient and learned profession who might exercise a lawmaking authority in practice that did not exist in theory.

The French view of law and judging also had implications for the judicial opinion. In contrast to the English, the French court issued a unanimous opinion (there were -- and are -- no dissents or concurrences), without identifying the opinion's author. French judges speak with a unanimous and anonymous voice, signifying a lack of lawmaking authority.³⁵ In addition, French judges have been required since the Revolution to write opinions in every case, and what they write is officially reported by the government. Government publication of written opinions had the political objective of assuring public accountability for judicial action. Given this objective, the French style of judicial opinion-writing seems odd to an Anglo-American observer. The opinions consist of a series of *whereas* clauses, containing brief statements of facts and legal principle found in authoritative code provisions, followed by the disposition of the case. There is little of the elaborate reasoning familiar in the Anglo-American tradition. The French style of opinion-writing is, however, consistent with the idea of a judiciary engaged in the mechanical task of identifying the governing law and passively applying that law to the facts.

But the French have not rejected the internal professional objectives of judicial development of the law. They have simply avoided using the judicial opinion for this purpose. This is achieved through techniques internal to the professional legal system. First, the judicial system makes extensive use of the *rapport* and *conclusions*. The *rapport* is an internal court document, written by the judge assigned to develop the case for the court; the *conclusions* are written by the representative of the Advocate General assigned to the court in each case. These two documents are totally different in style from the judicial decision itself. For example, the *rapport* often contains multiple proposed opinions, acknowledging the possibility of disparate legal results, and includes references to social policy and judicial precedent, despite the prohibition of judicial reliance on *stare decisis* in the French legal system.

Second, the bench and bar rely heavily on academic lawyers. Unlike the English (and the United States), the French profession is fractured by training and experience, not only between bench and bar, but also among academics, bench and bar. French academics exercise influence through both learned treatises and extensive notes appearing in the law reports which explain how judicial decisions fit into the evolution of the law. The French therefore retain the

³⁴ The following discussion of the French legal system relies on Vernon Palmer, *From Embrace to Banishment: A Study of Judicial Equity in France*, 47 *Amer. J. Comp. Law* 277 (1999); Mitchel Lasser, *Judicial (Self-)Portraits: Judicial Discourse in the French Legal System*, 104 *Yale L. J.* 1325 (1995); John Dawson, *Oracles of the Law*, pp. 376-383 (1968); John Bell, Sophie Boyron, and Simon Whittaker, *Principles of French Law*, Chapters 1-3 (1998).

³⁵ Unanimity and anonymity can also be a way to project power, as was true of the English Privy Council. Until recently, the Privy Council gathered together multiple *seriatim* opinions into a single anonymous opinion of the court to project judicial power to the colonies, who are the audience for Privy Council decisions. Since 1966, published dissents have been allowed. See Alan Paterson, *The Law Lords*, pp. 106, 206, 252 (1982).

formal public conception of passive judging, while the bench and bar rely on various techniques internal to the profession to help judges apply law to the facts and adapt law to change.

U.S. judges could not readily adopt either the early English or French Revolutionary conception of the judicial role. Instead, the judicial role in the United States was the result of a tension between these two extremes -- between the English commitment to judicial expertise and the French view that law derived from the people. The significance of the "people" as a constitutional source of power in the United States (as in France) made the claim to legal expertise suspect as a justification for the exercise of judicial power. But American judges never fully shook off their English heritage. Despite strong antagonism to judging soon after the Revolution, a more robust conception of judging survived when the Constitution was adopted. U.S. judges were still common law judges in a common law country. Consequently, unlike France, U.S. legislatures were not sovereign and the courts retained a significant independent if indeterminate power.³⁶

This tension in the U.S. constitutional structure between relying on both the people and on judges as a source of law required U.S. judges to locate their source of power in something more secure than a self-confident bench and bar with expert access to a substantive body of law. Instead of relying on individual judges with traditional judicial expertise (as in England), Article III of the U.S. Constitution created a judicial institution which was a source of law -- vesting the Judicial Power in a Supreme Court and such other courts as Congress may establish. Unlike the French, however, the U.S. judicial institution was not a passive bureaucracy, but one of the three great institutions of government -- the legislative, executive, and judicial.

These developments had an effect on how the judicial opinion was presented in the United States. The English tradition assured that U.S. judges would provide extensively reasoned opinions. But that does not explain why U.S. judges took readily to a system of publishing written reports of those opinions. After all, England got along for centuries with oral opinions that were unofficially and unreliably published. One relatively insignificant reason for publication in the United States might have been the need to provide information about judicial decisions to a profession that was far more geographically scattered than in England. But there were additional reasons, with greater significance for the judges' constitutional role.

