Symmetries of Access in Civil Rights Litigation: Politics, Pragmatism and Will

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Politics, Pragmatism and Will

GENE R. SHREVE*

Table of Contents

INTRODUCTION ............................................ 2
I. THE WILL CASE .................................................. 4
II. WILL AS A POLITICAL DECISION .................................. 6
   A. Three Nonpragmatist Approaches to Interpreting Section 1983 ........................................ 6
      1. Intentionalism .............................................. 6
      2. Plain Meaning and Political Interpretation ............. 7
   B. Jurisprudential Affinities .................................... 10
   C. A Community of Approaches .................................. 13
   D. Emergence of Political Models of Interpretation in Will .................................................. 17
      1. Insufficient Opportunities for Plain Meaning and Intentionalist Approaches .......................... 17
      2. Free Play in Will of Political Interpretations of Section 1983 .......................................... 18
      3. The Problem ................................................ 23
III. THE UNDISCLOSED PRAGMATISM OF THE RESULT IN WILL .... 26
   A. The Pragmatist Movement .................................... 27
   B. Features Setting Pragmatist Legal Theory Apart ........... 31
      1. Pragmatism Versus Historical Jurisprudence .......... 31
      2. Pragmatism Versus Natural Law ............................ 32
      3. Pragmatism Versus Analytical Positivism ............... 33
      4. Pragmatism's Frailties ........................................ 34
   C. A Pragmatist Approach to Statutory Interpretation in Will .................................................. 37
      1. The Current Landscape ...................................... 37
      2. Which Result Promotes More Coherence?
         Pragmatism as a Means for Taking Sides in Will ........ 38

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INTRODUCTION

During the past thirty years, section 1983 has become a mainstay for civil rights litigation in federal court. Most state courts also entertain section 1983 actions. However, the United States Supreme Court paid little attention to the statute's role in state litigation until its decision in Will v. Michigan Department of State Police. The most significant feature of Will was the extent to which it patterned the availability of section 1983 relief


in state court on the more established federal court model, even though eleventh amendment law which had shaped that model did not apply to state proceedings.

Will is an important case, and one that invites speculation about the amount of symmetry appropriate between state and federal civil rights litigation under section 1983. It is regrettable that the Will opinions throw so little light on these matters. In a sadly familiar pattern, a bare majority shrugged off the challenges of a shrill dissent.

But cause for dissatisfaction with Will runs deeper than style. Even if one attributes qualities of a dialogue to the exchange between the majority and the dissent, that dialogue may have been unproductive. This Article discusses why and suggests an alternative approach to the problem in Will over the meaning of section 1983.

The first part of this Article examines the function and jurisprudential roots of non-pragmatist approaches to the statutory interpretation issue in Will. Neither the approach of the Will majority nor that of the dissent created the possibility of a reasoned application of section 1983, because both positions rested on “political” interpretations of section 1983. The problem was not that the Justices misused conventional approaches to statutory interpretation. Of those approaches—which I will describe as intentionalism, plain meaning and political interpretation—it was predictable that only the last would be of real use in Will. Yet in Will and other cases, where plain meaning and intentionalism prove sterile, it is particularly useful to ask whether legal pragmatism might serve as an additional approach to statutory interpretation. If it can, the Justices will have more than politics left to talk about. They will also have pragmatism to shape the content and enhance the stature of their decisions. In the second part of this Article, I attempt to develop this idea and to demonstrate how it could have been applied in Will.

I suggest that legal pragmatism does not indicate a different result in Will because the approach seems to support the majority’s reading of section 1983. However, the Court could have enlisted legal pragmatism to clarify the issue in Will, to make the decision more acceptable and to inform the legal community more fully about comparative access in state and federal civil rights litigation. The example offered by Will suggests how pragmatism

5. Justice White wrote for the Court, joined by Chief Justice Rehnquist and Justices O’Connor, Scalia and Kennedy.

6. Justice Brennan wrote a dissenting opinion, joined by Justices Marshall, Blackmun and Stevens. Will, 109 S. Ct. at 2312 (Brennan, J., dissenting). Justice Stevens also filed a separate opinion. Id. at 2320 (Stevens, J., dissenting).

7. On the apparent decline of constructive discourse within the Supreme Court, see Revesz & Karlan, Nonmajority Rules and the Supreme Court, 136 U. Pa. L. Rev. 1067, 1067 (1988) (noting the growing polarization of the voting patterns of the Court and the increasing number of separate dissents).
may either provide a separate justification for the result favored under one of two conflicting nonpragmatist theories or may lessen the conflict itself by suggesting less real difference when the theories are actually applied.

This Article offers an expansive and optimistic vision of legal pragmatism. Comparisons between pragmatist and nonpragmatist theory are necessary to this approach, both to determine what sets legal pragmatism apart and to demonstrate how pragmatism might interact productively with nonpragmatist sources. Part of this multidimensional focus will be on convergences within and between three levels: approaches to statutory interpretation noted above; traditions of positivism, natural law and historical jurisprudence; and the politics of federal rights, federal courts and federalism. Those working within these levels have produced rich and quite extensive scholarship. I am indebted to them, and threads to broad-spectrum discussion within each of the three levels may be found in the notes that follow. At the same time, this Article breaks with tradition by dealing more with the intersection of these matters than with the matters themselves. This seems necessary to my objective; yet, I apologize to readers pained to find natural law, federalism or some other subject dear to them treated in only a few pages.

Two other aspects of the approach taken here may also throw some off balance. First, pragmatism is of paramount importance to this Article, yet readers will not encounter a discussion of pragmatist legal theory until midway. The delay stems from my view of legal pragmatism as a positive, interactive force within a larger community of nonpragmatist thought and the judgment that it might be useful first to establish at least the outlines of that larger community. Second, this Article may to some readers seem to be neither fish nor fowl. I will at times discuss Will with a particularity characteristic of articles based upon a single case. However, I will also use Will as a vehicle for much more theoretical discussion. Viewed only as an exegesis of the case, the Article may seem top heavy. Viewed as a broader exercise in legal theory, it may seem restricted by details about Will and its immediate environment. Yet recognition of the interplay of theory and application so important to legal pragmatism warrants the attempt in this Article to integrate both forms of inquiry.

I. THE WILL CASE

Having filed in state court, Ray Will did not have to worry about the eleventh amendment bar to section 1983 actions against states in federal court. Will lost anyway, because the Court interpreted section 1983 in a manner which replicated eleventh amendment doctrine.

8. The inapplicability of the eleventh amendment to state proceedings was settled prior to Will. See Maine v. Thiboutot, 448 U.S. 1, 9 n.7 (1980); Wolcher, Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations, 69 CALIF. L. REV. 189, 236 (1981).
The *Will* Court did not draw from exclusively eleventh amendment sources and it noted that "the scope of the Eleventh Amendment and the scope of section 1983" were "separate issues." Yet *Will* referred to the eleventh amendment repeatedly; cases that the eleventh amendment would have barred in federal court were also excluded from section 1983 actions. The Court stated that "Congress, in passing § 1983, had no intention to disturb the States' Eleventh Amendment immunity and so to alter the Federal-State balance in that respect . . . ." The Court then reasoned:

Given that a principal purpose behind the enactment of § 1983 was to provide a federal forum for civil rights claims, and that Congress did not provide such a federal forum for civil rights claims against States, we cannot accept petitioner's argument that Congress intended nevertheless to create a cause of action against States to be brought in state courts . . . ."

*Will* preserved the Court's previous holding in *Monell v. Department of Social Services of New York* that a municipality was a "person" within the meaning of section 1983, but bolstered its refusal to include states within the term by reference to the eleventh amendment. The Court turned again to eleventh amendment doctrine when it excluded from section 1983 coverage damage claims against Michigan state officials acting in their official capacities.

The Supreme Court cloned the benign side of its eleventh amendment doctrine as well, placing within section 1983 a major category of cases it had previously protected from the amendment when they arose in federal court. "Of course[,]" stated the Court, "a State official in his or her official capacity, when sued for injunctive relief, would be a person under

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9. *Will v. Michigan Dept. of State Police*, 109 S. Ct. 2304, 2309 (1989). The court went on to add, however, that "in deciphering congressional intent as to the scope of § 1983, the scope of the Eleventh Amendment is a consideration, and we decline to adopt a reading of § 1983 that disregards it." *Id.*
10. *Id.*
11. *Id.*
13. Section 1983 provides in part:
   
   *Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected,, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.* 42 U.S.C. § 1983 (1988) (emphasis added).
14. *Will*, 109 S. Ct. at 2311 ("States are protected by the Eleventh Amendment while municipalities are not . . . .").
§ 1983 because ‘official-capacity actions for prospective relief are not treated as actions against the State.’16 This breach in the wall did not help Will, who was suing Michigan state departments and (in their official capacity) the officers directing them for damages. Nor did it mollify the dissent, who lamented that “the Eleventh Amendment lurks everywhere in today’s decision and, in truth, determines its outcome.”17

II. Will as a Political Decision

A. Three Nonpragmatist Approaches to Interpreting Section 1983

1. Intentionalism

In positing their interpretations of section 1983, both the majority and the dissent emphasized legislative history, offering conflicting answers to the question(159,547),(879,760) of whether placing states within the reach of the Civil Rights Act of 1871 would have comported with Congress’ own understanding of the statute. Ostensibly then, much of the Will debate seems to occur within the precincts of intentionalism.18 The best intentionalist reading of a statute is not necessarily the most logical, or the one most aligned with any particular understanding of justice. Instead, the best reading is one which most fully captures what members of Congress actually thought and intended19 when they voted a statute into law. Ordinarily, intentionalist arguments focus on known events leading to passage and possibly (as in Will)20 on data drawn from the larger historical context in which the legislative enactment took place.

There is a certain affinity between intentionalism and historical jurisprudence, an important nineteenth century movement in Germany and

16. Will, 109 S. Ct. at 2311 n.10 (quoting Graham, 473 U.S. at 167 n.14) (citing Ex parte Young, 209 U.S. 123, 159-60 (1908)).
18. On the ultimate failure of intentionalist arguments in Will, see infra notes 93-101 and accompanying text.
19. Actual intent, as used here, is roughly synonymous with original intent. See, e.g., Easterbrook, The Role of Original Intent in Statutory Construction, 11 Harv. J.L. & Pub. Pol'y 59, 60 (1988). Proponents focus on how and why particular legislators responsible for the statute used their authority. “[T]he goal is not to look at a general legislative aim or purpose, but instead to see more particularly how the enacting legislature would have resolved the question, or how it intended that question to be resolved, if it had been presented.” Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 429 (1989).
20. See Sunstein, supra note 19, at 429 (“For those who emphasize legislative intent, the legislative history is a central object of concern.”).
21. See infra note 98.
England. Historical jurisprudence, while unsympathetic to legislative power, has in common with intentionalism a view of history as a constraint on legal change. Intentionalism also resembles historical jurisprudence as a phenomenon at odds with a modern understanding of history and historical method in legal theory. This is clear when one contrasts the inhibiting effect particular histories of legislative intent have on legal change with the opposite, liberating effect history can have by informing a wide range of policy choices.

2. Plain Meaning and Political Interpretation

Two other perspectives used in modern statutory interpretation at times complement and at times compete with intentionalism. The first is the plain meaning rule. The second, which I will term political interpretation, is manifested when the judiciary collaborates with the legislature in making political choices.

The plain meaning rule, which provides that a statute be interpreted according to the plain or ordinary meaning of its language, continues to

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23. Pound noted the movement's "distrust of legislation and of creative judicial decision." 1 R. Pound, supra note 22, at 85. Maine conceded legislation a role "by which Law is brought into harmony with society," but subordinated it in that regard to roles performed by legal fictions and equity. H.S. Maine, supra note 22, at 24. "The legislature," he wrote, "whatever be the actual restraints imposed upon it by public opinion, is in theory empowered to impose what obligations it pleases on the members of the community. There is nothing to prevent its legislating in the wantonness of caprice." Id. at 28.