First, publication of judicial opinions was important, as in France, to account to the people. This was probably significant at the state level, where the idea of popular sovereignty remained palpably real after the Founding in 1789.³⁷ Second, publication of written opinions at the federal level served the very different purpose of projecting the authority of a strong judicial institution. Even though Article III of the U.S. Constitution established judging as one of the three great governmental institutions, this institutional base did not guarantee widespread acceptance of what judges did, especially when it was clear that the judiciary was dominated by Federalist judges. Consequently, in the first decade of the 19th Century, Chief Justice Marshall succeeded in gathering together the multiple seriatim opinions that were familiar in the English tradition into a single opinion of the court, usually unsullied by concurrences and dissents. The Justices now spoke for an institution -- the Court -- which was the source of law, rather than for themselves as expert oracles of the law. And, in the second decade of the 19th Century, Justices Story and Marshall succeeded in persuading Congress to adopt legislation to provide for a salaried court reporter, replacing the prior system of private publication which was at the mercy of a less-than-enthusiastic private market.³⁸

The intriguing question for someone interested in the judicial role in statutory interpretation is why Story and Marshall viewed publication of judicial opinions as an important way to project judicial authority. Why didn't the court settle for disseminating their oral or written product through the traditional method of private publication, without public financing? The answer probably lies in the effort to make judicial opinions more "legislative," responding to the constitutional significance and growing practical importance of statutes in the late 18th and early 19th Century. The decision to publicly finance the reporting of judicial opinions in the mid-1810s came

³⁶ For a debate over how much judicial power was created by the early constitutions, see John Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1 (2001); William Eskridge, *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 Colum. L. Rev. 990 (2001). See also William Popkin, *Statutes in Court*, Chapters 2 and 3 (1999).

³⁷ See generally Denis Duffey, *Genre & Authority: The Rise of Case Reporting in the Early United States*, 74 Chi-Kent L. Rev. 263 (1998).

³⁸ See Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on the Marshall Court Ascendancy*, 83 Mich. L. Rev. 129 (1985).

some twenty years after the decision had been made in 1795 to publish statute law.³⁹ Federal government support for publication of judicial opinions assimilated what judges did to legislative law, giving Article I and Article III institutions a similar public face.⁴⁰

B. The Case for Candor

The tensions built in to judging in the United States -- the need to preserve judicial authority in a political system with both strong democratic leanings and a strong judiciary -- created special problems for writing candid judicial opinions that would remain faithful to the Anglo-American tradition of a more or less thorough explanation of judicial reasoning. The problem was that candidly accounting to the public about the judge's reasoning could undermine judicial authority, if the opinion included criteria that arguably fell outside the boundaries of acceptable legal analysis (such as dynamic statutory interpretation).

The French judge avoids this dilemma, preserving judicial authority by publishing brief opinions without any pretense of candor. English judges cannot hide behind cryptic opinions, but they do not seem bothered by the problem of candor, perhaps because the image of an expert bench and bar still persists as a constitutional foundation for judicial power.⁴¹ U.S. judges are not so fortunate. They are constantly under siege for failure to explain their decisions candidly and critics of U.S. judging seem obsessed with this failure.

Despite the American legal profession's preoccupation with judicial candor, it is far from clear that candor is required to preserve judicial authority.⁴² The public reaction to the Supreme Court's decision in *Bush v. Gore*⁴³ suggests that candor may be less important than professional critics assume. A recent study found that evaluation of what the Supreme Court did depended primarily on partisan party affiliation, which produced offsetting levels of approval and disapproval;⁴⁴ the process by which the judges reasoned to their conclusion was not a factor. Apparently, the inconsistency displayed by the Justices regarding deference to the states and lack of judicial interference in political issues did not weigh in public judgment, even though these concerns seemed paramount to professional critics. Indeed, public relief that an august and supreme judicial tribunal ended the political dispute may have overwhelmed other considerations. These conclusions fit comfortably with empirical studies finding that the substantive results of judicial decisions, rather than judicial process, influence public acceptance of what judges do.⁴⁵ This suggests that judges need only surround their conclusions with the trappings of legal analysis -- such as references to plain meaning and/or legislative intent in the context of statutory interpretation -- in order to meet the necessary threshold for public acceptance.

³⁹ Prior to 1795, publication of statutes had been left to private publication, often newspapers. But, in 1795, Congress required the Department of State to cause the printing of legislation at public expense. 1 Stat. 443 (1795).

⁴⁰ England also witnessed a shift to reliable reporting of written judicial opinions during the 19th Century, culminating in the publication of the "Law Reports" in 1865 under the sponsorship of the Law Council. See W.T.S. Daniel, *History of the Law Reports* (1884). Arguably, this shift was related, as in the United States, to the rise of legislation and the need to project the written product of both legislation and judging in a similar fashion.

⁴¹ Whether English courts can avoid this tension as the English bench and bar become more diverse, as the sources of law proliferate through the incorporation of European law, and as the predominance of legislation penetrates into the otherwise conservative mind of the legal profession, remains to be seen. The shift in statutory interpretation toward purposivism and the willingness to consider legislative history, *Pepper v. Hart* [1993], 1 All E.R. 42, indicate a recognition of legislative dominance in fact as well as in theory.

⁴² See generally Scott Idleman, *A Prudential Theory of Judicial Candor*, 73 *Texas L. Rev.* 1307 (1995); Nicholas Zeppos, *Judicial Candor and Statutory Interpretation*, 78 *Geo. L. J.* 353 (1989).

⁴³ 531 U.S. 98 (2000).

⁴⁴ Herbert Kritzer, *The Impact of Bush v. Gore on Public Perceptions and Knowledge of the Supreme Court*, 85 *Judicature* 32 (2001). The article cautions that its data do not measure long term effects.

⁴⁵ See William Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 *Minn. L. Rev.* 1133, 1173-1186 (1992). Perhaps the leading example of public acceptance combined with professional criticism is the response to the 1-person 1-vote cases: *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964).

I do not mean that the public would completely disregard how judges explain their decisions. Widespread adoption of French-style cryptic opinions or a refusal to publish important opinions would probably be unacceptable in the United States. In addition, judicial reasoning that lacks any legal content would probably produce a negative public reaction -- e.g., if the opinion read like a legislative policy-oriented committee report. Even then, however, the judicious use of policy data to support legal argument would probably not produce public loss of faith in judicial authority, even though it might attract legal critique.⁴⁶ Public acceptance of *Brown v. Board of Education* was probably unaffected by its citation of social science data.

Indeed, if we take a hint from Dostoevsky's Grand Inquisitor, we might surmise that the people are quite content to be fooled by judges, welcoming the image of authority for the comfort and security it provides:⁴⁷

So long as man remains free he strives for nothing so incessantly and so painfully as to find some one to worship. But man seeks to worship what is established beyond dispute, so that all men would agree at once to worship it. For these pitiful creatures are concerned not only to find what one or the other can worship, but to find something that all would believe in and worship; what is essential is that all may be together in it.

The Court itself seems to have a bit of the Grand Inquisitor in it, refusing to permit television coverage of its proceedings to preserve prestige through a sense of distance and mystery.

A significant objection to these comments calling into question the importance of judicial candor is the failure to distinguish among various publics. In other words, who is the audience for the judicial opinion and is candor more or less important depending on the audience? There are several potential audiences for judicial opinions -- (1) the professional bench and bar; and (2) a nonprofessional audience, which can in turn be divided into an (a) "elite" and (b) nonelite. The "elite" are opinion makers, such as influential news media and journals and their well-educated readers; the nonelite are the rest of the public whose views might or might not be influenced by elites.

It seems plausible that the nonprofessional nonelite public will be influenced strongly by the trappings of judicial authority and the substantive results in judicial opinions, rather than by how candid the opinions are. The courts -- especially appellate courts that issue opinions -- are a remote institution for the general public. By contrast, the professional and nonprofessional elite audiences might be concerned with the way decisions are reached -- including candor in judicial opinions -- and not just with judicial "show" and substantive results. But will their concerns undermine confidence in the judiciary?

First, the impact of nonprofessional elites -- acting as conduits for information to the general nonprofessional public -- is not likely to be great. Even if the general public gets their impressions of the political branches from opinion makers, judging remains too much on the periphery of public vision for elites to have a similar impact based on the judicial decision-making process.

Second, the more difficult issue is whether the perception of noncandid judging among the nonprofessional elite and the legal profession undermine the judiciary. Perhaps not. Knowledgeable commentators often have different opinions; not everyone viewed *Bush v. Gore* as unprincipled.⁴⁸ Moreover, an understanding of how judges really make decisions does not necessarily lead to objections to a noncandid explanation of their reasoning. It is typical of elites that they think they can handle the truth better than the general public. Elites and professionals might have enough faith in what judges do and how they reach their decisions without insisting that judges be candid about their reasoning in their judicial opinions, especially if they trust the judges' private deliberations.

⁴⁶ But see Dorf, *The Limits of Socratic Deliberation*, 112 Harv. L. Rev. 4, 26-50 (1998), for an argument favoring more use of empirical research by judges.

⁴⁷ Fyodor Dostoevsky, *Brothers Karamazov*, Part II, Book V, Ch. V, p. 301 (Modern Library College ed. 1950). See also *id.* at pp. 303, 305 (people want "miracle, mystery and authority").

⁴⁸ See Richard Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 S. Ct. Rev. 1 (endorsing three-Justice opinion regarding statutory interpretation); Richard Epstein, "In Such Manner as the Legislature Thereof May Determine": The Outcome in *Bush v. Gore* Defended, 68 U. Chi. L. Rev. 613 (2001) (same); Cass Sunstein, *Order Without Law*, 68 U. Chi. L. Rev. 757, 773 (2001) (favorable view of Equal Protection majority opinion). See also Note, *Non sub Homine? A Survey and Analysis of the Legal Resolution of Election 2000*, 114 Harv. L. Rev. 2170, 2193 (2001) ("appropriate resolution that satisfies concerns for legitimacy under the rule of law").