24. Historical jurisprudence creates "limitations both on the sovereignty of the lawmaker power and on the authority of reason and conscience." Berman, Toward an Integrative Jurisprudence: Politics, Morality, History, 76 CALIF. L. REV. 779, 780 (1988). Adherents "argue that what the law 'is' politically and 'ought to be' morally is to be found in the national character, the culture, and the historical ideals and traditions of the people or society whose law it is." Id. at 780-81. For a similar description, see D. Wigdor, Roscoe Pound 170 (1974).


exert influence.28 When plain language suggests how the statute is to be applied, giving it that application is often thought to comport with actual legislative intent, since the legislature chose the words. In reality, the language discloses only manifest intent29—which may or may not reflect actual legislative intent.30 Yet "despite this, there is no practical alternative to assuming that the manifest intent is the actual intent, until new appropriate evidence is available or the legislature enacts a corrective amendment."31 Plain meaning occasionally contradicts demonstrable legislative intent. Some have suggested that sufficiently clear statutory language should triumph even in such cases.32 Overall, the plain meaning rule has its critics,33 but seems to be enjoying a rise in popularity.34

A political model legitimates approaches to statutory interpretation which bring judges' own substantive values into play. Commentators favoring this approach do not discard possibilities for statutory interpretation through plain meaning or evidence of actual legislative intent. However, they encourage courts to entertain additional inquiries in what the writers (sometimes differently) conceive to be the right circumstances.35

28. The term textualism describes an approach close to (if not identical with) that undertaken under the plain meaning rule. For extended discussion of the former, see Eskridge, The New Textualism, 37 UCLA L. REV. 621 (1990).
30. "The meaning of words is not the same as the 'intent' of the writers. Often writers have no pertinent intent or have several intents." Easterbrook, Legal Interpretation and the Power of the Judiciary, 7 HARV. J.L. & PUB. POL'Y 87, 87 (1984).
31. R. DICKERSON, supra note 29, at 85.
32. E.g., Easterbrook, Statute's Domains, 50 U. CHI. L. REV. 533, 534 (1983). Plain meaning advocates, according to Professor Johnstone, "argue that legislative history materials should not be resorted to in statutory interpretation cases if the language of the statute is clear on its face. A corollary of this position is that legislative history materials should not be used to show ambiguity of a statute plain on its face." Johnstone, An Evaluation of the Rules of Statutory Interpretation, 3 KAN. L. REV. 1, 7 (1954). One commentator recently has offered examples where the "Court has applied the plain-meaning standard even when it has produced harsh results that the drafters and adopters of a particular statute did not intend." Jonakait, The Supreme Court, Plain Meaning, and the Changed Rules of Evidence, 68 TEX. L. REV. 745, 747-49 (1990). Justice Scalia appears to be at the forefront of the plain meaning movement. Cf. Popkin, A Common Law Lawyer on the Supreme Court: The Opinions of Justice Stevens, 1989 DUKE L.J. 1087, 1151 (comparing plain meaning arguments in Justice Scalia's opinions with Justice Stevens' insistence that demonstrations of legislative intent should control). For extended discussion of Justice Scalia's position, see Eskridge, supra note 28.
33. "Justice Scalia's approach, if adopted, would represent a significant change in the way the Court writes its statutory interpretation decisions, and probably even the way the Court conceptualizes its role in interpreting statutes." Id. at 624.
35. See, e.g., G. CALABRESE, A COMMON LAW FOR THE AGE OF STATUTES (1982); Aleinikoff,
The play of political values in statutory interpretation may be perceptible even in an intentionalist setting, where judges ask either what the enacting legislature intended or how that particular group would have answered other, related questions. The field of inquiry for such questions may be vast, and data found there may be cryptic or incomplete. Therefore, judges will be tempted (perhaps required) to draw upon their own political sensibilities to complete the inquiry. The endeavor can be seen as reconstructing the atmosphere of enactment in order to achieve a larger conception of legislative intent. The process, variously described as a search within an ever-widening context, a search for statutory purpose or a search to discover the equity of the statute, can quickly lead to bolder inquiries which courts may or may not acknowledge—those seeking meaning from a statute which the most informed and enlightened legislature of that time would have wished for it, or which those informed by experience and modern values would give to it. In its most radical form, this approach


36. See supra note 19 and accompanying text.

37. According to one scholar:

Context is an open-ended concept that includes an ever-widening circle of material—the shared conceptions of how particular words are used at the time a statute is passed, the historical mischief animating (or prompting) the passage of a law, legislative intent to solve a specific problem, more general purposes underlying the statute, and finally, the background considerations (such as traditional social and political values) affecting the legislature's action.

Popkin, supra note 32, at 1139; see also H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1415-16 (tent. ed. 1958); cf. Horack, The Disintegration of Statutory Construction, 24 Ind. L.J. 335, 341 (1949) (Ultimately, "legislative intention becomes not what the legislature in fact intended but rather what reliable evidences there are to satisfy the need for further understanding of the legislative action").

38. It is important here to note the difference between legislative "purpose" and actual legislative intent. "[T]he word 'intent' coincides with the particular immediate purpose that the statute is intended to directly express and immediately accomplish, whereas the word 'purpose' refers primarily to an ulterior purpose that the legislature intends the statute to accomplish or help to accomplish." R. Dickerson, supra note 29, at 88; see also Weisberg, supra note 26. What ulterior purpose (if any) the legislature might wish to serve by enacting a particular statute is an amorphous question, Sunstein, supra note 19, at 426-28, usually more difficult to answer than the question of actual legislative intent. R. Dickerson, supra note 29, at 90. A search for ulterior purpose may in fact downplay indicia of actual intent, H. Hart & A. Sacks, supra note 37, at 1416, focusing instead on more global considerations such as prior and contemporaneous law or simply "general public knowledge of what was considered to be the mischief that needed remedying." Id. at 1415.

39. For examination of this maxim, see Blatt, The History of Statutory Interpretation: A Study in Form and Substance, 6 Cardozo L. Rev. 799 (1985).

40. "For the individual justice to be left so much at large presents opportunity and temptation to adopt interpretations that fit his predilections as to what he would like the statute to mean if he were a legislator." Jackson, The Meaning of Statutes: What Congress Says or What the Court Says, 34 A.B.A. J. 535, 537 (1948).
to statutory interpretation has been described as one permitting courts to police legislatures, "to ensure that legislation reflects public values, rather than simply producing benefits for special interest groups. . . . [L]egislation would be restricted to a specific set of judicially identified goals chosen because they embrace civic virtue."41

B. Jurisprudential Affinities

It is not always possible to separate intentionalism from perspectives of plain meaning or political interpretation.42 When conceived as distinct, intentionalism still seems a formidable, perhaps dominant perspective.43 On the strength of its jurisprudential credentials, intentionalism is an unlikely winner. The attitude of historical jurisprudence it seems in part to reflect44 is generally out of favor.45 In contrast, the plain meaning and political models suggest affinities with analytical positivism and natural law, respectively—two movements now more important. It will be impossible here to do more than sketch outlines of these movements,46 but that much will be useful to this Article.

42. See infra notes 76-77 and accompanying text.
43. Cf. Eskridge & Frickey, Statutory Interpretation as Practical Reasoning, 42 Stan. L. Rev. 321, 325 (1990) ("The most popular grand theory is probably intentionalism.").
44. See supra notes 22-24 and accompanying text.
45. One commentator has suggested that "[h]istorical jurisprudence never did gain much of a foothold in America." R. Summers, Instrumentalism and American Legal Theory 35 (1982). While the movement had been significant in England, it was losing force there by the turn of the century:

Perhaps the greatness of historical jurisprudence lay in the fact that it provided its own seed of dissolution; for once it is admitted that law is historically conditioned, it is as impossible to limit the conception of law to a Volksgeist as to the commands of the sovereign; all forms of social control and all sources of law emerge as subjects for legitimate consideration and study.

Konvitz, supra note 22, at 22.

At the same time, the influence of historical jurisprudence in American law is not confined to the actual-intent approach to statutory interpretation. For example, the present standard for determining whether a federal civil case is one for which the seventh amendment of the United States Constitution confers a right to a jury trial is whether the case is (or sufficiently resembles) one for which a right to a jury would have existed at English common law in 1791. Tull v. United States, 107 S. Ct. 1831 (1987); see also Henderson, The Background of the Seventh Amendment, 80 Harv. L. Rev. 289 (1966).

46. For a more extensive introduction than is possible here, see D. Richards, The Moral Criticism of Law 7-38 (1977). Analytical positivism and natural law are enormous topics. Scholarship has spanned a great many subjects, including debate over true and deviant meanings of the concepts and about whether the two are entirely distinct. H.L.A. Hart, The Concept of Law 253 (1961); N. MacCormick, Legal Reasoning and Legal Theory 59-62 (1978); Berman, supra note 24, at 782-88; Fiss, Varieties of Positivism, 90 Yale L.J. 1007 (1981). Structure useful for framing such issues can be found in G. Christie, Law, Norms and Authority (1982).
Important analytical positivists were English writers Jeremy Bentham and John Austin. American John Chipman Gray was influenced by their work. The movement contributed significantly to American legal thought, although it never attained in America the dominant position that it continues to have in England. The most important English theorist of this century is H.L.A. Hart, whose positivism is more sophisticated and conciliatory in tone. The movement appears to be enjoying a resurgence as a significant, contending voice in American jurisprudence. Positivist sympathies are evident in views giving special importance to statutory text in isolation, or to constitutional text in isolation.

Analytical positivists were so named for their emphasis on the posited or enclosed character of law. "Positive law, so conceived, is a 'pure' fact; that is, a body of data that can be isolated from data of all other kinds and studied on its own terms, quite apart from any consideration of its

47. Sometimes "legal positivism" is used to denote what I intend here by the term "analytical positivism." E.g., D. Richards, supra note 46, at 16-22. I prefer the latter because it risks less confusion with what I will later introduce as pragmatist theory. See infra notes 190-95 and accompanying text.
53. However, "Hart continued the positivist tradition of insisting that there is no conceptual link between law and morals." P. Atiyah & R. Summers, supra note 51, at 260. That provoked lively controversy. Compare Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harv. L. Rev. 630 (1958) with Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593 (1958).
54. See supra note 32 and accompanying text.
causes, purpose, history, or value." A sense of the strong affinity between positivist jurisprudence and a plain meaning interpretive approach can be gained from the observations of Professors Atiyah and Summers in their study of the development of analytical positivism in England. Law to analytical positivists was that "commanded by the sovereign," not "something to be identified by reference to its substantive content, let alone the dictates of reason, or appeals to the law of nature or the law of God." Moreover, "the essential and overwhelmingly predominant form of law consisted of rules, preferably ... statutory rules." Finally, such a scheme determined the role of the judge because "the sole function of a court applying the law was to find the sovereign's commands, the underlying reasons behind those commands could arguably be said to be immaterial." This paradigm of a mechanical form of textual interpretation explains those strict applications of the plain meaning rule when invoked to override arguably contrary legislative intent.

Natural law concepts found expression in the writings of Aristotle, Cicero and Thomas Aquinas, among others. Natural law flowered in eighteenth century Europe, and is thought to have had an important influence on the shape of the United States Constitution and on evolving American legal theory in general. Natural law themes remained important in American legal thought throughout much of the nineteenth century, then waned with the ascendance of formalism. In large part through the influence of Lon

56. Feinberg, Analytic Jurisprudence, in 1 The Encyclopedia of Philosophy 109 (1967); see also Millon, Positivism in the Historiography of the Common Law, 1989 Wis. L. Rev. 669, 670 ("The central focus of the positivist theory is the conception of law as a system of rules. In form, these rules are general and impersonal. Justice depends on their application by the judiciary in a consistent and objective manner, without regard to bias, case-specific notions of fairness, or other 'extra-legal' considerations."). See generally S. Shuman, Legal Positivism (1963).


58. Id. at 240-41.

59. Id. at 241. Statutes (and hence their texts) thus become a significant means by which analytical positivists can conceptualize sovereign authority. See infra text accompanying note 194.


61. See supra note 32 and accompanying text.


63. C. Becker, The Heavenly City of the Eighteenth-Century Philosophers (1932). The great eighteenth century English writer Blackstone is usually placed in the natural law camp, although his views have proven particularly difficult to sort out. For one attempt, see Kennedy, The Structure of Blackstone's Commentaries, 28 Buffalo L. Rev. 209 (1979).