Nonetheless, I do not think we should dismiss concern about noncandid opinions. A more complex story would distinguish short term criticism from long run impact. Elites, especially the legal profession, understand quite well that the law often relies on fictions -- that is, noncandid explanations for results. But they also understand that the use of fictions is transitional, necessary to maintain an appearance of continuity with the past. Eventually, it is expected that the legal system will mature and the fiction discarded in favor of more candid grounds for decision.

There is good reason for this. Candor is necessary if the system is to maintain its internal integrity. Most institutions rot away internally long before they are swept away by some event that is the immediate cause of their decline. Candor is necessary to retain the confidence of professionals who know the system and must be relied on to defend it. Listen, again, to the Grand Inquisitor,⁴⁹ who is willing to accept “lying and deception” and who says that “only we, who guard the mystery, shall be unhappy.” Perhaps the elite are strong enough to remain unhappy with a lie and preserve their own integrity. But, in the long run, it is difficult to sustain an institution whose members know that it rests on a fiction, especially in a society that values respect for the public and their ability to engage in public deliberation. Failure to pursue that ideal will, over the long run, undermine the profession which guards the law in a democracy committed to public participation. Even if the actual audience for a judicial opinion is narrow, there is a professional imperative for the judge to be candid, at least a lot of the time.

I therefore agree with Eskridge that contemporary U.S. judges should openly acknowledge dynamic statutory interpretation in their opinions⁵⁰ and I proceed in Section IV to a consideration of what a candid “dynamic judicial opinion” might look like.

IV. The dynamic judicial opinion

A judicial opinion has two components -- its substance and its style. The question therefore is what substance and style are appropriate for a judicial opinion that embraces a dynamic approach to statutory interpretation. In the following pages, I sketch an outline of how a judge might write a dynamic judicial opinion, using Judge Posner as my primary illustration.

A. Substance -- “Intent of the statute”

The dynamic judicial opinion should rely on a version of “intentionalism.” At first, this seems a doubtful suggestion. Judicial reliance on legislative intent to interpret legislation is much maligned and with good reason. Numerous features of the legislative process make it unlikely that the legislature will have an intent about any controversial interpretive issue -- the number of legislators involved in passing legislation; the volume of business to which a busy legislature must give attention; the existence of political conflict precluding agreement; and the fact that many issues will arise in a future about which the legislature is ignorant. Given this reality, the judicial appeal to legislative intent seems to be an attempt to hide behind the appearance of deference to a legislature that intends nothing about how the statute should be applied to a particular case.⁵¹ But there is a substantial justification for judicial

⁴⁹ Fyodor Dostoevsky, *Brothers Karamazov*, supra note 47, at pp. 308, 310.

⁵⁰ A refreshing example of judicial candor about statutory interpretation appears in *Albertson’s Inc. v. Commissioner*, 42 F.3d 537, 540 (9th Cir. 1994) (on rehearing):

This is simply one of those cases -- and there are more of them than judges generally like to admit -- in which the answer is far from clear and in which there are conflicting rules and principles that we are forced to try to apply simultaneously. Such accommodation sometimes proves to be impossible. In some cases, as here, convincing arguments can be made for both possible results, and the court’s decision will depend on which of the two competing legal principles it chooses to give greater weight to in the particular circumstance. Law, even statutory construction, is not a science. It is merely an effort by human beings, albeit judges, to do their best with imperfect tools to arrive at a correct result.

⁵¹ Reliance on the text does not avoid the problems of “intentionalism.” As any textualist will tell you, plain meaning depends on the agreement of author and audience about the meaning of the text. See *Matter of Sinclair*, 870 F.2d 1340 (7th Cir. 1989) (Easterbrook, J.) (“Language is a process of communication that works only when authors and readers share a set of rules and meanings.”). The need for this agreement necessarily leads the interpreter to consider the author’s understanding of the legislative text -- and that in turn leads to speculation about how the author intended the audience to understand the statutory language. But “intentionalist textualism” is subject to the same uncertainties as any other version of intentionalism -- the intent of multiple authors, the volume of legislative business, political controversy, and future uncertainties.

reliance on “intentionalist” rhetoric, especially when placed in the service of a dynamic statutory interpretation that copes with legislative ignorance about the future.

The general outlines of an “intentionalist” approach to a dynamic legal environment is as old as Plowden and as recent as Judge Hand -- the inference of an “intent” based on a hypothetical dialogue between the departed legislature and the contemporary judge. Thus, Plowden stated at the end of the 16th Century:⁵²

In order to form a right judgment when the letter of a statute is restrained, and when enlarged by equity, it is a good way, when you peruse a statute, to suppose that the law-maker is present, and that you have asked him the question you want to know touching the equity, then you must give yourself such an answer as you imagine he would have done, if he had been present.