Fuller, natural law reemerged as a viable jurisprudential movement and remains so today. Despite differences, what unites natural law theorists and most clearly distinguishes them from others is that they "have concentrated on notions of the 'right' and the 'good' to be realized through law." Because they read a statute with sensitivity to the rightness of the decision, judges using a political model of interpretation demonstrate an affinity with natural law. Part of the value of the political model may be that it simply reveals and guides authority judges use even when they purport to adhere to actual intent or plain meaning. Yet commentators advancing a political model clearly go further and press the idea that judges cannot apply statutes free of a certain moral obligation. Judges must when necessary collaborate with legislators in determining what types of individuals or groups will be affected by the statute. In the words of Professor Popkin, "law is the result of public deliberation about political values in which courts play an active normative role."

C. A Community of Approaches

At the level of pure theory, analytical positivism and natural law seem to offer entirely separate (and potentially hostile) conceptions of legal justification. This is evident from the fact that each defines itself in significant part by stressing that it is not the other. The plain meaning rule and political models, while suggestive of analytical positivism and natural law respectively, do not appear to generate as much tension in statutory interpretation opinions or literature. Perhaps this is from reluctance to extend further a jurisprudential debate that has produced somewhat

68. Prominent theorists include Lloyd Weinreb, John Finnis and Michael Moore. See L. Weinreb, Natural Law and Justice (1987); J. Finnis, Natural Law and Natural Rights (1980); see, e.g., Moore, A Natural Law Theory of Interpretation, 58 S. Cal. L. Rev. 277 (1985); Moore, Moral Reality, 1982 Wis. L. Rev. 1061.
69. R. Summers, supra note 45, at 20. Putting the matter differently, "[p]ositivism has often been understood to hold, and Natural Law to deny, that there can be unjust laws." Lyons, The Connection Between Law and Morality: Comments on Dworkin, 36 J. Legal Educ. 485 (1986).
70. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed, 3 Vand. L. Rev. 395 (1950); cf. Bishin, The Law Finders: An Essay in Statutory Interpretation, 38 S. Cal. L. Rev. 1, 1 (1965) ("The only certainty is that the 'limits of adjudication' are uncertain and that the range of legitimate judicial choice is great.").
71. Popkin, supra note 27, at 627.
72. See supra notes 47-68 and accompanying text.
73. See supra note 53; see also L. Fuller, supra note 67 (Fuller's attack on Hart's positivism); Hart, American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream, 11 Ga. L. Rev. 969 (1977) (Hart's criticism of natural law theory).
disappointing results.\textsuperscript{74} Or perhaps it is part of a larger trend toward pluralism in American legal theory.\textsuperscript{75}

Moreover, in application, the plain meaning and political models do not seem to be entirely incompatible approaches. For example, whether a particular meaning is plain from the language of the statute will, like other questions of interpretation, be determined by the response that attracts the dominant group—what Stanley Fish has called an "interpretive community."\textsuperscript{76} In the Supreme Court, five or more Justices joining in the same portion of a judicial opinion can be said to constitute that "community" necessary to give an interpretation full legal authority.\textsuperscript{77} Yet Justices may be in this interpretive community for different reasons. It may be impossible to separate positivist and natural law impulses within the community\textsuperscript{78} or even within the thinking of a single Justice. To illustrate the latter, one Justice might be aided in concluding that a particular plain meaning exists by the conviction that it is a meaning that the words of the statute plainly should have in a good world.

The final and perhaps most significant factor easing tension between the plain meaning and political models is the added presence of intentionalism. Recall that intentionalism strives to derive the legislature's intended meaning.

\textsuperscript{74} Cf. P. ATTYAH & R. SUMMERS, supra note 51, at 262 (noting that "American legal theory generally" has been unable to devise "a synthesis reconciling natural law and positivism").

\textsuperscript{75} Pluralism characterized American attitudes towards law through the first half of the nineteenth century, declining thereafter with the rise of legal formalism. See L. FRIEDMAN, A HISTORY OF AMERICAN LAW 331-35 (1973); G. GILMORE, supra note 65, at 45-46. For reflection of this shift on a particular set of legal questions, see T. FREYER, HARMONY & DISSONANCE: THE SWIFT & ERIE CASES IN AMERICAN FEDERALISM (1981), and Shreve, From Swift to Erie: An Historical Perspective, 82 Mich. L. Rev. 869 (1984). Pluralism re-emerged with the decline of formalism early in this century and is now a frequent if quixotic feature in legal theory. For further discussion of pluralism, see infra notes 206-08.

\textsuperscript{76} S. FISH, IS THERE A TEXT IN THIS CLASS? 14 (1980); see also Easterbrook, Legal Interpretation and the Power of the Judiciary, 7 Harv. J.L. & Pub. Pol'y 87, 87 (1987) ("Words have meaning only to the extent there is some agreement among a community of users of language."). For application of the interpretive-community concept to legal theory, see Fish, Working on the Chain Gang: Interpretation in Law and Literature, 60 Tex. L. Rev. 551, 552 (1982). Some have attacked this view because it seems to invite the assumption that conflict between interpretive communities for the dominant (hence real) meaning of a text goes on without reference to notions of value or higher social good. Might makes right; or, at least, might makes meaning. See, e.g., Cornell, Two Lectures on the Normative Dimensions of Community in the Law, 54 Tenn. L. Rev. 327, 328-29 (1987) (criticizing "Fish's conventionalism").

\textsuperscript{77} Cases in which a majority cannot join in one opinion produce only plurality opinions. These have considerably less authority than majority opinions. How much is a matter of question. See Davis & Reynolds, Juridical Cripples: Plurality Opinions in the Supreme Court, 1974 Duke L.J. 59; Note, Plurality Decisions and Judicial Decisionmaking, 94 Harv. L. Rev. 1127 (1981).

\textsuperscript{78} Apparently Professor Fish would not find this cause for concern. "[I]t is interpretive communities, rather than either the text or the reader, that produce meanings and are responsible for the emergence of formal features." S. FISH, supra note 76, at 14.
This makes intentionalism both like and unlike each of the other two approaches. Like political interpretation, intentionalism does not confine a search for meaning to textual language alone. Like the plain meaning rule, intentionalism is antagonistic to a natural law approach because it claims to be indifferent to the rightness of the result. Thus, intentionalist justifications may overlap with either the plain meaning or political models of statutory interpretation.

While it is difficult to verify, intentionalism seems to hold its own when standing alone and when at cross purposes with either the plain meaning or political models. Why intentionalism does this well against perspectives with superior jurisprudential credentials is probably in large part because it so forcefully expresses the separation-of-powers advantage in lawmaking that legislators usually enjoy over courts. The advantage manifests itself most obviously in the rule that the common law a court makes can neither

79. See supra notes 28-31 and accompanying text.
80. See supra notes 36-41 and accompanying text.
81. See supra note 43 and accompanying text. On the bedrock importance of intentionalism in statutory interpretation, see, e.g., R. Dickerson, supra note 29, at 67-86. Cf. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 577 (1982) (Stevens, J., dissenting) ("In final analysis, any question of statutory construction requires the judge to decide how the legislature intended its enactment to apply to the case at hand.").
82. See Easterbrook, supra note 19, at 60-61 (noting how conclusions about what the legislature intended can replace the "written word" of the statute as "the real law").
83. See, e.g., Eskridge, Spinning Legislative Supremacy, 87 Geo. L.J. 281 (1989) (arguing that the notion of legislative supremacy can obstruct the normatively best or "dynamic" statutory interpretation).
84. See supra notes 42-68 and accompanying text. Intentionalism's relatively weak jurisprudential base makes it an attractive target. See, e.g., Eskridge, supra note 28, at 642-50 (Professor Eskridge's survey of what he terms realist, historicist and formalist criticisms).
85. In a recent article, Professor Anthony D'Amato offers a different basis for intentionalism. D'Amato, Can Legislatures Constrain Judicial Interpretation of Statutes?, 75 Va. L. Rev. 561 (1989). While "no interpreter has direct knowledge of the mind of the author," id. at 561, legislatures can use jurisprudential theory to shorten the distance between meanings they might intend for statutes and the meanings judges give them: "[I]f an audience believes a given jurisprudential theory, that audience has forfeited a few of its degrees of interpretive freedom, and . . . if the legislature knows this fact about its audience, it may be able to use jurisprudence to its advantage." Id. at 595.
defy nor outlive the will of the legislature. 87 Without intentionalism, courts could easily undermine that rule by revising legislative judgments through statutory interpretation. 88 At the same time, most agree that historical evidence of legislative intent can be so scant or contradictory as to tax even a dispassionate historian. 89 Law's adversary process magnifies such uncertainty, exposing the inquiry to manipulation and distortion as each side struggles to establish a usable past. 90 To insist on a determination of legislative intent from inconclusive legislative history risks having the judge act as a legislator, 91 turning the separation-of-powers rationale for intentionalism upside down. 92 None of this is to suggest that intentionalist inquiry is invariably futile, only that (as in Will) it can be.


88. According to one scholar:
In the division of responsibilities represented by the constitutional separation of powers, the legislature calls the main policy turns and the courts must respect its pronouncements. In such a relationship, it would seem clear that so far as the legislature has expressed itself by statute the courts should try to determine as accurately as possible what the legislature intended to be done.

The plain meaning approach to statutory interpretation also defers to legislatures, but in a different, less forceful way. Legislatures' sovereign authority underpins veneration of statutory text under a plain meaning approach. See supra text accompanying notes 60-61. Deference fades, however, when the approach calls for freestanding text to trump actual legislative intent. See supra note 32. The clearest nexus between plain meaning and separation-of-powers is likely to be in cases where actual intent is unfathomable and emphasis on text chosen by the legislature is a bulwark against freewheeling political interpretation. See infra note 92.

89. See, e.g., Jackson, supra note 40. Matters are "aggravated by the extraordinary difficulties of aggregating the 'intentions' of a multimember body." Sunstein, supra note 19, at 433; see also Aldisert, Philosophy, Jurisprudence, and Jurisprudential Temperament of Federal Judges, 20 Ind. L. Rev. 453, 506 (1987); Wellman, Dworkin and the Legal Process Tradition: The Legacy of Hart & Sacks, 29 Ariz. L. Rev. 413, 453 (1987).

90. Cf. Easterbrook, supra note 32, at 534 ("Inferences almost always conflict, and the enacting Congress is unlikely to come back to life and 'prove' the court's construction wrong.").

91. Cf. United States v. Public Utils. Comm'n, 345 U.S. 295, 319 (1953) (Jackson, J., concurring). I should concur in this result more readily if the Court could reach it by analysis of the statute instead of by psychoanalysis of Congress... Never having been a Congressman, I am handicapped in that weird endeavor. That process seems to me not interpretation of a statute but creation of a statute.

Id.

92. In this setting, history-based intentionalism shades into a political approach, see supra notes 37-40 and accompanying text, and a greater degree of separation-of-powers deference may be possible by shifting to a plain meaning approach. See Farber, supra note 88, at 286-87; Jackson, supra note 40, at 537-38. On the other hand, plain meaning too can mask political preferences. See Kannar, The Constitutional Catechism of Antonin Scalia, 99 Yale L.J. 1297 (1990).
D. Emergence of Political Models of Interpretation in Will

1. Insufficient Opportunities for Plain Meaning and Intentionalist Approaches

The majority and the dissent expressed their differences in *Will* on the same level. Plain meaning arguments were not a factor. Both sides pressed intentionalist arguments, but without great effect. Ultimately, the majority and the dissent clashed over political interpretations of section 1983. It will be useful to examine these matters more closely and to consider whether an exhaustion of approaches to interpretation under this triadic scheme gave the Court in *Will* enough with which to work.

Understandably, neither side really pushed the plain meaning approach in *Will*. It is difficult to argue that section 1983’s “person” plainly includes state governments. Whether it plainly excludes them might have been more of a question. However, after the Court’s earlier difficulty in defining the same term regarding municipalities, it would have been hard to argue that any definition of “person” was plain enough to provide a freestanding basis for interpreting the statute. The majority contented itself with the suggestion that the use of the term “person” “would be a decidedly awkward way of expressing an intent to subject the States to liability.”

Did Congress intend “person” in section 1983 to include states? The *Will* dissent and majority exchanged familiar arguments. In *Quern v. Jordan*, the Supreme Court had rejected the use of section 1983 for retroactive relief against a state officer in his official capacity. At minimum, the Court in *Quern* based its position on the effect of the eleventh amendment on that federal case. It is less clear whether *Quern* entirely anticipated the Court’s ruling in *Will* that a state was not a “person” under section 1983. It came

93. The Supreme Court ruled in Monroe v. Pape, 365 U.S. 167 (1961), *overruled*, Monell v. Department of Social Servs., 436 U.S. 658 (1978), that a municipality was not a “person.” From that premise in *Monroe*, the Court later reasoned that § 1983 “could not have been ‘intended to include States as parties defendant.’” Fitzpatrick v. Bitzer, 427 U.S. 445, 452 (1976). But the Supreme Court thereafter overruled that part of *Monroe* excluding municipalities from § 1983 coverage. *Monell*, 436 U.S. at 663. Much has been written on these and related developments. *See infra* note 260. Reopened by *Monell* but eclipsed in federal cases by the eleventh amendment, the question whether states were “persons” within § 1983 festered in state courts until *Will*. For state decisions going both ways, see Will v. Michigan Dep’t of State Police, 109 S. Ct. 2304, 2306-07 & n.3 (1989).

94. *Cf.* 13B C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3573.1, at 198 (1984) (“The defendant in a § 1983 action must be a ‘person,’ but this had been, and may still be, construed as a term of art.”).


close to doing so by stating "we are unwilling to believe, on the basis of such slender 'evidence,' that Congress intended by the general language of section 1983 to override the traditional sovereign immunity of the States." 97

Both sides in Will clothed their arguments in intentionalist language, yet as in Quern, neither side could muster convincing evidence about what Congress intended for section 1983 in damage actions. It seems doubtful whether adequate evidence exists. 98 In the end, both sides tried to make tactical use of the absence of a clear congressional intent in a battle of presumptions. The majority presumed a state was not a "person" because of the lack of a convincing indication that Congress intended section 1983 to reach states. 99 The dissent presumed states were covered in the absence of a convincing demonstration that Congress intended to exclude them. 100

Once their arguments reached this point, the majority and dissent abandoned any real intentionalist concern. Both sides used the same pair of factual hypotheses—either that evidence which would prove what Congress intended was lost, or that Congress did not really care about the question whether section 1983 applied to states—to support their opposing conclusions. The strongest claim of affiliation that one arguing at this level can make with the particular legislative body enacting the statute is merely that a proposed interpretation is within the spirit or ulterior purpose of the statute. 101

2. Free Play in Will of Political Interpretations of Section 1983

Evidence of actual congressional intent behind section 1983 mattered to the Justices in Will only if it clearly blocked the readings they wished to give the statute. 102 So freewheeling an approach invited (perhaps required)

97. Quern, 440 U.S. at 342. Dissenting in Quern, Justice Brennan felt that the majority had concluded that states were not parties under § 1983. Id. at 350.

98. Professor Sunstein noted that, "although courts and commentators have devoted much attention to the legislative history of section 1983, there remains considerable dispute about the intended scope of that provision." Sunstein, supra note 2, at 396-97. This is true concerning the question what, if anything, Congress intended concerning states as "persons" under the statute. Evidence from congressional debates preceding the enactment of § 1983 reveals little or no interest in the subject of state liability. See Quern, 440 U.S. at 343; see also S. Steinglass, supra note 3, at § 9.2(b)(2). Nor do either of the opposing arguments based on the contemporaneous Dictionary Act, Will, 109 S. Ct. at 2310-11, id. at 2315-16 (Brennan, J., dissenting), offer much assistance in determining whether Congress intended § 1983 to reach states.


100. Id. at 2317-20 (Brennan, J., dissenting).

101. See supra notes 36-40 and accompanying text; cf. Beermann, supra note 2, at 57 (viewing as "discredited the idea that one can answer important questions just by reading the text and legislative history of § 1983").

102. See supra notes 96-98 and accompanying text.
them to import their own values into the inquiry. The majority and the dissent responded by using versions of political interpretation for section 1983. To understand the politics of Will, let us consider the statute more closely. Although the particular consequences following treatment of states as "persons" will remain a matter of speculation, the bare suggestion that they are within section 1983 strikes a deep political chord. The statute exists to make real the constraints of federal substantive law. It protects civil rights forged during the Reconstruction era. But section 1983 also protects rights under the Constitution generally, as well as those under federal statutes. The decision whether to read a significant category of cases out of section 1983 therefore touches a "relationship between the themes of federalism and individual rights" that "runs deep in American intellectual and social history."

Will is enmeshed in a larger political struggle between individual rights and federalism that has two important components. The first is the idea that federal substantive law will at any given time privilege some types of individuals or groups over others. That is, it secures particular political advantages. Currently, in civil litigation, federal substantive law

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103. For a discussion of this point, see infra notes 222-71 and accompanying text.
104. Comment, supra note 2, at 1153-56. "[T]he draftsman [sic] of the measure were primarily concerned with suppressing the Klan . . . ." Id. at 1154. In addition:
   [M]ost Congressmen viewed the situation in the South as exacerbated by the inaction of the state and local governments. A full reading of the debates compels the conclusion that the Act [today § 1983] was aimed at least as much at the abdication of law enforcement responsibilities by Southern officials as it was at the Klan's outrages.

Id. For a reflection of this view, see Mitchum v. Foster, 407 U.S. 225, 238-43 (1972).
105. There is some question whether the section reaches claims based directly on the supremacy and commerce clauses. 13B C. WRIGHT, A. MILLER & E. COOPER, supra note 94, § 3573.2 (Supp. 1990); Note, Clarifying Comity, supra note 3, at 1895 n.57; Note, Section 1983 Remedies for the Violation of Supremacy Clause Rights, 97 Yale L.J. 1827 (1988).
107. Comment, supra note 2, at 1135.
108. Over time, different groups are likely to enjoy political advantages under federal law: For example, federal law was politically conservative in the late nineteenth century, favoring monied, corporate interests to a greater extent than state law. This was true of both the general federal common law created under Swift v. Tyson, 41 U.S. 1 (1842), see J.W. Hurst, supra note 26, at 190], and federal constitutional law. Ex parte Young, 209 U.S. 113 (1908), offers an illustration of the latter. Concluding that the eleventh amendment did not bar suit, the Court held that Minnesota's statute attempting to set maximum railroad rates violated the due process clause.

Shreve, Letting Go of the Eleventh Amendment, 64 Ind. L.J. 601, 605-06 n.22 (1989).
109. This is not to suggest that institutions responsible for the content of federal law will
seems generally to favor interests supported by the liberal left. In particular, federal civil rights law, usually vindicated through section 1983, has offered special advantages to minorities, to the disadvantaged, and to individuals who feel intruded upon by government. Typical section 1983 litigation finds persons so aggrieved suing state or local 'officials. The left is likely to be solicitous of the interests of such plaintiffs.

On the other side, conservatives are likely to sympathize with government defendants either because they see the benefit to which the plaintiff claims a right as one which the government should have the discretion to withhold, or because they see the plaintiff's suit as interference with government's realization of some moral agenda. Moreover, conservatives favor local autonomy in making and enforcing moral judgments and find interruptions from without . . . particularly irritating.110

Generally speaking, most would probably agree that the Warren Court reflected liberal sentiments,111 that the Burger Court became increasingly conservative112 and that the Rehnquist Court registers strongly on the
conservative side of the paradigm.\textsuperscript{113} Yet, while increased conservatism in the Supreme Court and in the lower federal courts\textsuperscript{114} has restricted possible applications of federal constitutional or statutory law, it has not yet brought about a fundamental political transformation of the law itself.\textsuperscript{115} Federal law typically does not restrain states from pursuing different or more ambitious liberal objectives through their laws. It usually manifests itself, if at all, by supplementing state law recognition of liberal values.\textsuperscript{116}

The second component of the tension between individual rights and federalism concerns state governments’ comprehension of federal substantive law and their willingness to enforce it. Initially, it may be useful to compare this factor in \textit{Will} with the way it manifests itself in a different, more accustomed setting: when the question is whether lower federal courts are prevented from entertaining suits against state and local officials.\textsuperscript{117} An important parallel exists between the clash of political sensibilities over the

\footnotesize{\textsuperscript{113} See, e.g., Collins & Skover, The Future of Liberal Legal Scholarship, 87 Mich. L. Rev. 189, 193 (1988) (identifying Chief Justice Rehnquist and Justices White, O’Connor, Scalia and Kennedy as a “conservative phalanx”); West, supra note 110, at 641 (“Over the last few years, a substantial and growing number of Supreme Court Justices ... have begun to articulate a profoundly conservative interpretation of the constitutional tradition.”). Correspondingly, former Justice Brennan and Justices Marshall, Blackmun and Stevens represent the vestiges of liberal sentiment. Cf. Kahn, The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell, 97 Yale L.J. 1, 2 n.2 (1987) (describing the group as “the liberal four”).}

\footnotesize{\textsuperscript{114} Professors Collins and Skover wrote in 1988 that more than 48% of sitting federal judges are Reagan appointees. Collins & Skover, supra note 113. Professors Carp and Rowland argue from their data a distinct correlation between the political philosophies of the appointing Presidents and their judicial appointees. R. Carp & C. Rowland, supra note 111, at 51-81.}

\footnotesize{\textsuperscript{115} Federal substantive law lacks the pronounced conservative character that it had, for example, in the late 19th century. See supra note 108.}

\footnotesize{\textsuperscript{116} Consider the following illustration. When a civil rights litigant demonstrates denial of a federal right, a state court cannot refuse relief on the ground that the challenged conduct comports with state law. Yet the state court may provide relief when that litigant successfully asserts a right under the state constitution, even if the conduct complained of does not violate the United States Constitution. E.g., Michigan v. Long, 463 U.S. 1032 (1983). In the first situation, federal law disrupts the regime of more conservative state law. In the second, state law is unimpeded by more conservative federal law. Such is the significance of a determination of rights under state law that “the state court’s ruling with respect to the federal question, even though arguably wrong, becomes superfluous and thus incapable of triggering Supreme Court jurisdiction.” R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice 168 (6th ed. 1986).}

authority of lower federal courts to entertain federal rights claims against states and controversies (like Will) over possible state immunity to proceedings enforcing federal rights in all courts.

The first half of the parallel rests on the assumption that state courts give less life overall to federal law than do federal courts. Some have urged the contrary, that state courts provide as receptive an environment for federal law. Difficult as these arguments have been to disprove, they seem wrong. State judges are in many cases under no obligation to read federal rights as broadly as federal judges and probably do not do so overall. However lacking in empirical support, the suspicion that federal law fares less well in state courts is widespread and is a leading justification for the federal question jurisdiction of lower federal courts. At the same time, deference to state courts should not depend on a demonstration that

118. "History ... underscores that any model identifying the 'proper' role of the federal courts has inescapable and far-reaching substantive implications, and, as a result, an unavoidable political dimension." Chemerinsky & Kramer, Defining the Role of Federal Courts, 1990 B.Y.U. L. Rev. 67, 76. For example, "because it determines the ability of federal courts to hear suits against state governments, the eleventh amendment is crucial to defining the content of American federalism." Chemerinsky, Congress, the Supreme Court, and the Eleventh Amendment: A Comment on the Decisions During the 1988-89 Term, 39 De Paul L. Rev. 321, 322 (1990).


120. Difficulties in demonstrating federal court superiority in this regard are examined at length in Chemerinsky, Parity Reconsidered: Defining a Role for the Federal Judiciary, 36 UCLA L. Rev. 233 (1988). He writes: "The problem is that without empirical measurement, each side of the parity debate simply has an intuitive judgment about whether the institutional differences between federal and state courts matter in constitutional cases." Id. at 278-79.

121. As I noted in an earlier article:

If state judges read federal law less broadly than federal judges, they are not a priori in violation of the supremacy clause. [U.S. Const. art. VI.] The duty imposed by the supremacy clause to enforce federal law is not the duty to give it the broadest possible reading, only a duty to give it a reasonable reading and one in keeping with controlling precedent. The only federal decisions on the meaning of federal law which bind state courts are those of the United States Supreme Court. Shreve, supra note 108, at 605 n.20 (citations omitted) (emphasis in original).