And Learned Hand stated in the first half of the 20th Century:⁵³

[W]hat [the judge] really does is to take the language before him, * * * and try to find out what the government * * * would have done, if the case before him had been before them. * * * To apply [the words] literally may either pervert what was plainly their general meaning, or leave undisposed of what there is every reason to suppose they meant to provide for.

The Plowden and Hand versions of a judicial-legislative dialogue are concerned with deriving an “intent” from a hypothetical conversation between legislature and judge and are well-suited to a dynamic interpretation that is concerned with both the historical background from which the statute emerged and the contemporary setting in which the law must be applied. Indeed, the same ambiguity regarding any dialogue between a judge and a departed legislature also exists with regard to dynamic statutory interpretation -- whether the legislature is brought forward in time to meet on the judge’s contemporary turf or whether the judge travels back in time to talk with the historical legislature. The concern that the judge conducting the dialogue will pay too much heed to the contemporary legal landscape is the same concern that arises regarding a less-than-cautious dynamic interpreter.

What remains is to find a version of intentionalist rhetoric that is sensitive to the dynamic features of statutory interpretation and that captures both the reality and the ambiguity of the judicial-legislative dialogue about statutory meaning. The rhetoric best suited to this purpose is the *intent of the statute* or *statutory intent*, rather than the more familiar “legislative intent.”⁵⁴ This avoids the misleading implication that the judge is identifying actual legislative intent, but at the same time retains the idea that the intention(s) of the historical legislature are relevant. It anchors statutory meaning in what the historical legislature did without pretending to more certainty than is possible when honestly attempting to interpret an historical text in a contemporary setting.

Another way for a judge to write about dynamic statutory interpretation is to state that “*we cannot believe the legislature would have intended*” a particular result, or some similar expression.⁵⁵ This language is often used when an

⁵² Eyston v. Studd, 75 Eng. Rep. 692 (1587).

⁵³ Learned Hand, How Far Is a Judge Free in Rendering a Decision (1935) in Learned Hand, *The Spirit of Liberty*, p. 106 (ed. Irving Dilliard 1952). Judge Hand made a similar statement in his judicial opinions: *Guiseppi v. Walling*, 144 F.2d 608, 624 (2d Cir. 1944) (Hand, J., concurring) (“As nearly as we can, we must put ourselves in the place of those who uttered the words, and try to divine how they would have dealt with the unforeseen situation; and, although their words are by far the most decisive evidence of what they would have done, they are by no means final.”); *Borella v. Borden Co.*, 145 F.2d 63, 64-65 (2d Cir. 1944) (“We can best reach the meaning here, as always, by recourse to the underlying purpose, and, with that as a guide, by trying to project upon the specific occasion how we think persons, actuated by such a purpose, would have dealt with it, if it had been presented to them at the time. To say that that is a hazardous process is indeed a truism, but we cannot escape it, once we abandon literal interpretation -- a method far more unreliable.”)

⁵⁴ See, e.g., *USA v. Martin*, 195 F.3d 961, 967 (7th Cir. 1999) (Judge Posner).

⁵⁵ See, e.g., the following Judge Posner opinions: *Malhotra v. Colter & Co.*, 885 F.2d 1305, 1315 (7th Cir. 1989); *R.D. McCullough, II v. Suter*, 757 F.2d 142, 143 (7th Cir. 1985); *State of Illinois v. General Electric*, 683 F.2d 206, 216 (7th Cir. 1982). See also *Marozsan v. United States*, 852 F.2d 1469, 1483 (7th Cir. 1988) (Posner, J., concurring) (“But I find it hard to imagine that in 1970, when it was last amended, or even in 1933, when it was first enacted, a majority of Congress, with the concurrence of the President, would have agreed to extinguish all constitutional remedies against

older statute appears to fit badly with contemporary facts and the judge is looking for a way to assure that the law makes sense in the modern legal environment.⁵⁶ Such language captures the essential elements of a dynamic judicial opinion -- both the legislative origin of the law (in its reference to what the legislature might or might not have intended) and the judge's affirmative role in working out the hypothetical dialogue with the legislature to make contemporary sense (by referring to what the judge "cannot believe").

B. Style -- Personal/Exploratory

Substance is only part of what makes up a judicial opinion. Style is also important. The most persuasive contemporary judicial style, especially regarding something as controversial as dynamic statutory interpretation, is a combination of a personal voice and an exploratory tone. This style responds to two concerns about modern judging -- the suspicion that judicial certainty is a facade that conceals choices that the judge makes and the demands of a democratic sensibility that requires the judge to take the audience into his or her confidence, doubts and all.