122. See Shreve, supra note 108, at 605 (citations omitted):

[O]ne need not question the good faith or diligence of state judges to conclude that they are unlikely overall to read as much into federal substantive law. Since they work with their state law more than federal judges do, it would be natural for them to give it more life and federal law correspondingly less.


federal rights will be worth just as much there. Because it promotes harmonious relations between the federal government and state and local governments, the supposition that state courts will respect federal law is a gesture having value in itself.125 Most agree the gesture is worth making even at some cost.126 Therefore, the issue becomes: assuming federal rights diminish in cases tried in state rather than federal court,127 when is that an acceptable cost for advancing policies of federalism?

In *Will*, the parallel question is this: assuming that reading states out of section 1983 appreciably diminishes enforcement of federal rights,128 is this an acceptable cost for advancing policies of federalism?129 The conservative and liberal wings of the Supreme Court split on this question in *Will* just as they have often split on the question whether lower federal courts should give way to state courts.130

3. The Problem

Rich as *Will* is in material for political interpretations of the statute, decision on this basis alone is disquieting. It may help in understanding this to compare *Will* with the following hypothetical situation.


128. Whether, in practical terms, the dissent's interpretation of § 1983 actually would have resulted in significantly greater state court access is another matter. See infra notes 269-71 and accompanying text.

129. See E. CHEMERINSKY, Federal Jurisdiction 71 (Supp. 1990) (describing the confrontation in *Will* as federalism versus protection against constitutional violations); cf. Note, State Remedies for Federally-Created Rights, 47 MINN. L. REV. 815, 817 (1963) ("[T]he federal interest of securing the effective enforcement of federal rights may conflict with the state interest in remaining an independent, viable political unit able to direct the objectives of its judicial system.").

130. On the latter, see supra notes 116-17. Concerning the former, Professor Beermann observed that "[t]he liberal favors expanding the definition of 'persons' subject to suit under § 1983 to include state and local governments and their officials, for all of the reasons that she desires more effective § 1983 enforcement." Beermann, supra note 2, at 99. In noting *Will*, Beermann states that "[t]he conservative would not include states and state agencies as persons, so that federal courts, or state courts applying federal law, would not meddle in state affairs." Id. (footnote omitted).
Assume that Congress amended section 1983, giving readers of the statute direction they now lack in answering the question whether states are included. Whether the amendment placed states in or out of section 1983, and even if it passed Congress by a single vote, the Supreme Court would give that effect to the statute—probably by unanimous decision. Congress' ad hoc political judgment in revising section 1983 and the stature of the Court's decision enforcing it as amended would both be secure. The former is secure because of the position Congress enjoys as an elected, representative body; the latter because the Court (though an unrepresentative body) has a "reasoned justification" for judicial decision—the separation-of-powers obligation to enforce the political will of Congress. That is, the Court could give a reason for deciding the case applicable to a category of similar cases: that Congress directed the result in a way valid under the Constitution.

131. The term is from Greenawalt. Greenawalt, The Enduring Significance of Neutral Principles, 78 Colum. L. Rev. 982, 999 (1978). Explaining the added pressure on courts for what he termed reasoned justification, Professor Greenawalt noted: "Legislatures are representative and politically responsible and the legitimacy of statutes derives largely from these characteristics. Courts are not representative and responsible in the same senses." Id. Courts must appeal to the public to approve their decisions because they are more vulnerable institutionally than legislatures, one reason judicial opinions have no real counterpart in the legislative process. Cf. White, The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change, 59 Va. L. Rev. 279, 285 (1973) (noting how judges are "required to make public the justifications for their decisions, thus inviting comment on their performance").

132. See generally supra notes 86-88 and accompanying text.

133. While controversy exists over applications and ultimate reach of the proposition, there is wide acceptance for the view that a good judicial decision must offer a reason why the same result would occur in a category of like cases. See, e.g., Golding, Principled Decision-Making and the Supreme Court, 63 Colum. L. Rev. 35 (1963); Levi, An Introduction to Legal Reasoning, 15 U. Chi. L. Rev. 501, 501-02 (1948); Murray, The Role of Analogy in Legal Reasoning, 29 UCLA L. Rev. 833 (1982); Wellman, Practical Reasoning and Judicial Justification: Toward an Adequate Theory, 57 U. Colo. L. Rev. 45 (1985); Winston, On Treating Like Cases Alike, 62 Calif. L. Rev. 1 (1974). Professor Golding expressed the idea this way in his model of "Principled Decision-Making":

A decision or judgment is principled only when it is guided by some "external consideration," i.e., a guiding principle that contributes to the deliberation on the case. Such a principle is a reason (or part of the reasons) for the decision. It cannot be a reason for the decision unless it determines, at least to some extent, the outcome of the process of deliberation. This means that a principle cannot be so flexible as to allow for free-wheeling discretion. Furthermore, in applying a principle, the instant case must be treated ... in a certain manner because it is held to be proper to treat cases of its type in that manner. In this way every principled judgment makes, or rests upon, a universal, or general, claim.

Golding, supra, at 40 (emphasis in original).

134. So long as Congress acts within the spacious authority conferred by separation of powers, there is much in the view that "the Constitution adopts a scheme of pure procedural justice: whatever results from the operation of the political process is constitutionally acceptable, and there are no external evaluative criteria against which that outcome can be measured." Tushnet, Principles, Politics, and Constitutional Law, 88 Mich. L. Rev. 49, 80 (1989).
Neither of the contending factions found material in Will for a decision of such stature. Obscurities of legislative history and textual language made it impossible to claim convincingly either reading as an act of fidelity to Congress. The Court was left to fashion its own solution to the interpretive problem of whether section 1983 created damages liability for states. It is difficult to find reasoned justification for a response under these circumstances, difficult to support either choice with a rule applicable to a larger category of judicial decisions.\textsuperscript{135} The Justices in Will seem hardly more distanced from ad hoc politics than Congress would have been in amending the statute to more clearly provide an answer.

This is not to suggest that Will lacks legal authority. After all, the Supreme Court was forced to take the indeterminate legislative history and language of section 1983 as it found it. And the Court did not have the option of refusing to decide the case because the meaning of the statute was unclear.\textsuperscript{136} I merely suggest that exhaustion of opportunities for statutory interpretation under intentionalism, plain meaning and political interpretation—the trio of approaches I have considered so far—leaves the Court’s decision in Will on less than firm ground. As Professor Kent Greenawalt has observed, “[f]or any well functioning governance, it is as important that decisions seem appropriate as well as that they are appropriate. This is especially true for the courts, which are supposed to dispense even-handed justice.”\textsuperscript{137}

\textsuperscript{135} The following may help to illustrate the idea that judicial reasoning cannot make one political (moral) choice more attractive than another:
Some moral philosophers think utilitarianism is the answer; others feel just as strongly it is not. Some regard enforced economic redistribution as a moral imperative; others find it morally censurable. What may be the two most renowned recent works of moral and political philosophy, John Rawls’ \textit{A Theory of Justice} [(1971)] and Robert Nozick’s \textit{Anarchy, State and Utopia} [(1974)], reach very different conclusions. There simply does not exist a method of moral philosophy.

One might be tempted to suppose that there will be no systematic bias in the judges’ rendition of “correct moral reasoning” aside from whatever derives from the philosophical axioms from which they begin. (“We like Rawls, you like Nozick. We win, 6-3. Statute invalidated.”).

J. Ely, \textit{supra} note 86, at 58 (emphasis in original).

\textsuperscript{136} \textit{Cf.} Greenawalt, \textit{supra} note 131, at 1007 (noting “the widespread presupposition that the law that judges interpret is comprehensible”).

\textsuperscript{137} Greenawalt, \textit{supra} note 131, at 999; see also Summers, \textit{Evaluating and Improving Legal Processes—A Plea for “Process Values,”} 60 \textit{CORNELL L. REV.} 1, 3, 38-42 (1974). The concern is greatest in cases like Will where those participating in the decision are “closely divided” and “an issue is politically controversial.” Greenawalt, \textit{supra} note 131, at 1007. \textit{But see} Beermann, \textit{supra} note 2, at 101:
The way to understand the controversy over § 1983 is to understand its political and ideological aspects and to open the process to real assessment of the facts rather than stylized policy arguments. What is needed are data regarding the social costs of more or less enforcement, and straight talk about a political vision
One is left with the impression that an additional approach to interpreting section 1983 would have been useful. The balance of this Article explores how legal pragmatism might fill that role in Will and other cases.

III. THE UNDISCLOSED PRAGMATISM OF THE RESULT IN WILL

A few observations by Robert Summers help to introduce the sections that follow. Professor Summers identified the three jurisprudential movements which I have noted—historical jurisprudence, analytical positivism and natural law—and added one more. "In my opinion," he wrote, "its substance and range qualify pragmatic instrumentalism as a fourth great tradition in Western legal theory . . . ."139 Having seen in intentionalism, plain meaning and political interpretation reflections of the first three jurisprudential movements identified by Professor Summers, I now consider how an approach to statutory interpretation rooted in pragmatist legal theory140 might contribute to a more secure decision in Will.

In popular usage, pragmatism connotes purposeful conduct,141 a preference for weighing the effects of possible actions and choosing the most practical course.142 Pragmatism's commonly accepted role in legal discourse is much for § 1983 . . . .

For further argument in this vein, see Spann, Pure Politics, 88 Mich. L. Rev. 1971 (1990). "[T]he Court is a political institution that minorities must treat politically if they are to use the Court to facilitate rather than retard the advancement of minority interests." Id. at 2032.

138. R. SUMMERS, supra note 45, at 19. Professor Berman's recent article addresses the three movements, their similarities and their differences. See Berman, supra note 24.


A smaller amount of writing has treated substantive matters, principally the rights of individuals and groups. E.g., Farber, Legal Pragmatism and the Constitution, 72 MINN. L. REV. 1331 (1988); Radin, The Pragmatist and the Feminist, 63 S. CAL. L. REV. 1699 (1990). Pragmatist forays into the subject of statutory interpretation have just begun. See Eskridge & Frickey, supra note 43. The authors argue their public-choice theory of statutory interpretation by blending hermeneutics with a version of pragmatism different from that offered in this Article. For further discussion of their article, see infra notes 278-87 and accompanying text.

141. E.g., Neuman, Pragmatists Likely to Stick to Business, USA Today, May 29, 1990, at
the same: a kind of ad hoc exhortation that we keep an eye on the reliability of our methods and the success of our results. In statutory interpretation, as elsewhere in the law, pragmatism would be important for this alone.\textsuperscript{143}

However, this Article expects of pragmatism a greater, more freestanding role as legal theory. Such a project must confront the fact that pragmatism's jurisprudential underpinnings are less clearly understood than those of historical jurisprudence, natural law or analytical positivism. The following discussion is offered to fill that gap, to consider something of pragmatism's history, meaning and frailties.

\textbf{A. The Pragmatist Movement}

Pragmatism began before the turn of the century as a distinctly American philosophical movement, and "[i]t is primarily as a movement rather than by any one doctrine that pragmatism is best understood."\textsuperscript{144} The leading contributors were Charles Sanders Peirce, William James and John Dewey.\textsuperscript{145}

\textsuperscript{1A} (describing preparations for a meeting between President Bush and Soviet President Gorbachev).

142. \textit{See} 2 \textsc{The Oxford English Dictionary} 2266 (Compact ed. 1971) (defining pragmatism as "[a] method of treating history in which the phenomena are considered with special reference to their causes, antecedent conditions, and results, and to their practical lessons").

143. \textit{Cf.} Sunstein, \textit{supra} note 19, at 498 ("Inevitably, statutory construction is an exercise of practical reason, in which text, history, and purpose interact with background understandings in the legal culture.").


145. Introductory studies of Peirce, James and Dewey appear in P. Conkin, \textit{Puritans and Pragmatists} 193-402 (1968). For selected bibliographies of the works of the three philosophers and the exegetical literature surrounding them, see, for example, W. Gallie, \textit{Peirce and Pragmatism} 243-44 (1966) (regarding Peirce); G. Myers, \textit{William James: His Life and Thought} xix-xxi, 293 (1986) (regarding James); M. White, \textsc{Dewey's Instrumentalism}, \textit{supra} note 144, at 153-54 (regarding Dewey); and \textsc{Pragmatism: The Classic Writings}, \textit{supra} note 144, at 379-82 (regarding Peirce, James and Dewey).