The argument for a personal/exploratory style of judicial opinion-writing requires an explanation of the concept of voice and tone.⁵⁷ The judicial voice can be either (a) magisterial or (b) personal; the tone can be either (a) authoritative or (b) exploratory. A magisterial voice speaks from a distance, suggesting an insider's understanding of the law. A personal voice draws the reader in, suggesting a shared understanding of legal principle between judge and reader. As for tone, an authoritarian tone suggests that the judge is certain about his results and on firm legal ground. By contrast, an exploratory tone conveys the message that the judge is not so sure, that he or she is thinking through doubts in arriving at a legal conclusion.

We tend to associate the magisterial style with authoritative judging. All magisterial/authoritative opinions have in common their reliance on "given" first principles -- often associated with "formalistic" legal reasoning. These opinions proceed confidently from premise to conclusion.⁵⁸ However, a magisterial voice and authoritative tone do not necessarily go together. An authoritative tone can be linked with a personal voice, as in the opinions of Justice Holmes. Instead of confronting the reader with a distant magisterial appeal to legal reasoning, Holmes relies on short opinions with homely aphorisms,⁵⁹ making a personal appeal to the reader to accept a shared point of view. Holmes does this, however, with little indication of doubt or exploration of legal reasoning -- he is both authoritative in tone and personal in voice. This combination of the authoritative and personal was ideally suited to a period of declining faith in the judge's ability to access first principles, associated with the rise of Legal Realism in the early 20th Century,

the Veterans' Administration that veterans might otherwise possess, or might acquire by virtue of subsequent enactments. The question is not whether Congress in 1933 or 1970 conferred any such remedies but whether it meant to forever preclude all such remedies even if the result would someday be a bizarre discrepancy between the constitutional position of veterans and that of other citizens.")

⁵⁶ A common theme in dynamic statutory interpretation is that the legislature has overlooked the contemporary world to which the statute must be applied, but legislative oversight is not limited to these situations. See, e.g., *Reich v. Great Lakes Indian Fish & Wildlife Comm'n.*, 4 F3d. 490 (7th Cir. 1990) (Posner, J.), where congressional oversight rendered the literal meaning of a statute "extrinsically ambiguous," leading the court to rely instead on "legislative intent."

⁵⁷ For a discussion of judicial style, see Richard Posner, *Law and Literature*, pp. 281-299 (1988); Richard Posner, *Goodbye to the Bluebook*, 53 U. Chi. L. Rev. 1343 (1986); Richard Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. Chi. L. Rev. 1421 (1995); Robert Blomquist, *Playing on Words: Judge Richard A. Posner's Appellate Opinions, 1981-82 - Ruminations On Sexy Judicial Opinion Style During an Extraordinary Rookie Season*, 68 U. Cinc. L. Rev. 651 (2000). See also Benjamin Cardozo, *Law and Literature*, pp. 3-33 (1931);

⁵⁸ See, e.g., *Eisner v. Macomber*, 252 U.S. 189 (1920) (corporations are separate from its shareholders, so stock dividends are not "income").

⁵⁹ See, e.g., *Buck v. Bell*, 274 U.S. 200, 207 (1927) ("three generations of imbeciles are enough"); *Schenck v. United States*, 249 U.S. 47, 52 (1919) ("[O]ne is not free to shout 'fire' in a crowded theater"); *Lucas v. Earl*, 281 U.S. 111, 114-15 (1930) ("This case is not to be decided by attenuated subtleties"). Boris Bittker refers to *Lucas v. Earl* as an example of Holmes' magisterial style; Boris Bittker, *Taxation and the Family*, 27 Stan. L. Rev. 1389, 1401 (1975).

at the same time that the judge remained true to a formalist vision of the law -- declaring the law, rather than speculating about some brooding omnipresence.⁶⁰

None of these judicial styles of opinion-writing seems appropriate today. The magisterial voice establishes a judicial distance that is incompatible with the democratic demand for public accountability. And an authoritative tone pretends to a judicial certainty that current suspicion of judging will not accept. That leaves the personal/exploratory style,⁶¹ sensitive to the uncertainties in the law, without maintaining judicial distance from the audience. This style is illustrated in the following recent opinions by Judge Posner.

First, Posner draws the reader in with a chatty colloquial voice. Words and phrases like “shenanigans,”⁶² “spiel,”⁶³ “chintzy,”⁶⁴ “clincher,”⁶⁵ “click in,”⁶⁶ “real gripe,”⁶⁷ “scotches [plaintiff’s] argument,”⁶⁸ “weird result,”⁶⁹ “whacky result,”⁷⁰ “smelling a rat,”⁷¹ and “monkey with,”⁷² suggest that the judge is speaking at a personal down-to-earth level to the reader. The use of contractions -- “don’t,”⁷³ and “won’t”⁷⁴ add to this impression. And when

⁶⁰ See *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Justice Holmes, dissenting) (“The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified.”).

⁶¹ I considered but rejected the possibility that a magisterial voice can be effectively combined with an exploratory tone. The distance between a magisterial judicial author and the reader makes it hard for the judge to persuade the reader that he or she is genuinely exploring potential results. Some observers might think that Learned Hand achieved this combination, but that would mistake his erudite vocabulary and complex sentence structure with a distant magisterial tone. Judge Hand was a product of a culturally rich humanistic education that is now out of fashion. The judicial work product that resulted from this education might seem distant to the modern reader but was less so in an earlier era and was in no way meant to establish the judge as a magisterial figure. Hand’s unmistakable struggle to arrive at the proper legal decision is anything but magisterial.

⁶² *International Oil, Chemical & Atomic Workers v. Uno-Ven Co.*, 170 F.3d 779, 784 (7th Cir. 1999).

⁶³ *Ackerman v. Northwestern Mutual Life Ins. Co.*, 172 F.3d 467, 469 (7th Cir. 1999).

⁶⁴ *Hemisphere Building Co. v. Village of Richton Park*, 171 F.3d 437, 439 (7th Cir. 1999).

⁶⁵ *Blue Cross and Blue Shield United of Wisconsin v. Marshfield Clinic*, 152 F.3d 588, 595 (7th Cir. 1998).

⁶⁶ *Herremans v. Carrera Designs, Inc.*, 157 F.3d 1118, 1124 (7th Cir. 1998); *Caterpillar, Inc. v. Herman*, 154 F.3d 400, 403 (7th Cir. 1998).

⁶⁷ *Berens v. Ludwig*, 160 F.3d 1144, 1147 (7th Cir. 1998).

⁶⁸ *Lunn v. Montgomery Ward & Co., Inc.*, 166 F.3d 880, 884 (7th Cir. 1999).

⁶⁹ *Robinson v. Page*, 170 F.3d 747, 749 (7th Cir. 1999).

⁷⁰ *Level 3 Communications, Inc. v. Federal Insurance Co.*, 168 F.3d 956, 958 (7th Cir. 1999).

⁷¹ *United States v. Bach*, 172 F.3d 520, 521 (7th Cir. 1999).

⁷² *Adams v. Plaza Finance Co., Inc.*, 168 F.3d 932, 935 (7th Cir. 1999).

⁷³ *In re Factor VIII or IX Concentrate Blood Products Litigation*, 159 F.3d 1016, 1019 (7th Cir. 1998); *Kirksey v. R. J. Reynolds Tobacco Co.*, 168 F.3d 1039, 1041 (7th Cir. 1999).

⁷⁴ *U.S. v. Sapoznik*, 161 F.3d 1117, 1119 (7th Cir. 1998).

the reader is told that “we have before us a charming miniature of a case,”⁷⁵ we know that we have left a world of magisterial judging.

Even legal conclusions are mixed with colloquial language -- “frivolous squared,”⁷⁶ “recognize an animal called ‘prima facie tort,’ ”⁷⁷ “whiff of equitable estoppel,”⁷⁸ a particular case is not “a straight jacket into which every [] case must be forced kicking and screaming,”⁷⁹ “We are confident that he is wrong, although we cannot find any appellate case law directly on point,”⁸⁰ “pull on one thread of a complex legal tapestry,”⁸¹ and “trundle out the heavy artillery of constitutional law.”⁸² The aggressive absence of footnotes, even at the cost of extensive string citations that break the reader’s concentration, also departs from “legal” writing. Even when Posner is highly critical of an argument, he uses personal terms -- such as “nonsense,”⁸³ “ridiculous,”⁸⁴ and “feeble argument”⁸⁵ -- to characterize the rejected view, rather than criticizing from some remote legal pedestal.

Second, the tone of Posner’s opinions is frankly exploratory,⁸⁶ self-consciously revealing the judge’s thought processes as he works his way to a conclusion. He is sometimes frank about the uncertainty in the law -- “The law is torn in two ways”⁸⁷ -- but the uncertainty usually emerges from his opinion-writing style. Posner appears to let the reader eavesdrop on a conversation that he is having inside his head. Sentences begin with “But,”⁸⁸ “Maybe,”⁸⁹ and

⁷⁵ *Howard v. Wal-Mart Stores, Inc.*, 160 F.3d 358, 358 (7th Cir. 1998).

⁷⁶ *United States v. Cooper*, 170 F.3d 691, 691 (7th Cir. 1999).

⁷⁷ *Kirksey v. R. J. Reynolds Tobacco Co.*, 168 F.3d 1039, 1042 (7th Cir. 1999).

⁷⁸ *Flight Attendants Against UAL Offset v. Commissioner of Internal Revenue*, 165 F.3d 572, 575 (7th Cir. 1999).

⁷⁹ *Latimore v. Citibank Federal Savings Bank*, 151 F.3d 712, 714 (7th Cir. 1998).

⁸⁰ *Sullivan v. Conway*, 157 F.3d 1092, 1094 (7th Cir. 1998).

⁸¹ *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842, 848 (7th Cir. 1999).

⁸² *United States v. Wilson*, 159 F.3d 280, 293 (7th Cir. 1998) (Posner, J., dissenting).