Although the movement has been grouped under various terms\(^{146}\) which can inform legal theory, this Article will follow recent practice and refer to works within the movement generically as pragmatism.

Peirce, James and Dewey energized the movement through the views they shared:

One of the main features of pragmatism, which comes out not only in Peirce but also in James and Dewey and their followers, is that it is a dynamic philosophy. In contrast to philosophers like Plato and Descartes who adopt the standpoint of a pure intelligence in contemplation of eternal verities, the pragmatists put themselves in the position of an enquirer adapting himself to and helping to modify a changing world.\(^{147}\)

Differences of approach enriched the movement. "Dewey's own focus was not so much on the methods of the natural sciences (as with Peirce) or on the life-situation of the individual (as with James), but more on issues of social theory, politics and law."\(^{148}\)

Contemporary philosophers and legal scholars find instrumentalism (Dewey's particular form of pragmatism) particularly appealing because, as Morton White describes it, instrumentalism "holds that ideas are plans of action, and not mirrors of reality; that dualisms of all kinds are fatal; that the method of intelligence is the best way of solving problems; and that philosophy ought to free itself from metaphysics and devote itself to social engineering."\(^{149}\)

James, the first of the three to reach prominence, strongly supported the work of Peirce and Dewey until his retirement from Harvard.\(^{150}\) Despite disagreements within the group\(^{151}\) and attacks from the

\(^{146}\) Peirce, James and Dewey were pragmatists, although the term is most frequently applied to Peirce and James. Dewey's work is called in addition instrumental, functional or experimentalist. See, e.g., E. Flower & M. Murphey, supra note 144, at 819 (describing Dewey as having developed "his functionalism into the mature instrumentalism which is his version of pragmatism"); M. White, PRAGMATISM AND THE AMERICAN MIND 51 (1973) (describing "the emergence of [Dewey's] distinctly instrumentalist, pragmatist, or experimentalist outlook"). For definitions and comparisons, see R. Summers, supra note 45, at 20-22; H.S. Thayer, supra note 144, at 421, 431; and Dewey, The Development of American Pragmatism, in PRAGMATISM: THE CLASSIC WRITINGS, supra note 144, at 23-40.

\(^{147}\) A.J. Ayer, supra note 144, at 5-6.

\(^{148}\) Grey, supra note 140, at 791.

\(^{149}\) M. White, Social Thought in America 7 (1957).

\(^{150}\) G. Myer, supra note 145, at 42.

\(^{151}\) Personal differences have often been noted. E.g., 2 R. Perry, The Thought and Character of William James 422 (1935) (examining the differences between Peirce and James); H.S. Thayer, supra note 144, at 441-43 (exploring the differences between James and Dewey). Peirce and Dewey strongly objected to James' justification of belief. See W. James, The Will to Believe (1897).

James the psychologist and literary artist brilliantly described the working consequences of types of religious belief for characteristic types of persons. But [Peirce, Dewey and others contended that] James the philosopher tended to confuse a descriptive analysis of how belief functions and why men believe with questions of the evaluation or verification of specific cases of belief. Thayer, Pragmatism, supra note 144, at 434.
outside, pragmatism became a dynamic movement. It figured prominently in philosophical discourse during the first third of this century, declined, and enjoys a recent rebirth under the leadership of "neopragmatists" such as Richard Rorty, Hillary Putnam and Richard Bernstein.

While their predecessors distrusted propositions that could not be verified pragmatically, neopragmatists incline toward pluralism. This shift is due in large part to the tendency of first-generation pragmatists to exaggerate scientific method's capacity to clarify matters of rational belief and justification. Neopragmatists are wary of scientific method and attempt more diffuse applications of pragmatism. Some critics have deemed the enterprise a failure. Others, however, are attracted to neopragmatism and believe it enhances the usefulness of pragmatism in jurisprudence.


153. For some of Rorty's work treating pragmatism, see supra note 144.


156. Cf. Ezorsky, supra note 144, at 430 ("Dewey claimed that assertions become true when they are verified.").


Rorty asserts . . . that no one discipline, culture, or time has a privileged view of knowledge or the truth. No framework exists within the human mind that the philosopher can inspect to determine the rules of rationality. Instead, rationality and justification are social phenomena; different shared standards of rationality and justification exist not only within each culture but within each academic discipline studied in a culture. Moreover, these rules change over time.

Stick, supra note 140, at 340.

158. See Rorty, The Banality of Pragmatism and the Poetry of Justice, 63 S. Cal. L. Rev. 1811 (1990); cf. Wells, Situated Decisionmaking, 63 S. Cal. L. Rev. 1727 (1990) (suggesting early pragmatists were unduly influenced by Darwin). This is most true concerning Peirce and Dewey. James suggested a variety of pluralism by which individual traits of behavior could more easily be recognized. W. James, A Pluralistic Universe (1909).

159. See H. Putnam, Reason, Truth and History 188-200 (1981); R. Rorty, Consequences of Pragmatism 191-95 (1982); cf. H. Putnam, The Many Faces of Realism 72 (1987) (emphasis in original) ("My own view, to be frank, is that there is no such thing as the scientific method.").

160. For an exegesis on the work of Richard Rorty in this regard, see Stick, supra note 140.


162. Neopragmatism's philosophical shift, see supra note 158 and accompanying text, seems to have supported a pluralistic attitude among several pragmatist legal theorists. The latter note the capacity of pragmatism to contribute as a mode of legal thought within larger, loose-textured settings and to mediate clashes between other phenomena. E.g., Grey, Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory, 63 S. Cal. L. Rev. 1569 (1990); Grey, supra note 140, at 789-91; Radin, supra note 140.
Intersections with law date from the outset of the pragmatist movement. Dewey took an interest in legal subjects. Some trained in law actively supported pragmatism. Peirce said that he developed the outlines of pragmatism through lively meetings of the informal Metaphysical Club in Cambridge, Massachusetts. Among the regular and significant contributors to discussion at Club meetings, Peirce listed Oliver Wendell Holmes, Jr., and Harvard law graduates Joseph Warner and Nicholas St. John Green. Holmes, perhaps the leading figure in American jurisprudence, not only admired some of the work of pragmatist philosophers but wrote in a spirit closely allied with pragmatism.

Pragmatism carried great appeal for many twentieth century legal reformers. Pragmatist tenets frequently appeared in the work of Roscoe Pound and of legal critics in the Realist movement. By the time its popularity


164. P. Wiener, supra note 144, at 19.

165. Holmes greatly admired Dewey's work. See P. Wiener, supra note 144, at 186-87; Grey, supra note 140, at 788. He did not feel the same enthusiasm for the writing of Peirce or for James' later work. Fisch, Justice Holmes, the Prediction Theory of Law, and Pragmatism, 39 J. PHILOS. 85, 96 (1942); see also H. POHLMAN, JUSTICE OLIVER WENDELL HOLMES & UTILITARIAN JURISPRUDENCE 163-64 (1984).

166. Many commentators have argued that, while Holmes may have disliked the term, there was a good deal of pragmatism in his philosophy of law. Professor Hantzis suggested an affinity between Holmes and Peirce. Hantzis, supra note 140. Fisch and Grey stressed an affinity between Holmes and Dewey. Fisch, supra note 165; Grey, supra note 140, at 788. So did Morton White, adding that "Dewey, Holmes, and Veblen were the leaders of a campaign to mop up the remnants of formal logic, classical economics and jurisprudence in America, and to emphasize that the life of science, economics, and law was not logic but experience in some streaming social sense." M. WHITE, supra note 149, at 11-12. But see H. POHLMAN, supra note 165, at 80-105, 163-64 (arguing similarities between Holmes' approach and that of analytical positivist John Austin, and that pragmatism was largely absent from Holmes' philosophy).

167. According to one scholar:

In pragmatism, human beings, their purposes, and their actions occupy the central position in the universe. The very word "pragmatism" signifies an act, deed, or affair. It can hardly be surprising, then, that when this philosophy became prominent in America, legal theorists came to see law more as an instrument for human use than as an abstract object for disinterested analysis and study.

R. SUMMERS, supra note 45, at 31.

168. D. Woodor, supra note 24, at 183-205; cf. Golding, supra note 50, at 450 (describing Pound's "Jamesian pragmatism"). For example, Professor Bone noted the pragmatist tenor of Pound's arguments for procedural reform. Bone, Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure From the Field Code to the Federal Rules, 89 Colum. L. Rev. 1, 93 & n.319 (1989); see, e.g., Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, 29 A.B.A. REP. 395, 408 (1906) (deploring the "[u]ncertainty, delay and expense, and above all the injustice of deciding cases upon points of practice").

169. On the legacy of pragmatism for legal realists, see L. KALMAN, LEGAL REALISM AT YALE 16-17 (1986); W. RUMBLE, AMERICAN LEGAL REALISM 4-8 (1968); and Summers, supra note
peaked shortly before the Second World War, pragmatism was arguably a discrete jurisprudential movement. Professor Summers described pragmatism this way:

First, it conceives the primary task of legal theory to be the provision of a coherent body of ideas about law which will make law more valuable in the hands of officials . . . . Second, [it takes the view] that legal rules and other forms of law are most essentially tools devised to serve practical ends . . . . Third, [it focuses] on the instrumental facets of legal phenomena, including: the nature, variety, and complexity of the goals law may serve; law's implementive machinery; the kinds of means-goal relationships in the law; the variety of legal tasks that officials must fulfill to translate law into practice, the efficacy of law; and its limits.171

**B. Features Setting Pragmatist Legal Theory Apart**

1. Pragmatism Versus Historical Jurisprudence

Strong ties link historicism and pragmatist conceptions of learning, planning and progress. Morton White defined historicism as "the attempt to explain facts by reference to earlier facts."172 Historicism clearly takes in more than the pragmatist movement.173 Yet its importance to pragmatism

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Llewellyn's private ambition, as he once confessed in a lecture, was to perform the role of a Dewey in jurisprudence, trying to do for law what the great man had done for other subjects. The most pleasing compliment that could be paid to Llewellyn was to compare him to John Dewey. *Id.*

Pound held many views in common with realists Llewellyn and Jerome Frank. White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. Rev. 999, 1020 (1972). Yet, while Pound was a frequent inspiration for realists, he was uncomfortable within their circle. Pound publicly decried the lengths to which they carried some of their antiformalist attacks. Realists often resented him in return. Descriptions of this troubled relationship appear in *D. WIGDOR, supra note 24, at 255-67, and L. KALMAN, supra, at 46.*

170. Realists were by then the conservators of pragmatism, and damaging associations with Nazi Germany and Fascist Italy pulled down legal realism. The associations came from (characteristically pragmatist) disavowal in realist writing of the relation between the authority of law and a higher conception of morality. White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. Rev. 279, 282 (1973). Attempts by Llewellyn and Frank to save the movement by revising their positions came too late. *See id.* at 283. Later, cold war tensions kept the perceived relativism of realists out of favor. *Id.* at 284.

171. *R. SUMMERS, supra note 45, at 20.*

172. *M. WHITE, supra note 149, at 12. He expounds on this epigram in White, The Logic of Historical Narration, in *PHILOSOPHY AND HISTORY* 3-31 (S. Hook ed. 1963).*

is clear. Dewey recognized a bond between historicism and his emphasis on problem solving as a basis for knowledge and intellectual growth. The focal importance of historicism has also been recognized (if not yet completely explained) in pragmatist legal theory.

Helpful in separating pragmatism from historical jurisprudence is the distinction between the former’s use of historicism and the latter’s use of history. The historical school of jurisprudence believed that history, information about the past gathered and organized, defined and often limited legal authority. Pragmatism no more accepts the constraints of history than those of any other conceptual system which, as such, are extrinsic to law in application. On the other hand, historicism in the sense intended here sustains pragmatism because it is the means by which pragmatists use history to acquire data about human experience. For the pragmatist, historical data informs the activity of identifying and solving problems.