⁸³ *Peabody Coal Co. v. Director, Office of Workers’ Compensation Programs*, 165 F.3d 1126, 1128 (7th Cir. 1999); *Papa v. Katy Industries, Inc.*, 166 F.3d 937, 943 (7th Cir. 1999).

⁸⁴ *Olech v. Village of Willowbrook*, 160 F.3d 386, 389 (7th Cir. 1998).

⁸⁵ *Level 3 Communications, Inc. v. Federal Insurance Co.*, 168 F.3d 956, 959 (7th Cir. 1999).

⁸⁶ The institutional presentation of judicial opinions can make judging appear exploratory even if the individual style used by judges does not. First, the existence of multiple opinions (dissents and concurrences) renders the practice of judging more exploratory than the style of an opinion might suggest. Second, the distinction between holding and dictum, which governs the reading as opposed to the writing of an opinion, can make the opinion more exploratory than the author’s style.

⁸⁷ *Nadalin v. Automobile Recovery Bureau, Inc.*, 169 F.3d 1084, 1086 (7th Cir. 1999).

⁸⁸ *Greisz v. Household Bank (Illinois) N.A.*, 176 F.3d 1012, 1015-1016 (7th Cir. 1999); *Amati v. City of Woodstock*, 176 F.3d 952, 958 (7th Cir. 1999).

⁸⁹ *Peabody Coal Co. v. Director, Office of Workers’ Compensation Programs*, 165 F.3d 1126, 1129 (7th Cir. 1999); *Marozsan v. United States*, 852 F.2d 1469, 1484 (7th Cir. 1988) (Posner, J., concurring)

“Remember,”⁹⁰ as the judge engages in a point-counterpoint of judicial reasoning. He thinks out loud with the reader -- “The puzzle is,”⁹¹ “But that cannot be the end of the analysis,”⁹² and “We think not.”⁹³ And he listens to the lawyers -- “we asked the government’s lawyer at oral argument,”⁹⁴ and “[w]hen asked at oral argument”⁹⁵ -- even though he is often disdainful of their arguments: “We expect better from the Department of Justice,”⁹⁶ “defendants make one very poor argument.”⁹⁷ In sum, the personal/exploratory style of judicial opinion-writing speaks directly to the reader in his own language, frankly revealing doubts encountered along the way to a legal result.

Third, a Posner opinion differs from most judicial opinions in not telling the reader how the case has been decided until the end. This creates the impression that the judge is sharing with the reader the exploratory process by which the legal conclusion is reached.

Conclusion

It may seem a long way from Eskridge’s “Dynamic Statutory Interpretation” to these musings about the dynamic judicial opinion, but I do not think so. The ultimate persuasiveness and success of dynamic interpretation depends on its professional acceptance and that, in turn, depends on judges finding the right substantive content and the appropriate voice and tone to embrace such a controversial approach to statutory interpretation. Different ways of writing judicial opinions are suited to different legal environments and modern sensibilities about the judicial role in a democracy require careful attention to how the judge writes an opinion, especially when the judge is doing something as controversial as incorporating dynamic statutory interpretation into the process of determining statutory meaning.

The contemporary legal environment calls for an honest acknowledgment that judges and legislatures collaborate to make law, in statutory interpretation as elsewhere. Substantively, the “intent of the statute” best captures this collaborative effort. As for style, a personal/exploratory approach draws the audience into the judge’s deliberative process in a way that provides the right balance of judicial authority and democratic accountability. Unless, of course, we prefer the Grand Inquisitor.

⁹⁰ *CSY Liquidating Corp. v. Harris Trust & Savings Bank*, 162 F.3d 929, 933 (7th Cir. 1998); *Commonwealth Edison Co., v. Vega*, 174 F.3d 870, 873 (7th Cir. 1999); *Sullivan v. Conway*, 157 F.3d 1092, 1098 (7th Cir. 1998); *Baltimore & Ohio Chicago Terminal Railroad Co. v. Wisconsin Central Ltd.*, 154 F.3d 404, 406 (7th Cir. 1998).

⁹¹ *CSY Liquidating Corp. v. Harris Trust & Savings Bank*, 162 F.3d 929, 933 (7th Cir. 1998).

⁹² *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842, 846 (7th Cir. 1999).

⁹³ *Tinker v. Hanks*, 172 F.3d 990, 991 (7th Cir. 1999).

⁹⁴ *Velasquez v. Frapwell*, 160 F.3d 389, 394 (7th Cir. 1998).

⁹⁵ *Flight Attendants Against UAL Offset v. Commissioner of Internal Revenue*, 165 F.3d 572, 576 (7th Cir. 1999).

⁹⁶ *United States v. Marzano*, 160 F.3d 399, 403 (7th Cir. 1998).

⁹⁷ *Sullivan v. Conway*, 157 F.3d 1092, 1096 (7th Cir. 1998).