2. Pragmatism Versus Natural Law

The categorical difference between pragmatism and natural law was evident from the beginning of the former. Peirce, James and Dewey

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174. See H.S. Thayer, supra note 144, at 431 (describing among “the formative doctrines of pragmatism,” the theory “that all knowledge is evaluative of future experience and that thinking functions experimentally in anticipations of future experiences and consequences of actions—thus organizing in conditions of future observations and experience”).

175. As one source has noted:

"With respect to logical theory, there is no existential proposition which does not operate either (1) as material for locating and delimiting a problem; or (2) as serving to point to an inference that may be drawn with some degree of probability; or (3) as aiding to weigh the evidential value of some data; or (4) as supporting and testing some conclusion hypothetically made."


177. However value judgments color the work of historians, their function remains largely one of reporting events. Cf. 1 A. Toynbee, A Study of History 15 (D.C. Somervell abr. Laurel ed. 1965) (“Historians generally illustrate rather than correct the ideas of the communities within which they live and work . . . .”).

178. See supra notes 23-24 and accompanying text.

179. But see Gordon, Historicism in Legal Scholarship, 90 Yale L.J. 1017 (1981). Professor Gordon offers a different conception of historicism, one closer to historical jurisprudence. He deplores the former as “a perpetual threat to the aims of our legal scholarship.” Id. at 1017. Some scholars have simply used the term in discussing historical jurisprudence. Berman, supra note 24, at 780; Grey, supra note 140, at 808. This all suggests that historicism is hardly a term of art.

180. See supra note 177 and accompanying text.

181. See supra notes 62-96 and accompanying text.
rejected moral abstractions, as they did abstractions generally. Dewey expressed this view in his writing on law, deploiring courts' "confusion of theoretical certainty and practical certainty." Logical theory, Dewey wrote, should be understood as "a theory about empirical phenomena, subject to growth and improvement like any other empirical discipline." Facts of human experience were to Dewey "the empirical raw material of legal theory."

Under the early influence of pragmatism, several legal theorists were openly hostile toward natural law theories. Holmes was "sharply critical of natural law theorizing." Pound, too, "maintained that there was no 'absolute formula' for assigning values to the different interests in particular cases and thus no set of general principles that could support deductively derived legal decisions in all cases." Members of the realist movement also attacked natural law principles.

3. Pragmatism Versus Analytical Positivism

Because pragmatism includes a "major positivist tenet[]" that "law and morals must be sharply separated," it may not be as easy to distinguish pragmatism from analytical positivism. This may account for the description of aspects of pragmatism or instrumentalism as positivist, for the argument whether Holmes is a pragmatist or an analytical positivist, and for a certain terminological ambiguity in the emerging literature on pragmatism in statutory interpretation.

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183. See Exorsky, supra note 144, at 427-30.
185. Id. at 25.
186. Id. at 19.
187. R. Atiyah & R. Summers, supra note 51, at 246. "Holmes frequently insisted that he had 'no criterion [sc., of right and wrong] except what the crowd wants.'" Id. at 252 (brackets in original). See generally F. Biddle, Justice Holmes, Natural Law, and the Supreme Court (1961); H. Pohman, supra note 165, at 14-16.
188. Bone, supra note 168, at 95. Pound considered natural law "a serious barrier to modernity in law." D. Wigdor, supra note 24, at 167.
189. W. Rumble, supra note 169, at 230-32; Golding, supra note 50, at 452-53. In the view of one commentator, this was to prove the movement's undoing. See supra note 170.
191. See the earlier description of analytical positivism at supra notes 47-60 and accompanying text. Cf. R. Summers, supra note 45, at 42 (observing that "Bentham and John Austin and the pragmatist philosophers (particularly William James)" shared "a theory that may be characterized as utilitarian, quantitative, conventionalist, and majoritarian in tenor").
192. See supra note 166.
193. The term "practical reason" is offered to describe a pragmatic approach to statutory
The difference between pragmatism and analytical positivism clears, however, if one keeps in mind that the latter (like natural law, but in an entirely different way) is highly theoretical. "Analytical positivists have analyzed the basic concepts that figure in a system of law including rule, right, duty, sanction, and sovereign." Ultimately, then, analytical positivism is couched in abstractions that pragmatism finds as irrelevant to the "law in action" as that found in historical jurisprudence or natural law.

4. Pragmatism's Frailties

These foregoing comparisons suggest that it is easier to grasp what pragmatism is not. Some may wonder whether pragmatism really has much of its own to offer jurisprudence. Holmes' retort, that "judging the law by its effects and results did not have to wait for W[illiam] J[ames]," was one with which James would have agreed. Another observer noted that "[w]e were all Deweyites before we read Dewey." Doubters might suggest for pragmatism the following dilemma.

Pragmatism, particularly the Deweyian side most influential today, is designed around the process of finding and solving problems. But what
are the problems? How, when and why do we define them? Pragmatism is often thought to eschew moral (substantive) values, but it must have a moral base somewhere to escape relativism. That is, pragmatism can neither call something a problem nor value one solution to it over another without substantive reference points. Hence the dilemma. If pragmatism is substantive, does it contradict itself? If pragmatism lacks substantive reference, is it not hopelessly relativistic? In the wake of these difficulties, is what remains of pragmatism little more than an appeal to "common sense"—at best an analytic muddle and at worst a mask for substantive injustice?

It would be difficult to argue that these concerns leave pragmatist legal theory unscathed. Certainly they help to account for present disparities in describing and applying legal pragmatism within the academy. But one particular development has perhaps saved pragmatist theory from the pitfalls of incoherence or trivialism (the horns of the dilemma above) and opened the way for its usefulness as a freestanding jurisprudence: the movement's pluralistic shift. Of course there is more to pluralism in standpoint, there is shock, confusion, perturbation, uncertainty. For the moment he doesn't know what hit him... nor where he is going. But a new impulse is stirred which becomes the starting point of an investigation, a looking into things, a trying to see them, to find out what is going on. Habits which were interfered with begin to get a new direction as they cluster about the impulse to look and see. The blocked habits of locomotion give him a sense of where he was going, of what he had set out to do, and of the ground already traversed. As he looks, he sees definite things which are not just things at large but which are related to his course of action. The momentum of the activity entered upon persists as a sense of direction, of aim; it is an anticipatory project. In short, he recollects, observes and plans.


200. See supra notes 147, 149, 156, 167, 170, 182, 187, 188 and accompanying text.


203. A risk acknowledged in Grey, supra note 162, and a point of attack against Rorty's pragmatism in Hutchinson, supra note 161.

204. For expressions of this concern see Minow & Spelman, In Context, 63 S. Cal. L. Rev. 1597 (1990); Singer, supra note 193, at 1754-55.


206. This view of opportunities offered by pluralism in neopragmatist philosophy suggests that, perhaps along with some other commentators, see supra note 162, I may be more hopeful about uses of pragmatism than neopragmatist philosophers have at times been themselves. See, for example, the discussion of Rorty's skepticism in Stick, supra note 140, at 338-41.
contemporary usage than pragmatism,\textsuperscript{207} and vice versa.\textsuperscript{208} Yet pluralism


A LEXIS search of law reviews currently on line (about 40) confirmed Wittgenstein’s attraction for legal scholars. A comparison of the number of articles citing Wittgenstein with the number referring to one of traditional legal theory’s hardiest perennials, United States v. Carolene Prods. Co., 304 U.S. 144 (1938), yielded the following:

<table>
<thead>
<tr>
<th>Year</th>
<th>Wittgenstein</th>
<th>Carolene Products</th>
</tr>
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<tbody>
<tr>
<td>1990 (through Oct. 22)</td>
<td>14</td>
<td>17 (1)</td>
</tr>
<tr>
<td>1989</td>
<td>35</td>
<td>34 (6)</td>
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<td>1988</td>
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<td>38 (10)</td>
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<td>1986</td>
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<td>28 (6)</td>
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<td>1985</td>
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<td>23 (6)</td>
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</tbody>
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\textit{Carolene Products} did this well only because I included in the total (and separately in parentheses) articles that did not cite it but did cite Professor Ackerman’s article about the case, Ackerman, \textit{Beyond Carolene Products}, 98 Harv. L. Rev. 713 (1985).

\textsuperscript{208} If the pluralism of latter-day pragmatism is crucial to the application of pragmatism attempted in this Article, so too are the direct contributions of James and Dewey. James’ influence appears, for example, in the supple, methodological approach attempted in this Article to accommodate different configurations of statutory interpretation arguments. “Jamesian pragmatism as a philosophy of law meant that legal rules and precedents should be thought of as guides to decision rather than rigid prescriptions governing fixed categories.” Golding, supra note 50, at 450 (emphasis in original). Dewey’s instrumentalism, see supra note 149 and accompanying text, provides this Article’s critical thrust.
is of great importance to pragmatist theory and to application in this Article of the idea that pragmatism is enhanced rather than threatened by the value of other approaches.

Imagine intentionalism, plain meaning and political interpretation as a larger context or community of potential approaches to statutory interpretation viewed through a pragmatist lens. Pragmatism concerns itself with results, with the instrumental effectiveness and interaction of these approaches in particular applications. Do they promote coherence in the law? Are there more beneficial ways in the instant case or the legal system overall for producing the same ends? Pragmatism thus may escape the dilemma noted above because, while having no substantive content of its own, it subsists by clarifying or mediating substantive impulses originating within one or more other approaches.210

C. A Pragmatist Approach to Statutory Interpretation in Will

This Article does not suggest that a pragmatist approach to statutory interpretation would be greatly important to every case. Nor does it attempt to inventory all of the ways in which a pragmatist approach might aid in discerning whether one reading of a statute is more appealing than another. I attempt to demonstrate, however, how a pragmatist approach can be useful, and how it would have been in Will, by providing a separate basis for choosing between the contending political readings of section 1983, or by mediating the political conflict. As I examine these matters, it will be useful to review how things now stand.

1. The Current Landscape211

Will established that states are no more exposed to section 1983 suits in state court than they had been in federal court. Prior to Will, states were protected from greater federal court exposure by eleventh amendment doctrine. After Will, states receive the same protection in state and federal court by the failure of "person" as used in section 1983 to include states or state officials sued for damages in official capacities. At the same time, states after Will remain about as exposed to section 1983 suits in federal court as they had been before.212 By characterizing the relief sought as

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209. Context is an important theme in pragmatist legal theory. See, e.g., Minow & Spelman, supra note 204. The meaning of context in this setting is different from that for the term in statutory interpretation. On the latter, see supra note 37 and accompanying text.

210. For a description of the substantive character of intentionalist, plain meaning and political approaches to statutory interpretation, see supra notes 93-130 and accompanying text.

211. See supra notes 8-17 and accompanying text.

212. The only exception concerns an insignificant number of cases where states by waiver or consent could have exposed themselves to § 1983 suits, had Will not read them out of the statute. For descriptions and examples of this situation before Will, see E. Chemerinsky, supra note 117, at 419-20, and 13B C. Wright, A. Miller & E. Cooper, supra note 94, § 3573.1, at 202.
prospective rather than retroactive, Will read into section 1983 cases which previously had been placed beyond the protection of the eleventh amendment.

Recall how the exhaustion of opportunities for statutory interpretation under the trio of approaches discussed earlier in this Article left the Supreme Court hanging in Will. The Court could have decided the case as an act of judicial reasoning if material existed for an intentionalist reading of section 1983. The same might also have been true under a plain language reading. Because, however, neither of these approaches offered a plausible basis for interpreting section 1983, the Justices were left with warring moral/political choices of how to read the statute. Congress could have favored either result in considering whether to amend the section. Yet the same choice created a quandary for the Supreme Court, since one option appeared no less attractive than the other through the process of judicial reasoning.

2. Which Result Promotes More Coherence? Pragmatism as a Means for Taking Sides in Will

In exploring pragmatism as a fourth approach to statutory interpretation, I will begin by accepting at face value a point upon which the majority and dissent in Will seem to agree: that their conflicting interpretations of “person” in section 1983 entailed significant and differing consequences for the balance between federalism and federal law enforcement in future litigation under the statute. A pragmatist inquiry proceeding from this supposition might be whether either of these results would have produced as an additional consequence more settled law. If one would, a way out

213. See supra notes 72-93 and accompanying text (discussing intentionalism, plain meaning and political interpretation).
214. See supra notes 131-34 and accompanying text.
215. See supra notes 28-31, 92 and accompanying text.
216. See supra notes 93-101 and accompanying text.
217. See supra notes 131-34 and accompanying text.
218. See supra notes 135-37 and accompanying text.
219. A challenge might occur here that pragmatists would value law’s settling effects least of all, that they would be interested in the results of particular cases in isolation rather than in rules. Skepticism of realists (in many respects influenced by pragmatism, see supra note 169) toward rules might seem to support this. See, e.g., Schlegel, American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore, 29 BUFFALO L. REV. 195 (1980). However, the problem with such a challenge is that it overlooks both the instrumental value legal pragmatism attaches to the effective operation of courts as a whole, see supra note 168, and the importance Dewey assigned to rules as a means of standardizing growth and improvement through human experience. Dewey, Logical Method and Law, 10 CORNELL L.Q. 17, 19, 27 (1924). Dewey sought a balance here:

It is most important that rules of law should form as coherent generalized logical systems as possible. But these logical systemizations of law in any field . . . are
of the quandary may exist. The choices facing the Supreme Court in Will would no longer appear equally impoverished, for coherence and stability in law is a goal of judicial reasoning.\textsuperscript{220} Coherence as a pragmatist value encompasses both coherence in law's theoretical justification and relative ease of law's application.\textsuperscript{221} I will attempt to suggest why the Court's options differ at this level, and why excluding states from section 1983 makes law more coherent overall.

First, Will works one positive effect exclusively on federal litigation. The decision obviates the most egregious applications of unstable eleventh amendment doctrine originating in \textit{Hans} v. \textit{Louisiana}.\textsuperscript{222} In \textit{Hans} the Supreme Court invoked the eleventh amendment to bar federal courts from hearing suits brought against unconsenting states by their own citizens. \textit{Hans}' notoriety stems from the great difficulty in squaring this ruling with the language of the amendment.\textsuperscript{223} Many commentators feel that \textit{Hans} should be overruled,\textsuperscript{224} and

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\textit{clearly in last resort subservient to the economical and effective reaching of decisions in particular cases.}\footnote{J. Dewey, \textit{Philosophy and Civilization} 129 (1931). "Dewey was influenced by Holmes and Pound, and he never associated himself with the realists. Attention to Dewey's approach would have saved the last from extreme and untenable statements that denigrate the role of logic in the law." Golding, \textit{supra\ note 50}, at 467.}

\textit{220. See, e.g., G. Christie, \textit{supra\ note 46}, at 44-82; L. Fuller, \textit{supra\ note 67}, at 81-82; N. MacCormick, \textit{supra\ note 46}, at 152-94; see also \textit{supra\ notes} 135-37 and accompanying text.}

\textit{221. See J. Dewey, \textit{supra\ note 219}; Dewey, \textit{supra\ note 219}.}

\textit{222. 134 U.S. 1 (1890).}

\textit{223. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. There is simply no room in this text to fit citizen suits like \textit{Hans}. Pennsylvania v. Union Gas Co., 109 S. Ct. 2273, 2286 (1989) (Stevens, J., concurring); Shreve, \textit{supra\ note 108}, at 608-10. As Professor Lawrence Marshall wrote of \textit{Hans} and related decisions, "it is . . . difficult to think of any other facet of the Constitution with respect to which the Court has reached results so obviously inconsistent with the words used by the framers." Marshall, \textit{Fighting the Words of the Eleventh Amendment}, 102 Harv. L. Rev. 1342, 1345 (1989). Similarly, bleak appraisals are numerous. See, e.g., L. Tribe, \textit{American Constitutional Law} 173 (2d ed. 1987); Amar, \textit{Of Sovereignty and Federalism}, 96 Yale L.J. 1425, 1467 (1987); Fletcher, \textit{A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction}, 35 Stan. L. Rev. 1033, 1044 (1983); Gibbons, \textit{The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation}, 83 Colum. L. Rev. 1889, 1891 (1983).}

four Justices on the Supreme Court have expressed their desire to do so.\textsuperscript{225} Despite \textit{Will}, and despite a recent strengthening of Congress' authority to abrogate the eleventh amendment,\textsuperscript{226} \textit{Hans} remains a sore point.\textsuperscript{227} But \textit{Hans'} greatest impact probably was on real or potential litigation under section 1983. This was measurable in part by the proportion of section 1983 cases among those affected by \textit{Hans},\textsuperscript{228} and in part by the disturbing impression that the Supreme Court had, by turning the language of the eleventh amendment inside out, placed damage recovery just out of the reach of plaintiffs suing states for violations of federal rights.\textsuperscript{229} \textit{Will} dispelled that impression. \textit{Hans} will not be overruled in the foreseeable future;\textsuperscript{230} however, that dubious decision will no longer dominate federal civil rights litigation. That may be cold comfort to plaintiffs as frustrated in federal court after \textit{Will} as before. This merely demonstrates, however, the persistence of political arguments for and against state amenability to suit.\textsuperscript{231} What changes is the emergence of a nonpolitical, pragmatist argument.


\textsuperscript{226} In \textit{Union Gas}, 109 S. Ct. at 2273, the Supreme Court upheld Congress' authority under the commerce clause of the Constitution to abrogate the eleventh amendment by exposing states to suit. The Court recognized such authority for Congress prior to \textit{Union Gas}, but perhaps only for statutes based on § 5 of the fourteenth amendment. \textit{Union Gas} does not resolve the question whether Congress' abrogation power extends to the full reach of its legislative competence, but that power now seems considerable. See generally Note, Pennsylvania v. \textit{Union Gas}: \textit{Congressional Abrogation of State Sovereign Immunity Under the Commerce Clause, or, Living With Hans, 58 FORDHAM L. REV. 513 (1989). The Supreme Court recently granted certiorari in another case involving the commerce clause and the eleventh amendment. Hoffman v. Native Village of Noatak, 59 U.S.L.W. 3213 (Oct. 2, 1990).


\textsuperscript{229} Cf. \textit{Quern} v. Jordan, 440 U.S. 332, 365 (1979) (Brennan, J., concurring) (arguing that to subject federal § 1983 suits to the eleventh amendment denies claimants the range of remedies provided in the statute).

\textsuperscript{230} Chemerinsky, \textit{supra} note 118, at 331.

\textsuperscript{231} \textit{See supra} notes 102-130 and accompanying text; cf. \textit{Brown}, \textit{supra} note 227, at 871 ("Balancing concerns of national supremacy with concerns of state sovereignty can never be done to the satisfaction of both sides.").
that supports Will: law becomes more coherent by excluding states from section 1983 because decision in a significant category of cases no longer turns on a bogus reading of constitutional text.\textsuperscript{222}

It is perhaps ironic that it is easiest to demonstrate how Will, a state case, lends coherence to federal litigation. The picture grows more complicated when one examines Will’s practical consequences for state proceedings. In this analysis, the pragmatist focus shifts from coherence of the theoretical underpinning for a rule (the problem in Hans) to coherence in a law’s application. This inquiry proceeds with the question of whether the Court’s or the dissent’s interpretation of “person” in Will is more likely to generate uncertainty in state court litigation under section 1983?

In these terms, one must acknowledge that the most obvious effects of Will on state litigation are those counting against it. By aligning section 1983 with eleventh amendment doctrine, Will seems to introduce into state litigation uncertainties afflicting the latter. Three distinctions derived from the Court’s eleventh amendment jurisprudence, which have been elusive in content and perplexing in application, now hover over state litigation under section 1983: state versus municipal defendants,\textsuperscript{223} retroactive versus prospective relief\textsuperscript{23} and official-capacity versus personal-capacity defendants.\textsuperscript{225} State courts may have already been accustomed in part to these distinctions,\textsuperscript{226} but one can expect some upheaval as a result of Will. If states

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\item[222.] See supra note 223 and accompanying text.
\item[223.] See supra note 93. The distinction is not altogether rational, since the distribution of functions between states and municipalities (or other political subdivisions) varies greatly. Moreover, certain entities have been difficult to classify. See, e.g., Clague, \textit{Suing the University “Black Box” Under the Civil Rights Act of 1871}, 62 \textit{Iowa L. Rev.} 337 (1976). Finally, this distinction may even frustrate suits against municipalities, depending upon whether an unreachable state defendant is deemed to be indispensable to the lawsuit. See \textit{Pennhurst State School & Hosp. v. Halderman}, 465 U.S. 89 (1984) (a state protected by the eleventh amendment and indispensable).
\item[225.] The distinction is important because the liability of local or state officers acting in their official capacities is likely to be pegged to that of their governmental unit. That exposure is usually less than the same persons have when sued as individuals. S. \textit{NAHMOD}, supra note 2, at § 6.14. The distinction can be elusive in application. \textit{Id.} at § 6.04. For an example at the state government level, see \textit{Graham}, 473 U.S. at 159 (1985).
\end{enumerate}
\end{footnotesize}
were "person[s]" under section 1983, state courts would not have to struggle with any of these matters in applying the statute.\(^\text{237}\)

On the other side, the skein of possible consequences from the dissent's reading of section 1983, that states are "person[s]" under section 1983, is not easy to untangle. What can be said is that reading states into the statute would have left additional questions concerning state damage liability for disgruntled state courts to grapple with. Combined, these complications might have been more unsettling than \textit{Will}'s actual effects on state litigation.

Let us examine an important aspect of the picture easily overlooked. The new subcategory of section 1983 law which would have followed the dissent's reading of the statute would not have been administered by lower federal courts. Instead, it would have been entrusted to state judges (with the periodic intercession of the United States Supreme Court).\(^\text{238}\) Many state judges would not approach this task with much enthusiasm, perplexed at a reading of federal law denying them the same authority to protect their states that federal judges have.\(^\text{239}\)

This is not to say that state judges would rebel by entertaining state sovereign immunity as a defense to damage actions under section 1983.\(^\text{240}\) But it is unlikely that these judges would be aggressive in filling any gaps in the law necessary to facilitate enforcement of the statute.\(^\text{241}\) If there were

S.W.2d 480, 482-83 (1937); Ables v. Mooney, 264 S.E.2d 424, 429-30 (W. Va. 1979); Metzger v. Wisconsin Dep't of Taxation, 35 Wis. 2d 119, 132-34, 150 N.W.2d 431, 438 (1967); Rocky Mt. Oil & Gas Ass'n v. State, 645 P.2d 1163, 1166 (Wyo. 1982). \textit{But see} Hurst v. Highway Dep't, 16 Utah 2d 153, 154-56, 397 P.2d 71, 73-74 (1964) (rejecting the distinction and invoking sovereign immunity to bar prospective as well as retroactive relief).

\(^\text{237}\) The beneficial effect of such a result in \textit{Will} would be comparable to that generated by Monell v. Department of Social Servs., 436 U.S. 658 (1978). By placing municipalities within the scope of § 1983, \textit{Monell} greatly eased problems which had existed in distinguishing between official-capacity and individual-capacity municipal officers and between prospective and retroactive relief. \textit{See} S. Nahmod, \textit{supra} note 2, at §§ 6.01-.07.

\(^\text{238}\) Given the federal-question character of state litigation under § 1983, the United States Supreme Court could be expected periodically to exercise its discretionary appellate jurisdiction. However, here as in other areas of federal law enforcement there would have been concern whether the Court offered a sufficient prospect superintendence. Commentators have questioned whether the Supreme Court can be counted upon to review enough cases. Stoltz, \textit{Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity}, 64 CALIF. L. REV. 943 (1976); cf. Baker & McFarland, \textit{The Need for a New National Court}, 100 HARV. L. REV. 1400, 1400 (1987) ("By any measure, the Supreme Court is tremendously overburdened.").

\(^\text{239}\) Or the matter could be stated in terms of obligation. Federal judges would be obligated under the eleventh amendment to honor state sovereign immunity in damage suits against states, while state courts would be pressured under (the dissent's reading of) § 1983 to entertain the same cases. The Court in \textit{Will} noted this anomaly. Will v. Michigan Dep't of State Police, 109 S. Ct. 2304, 2309 (1989).


\(^\text{241}\) Irritation over the anomaly would add to the general reluctance of many state judges to read federal law (here § 1983) as broadly or as sympathetically as federal judges might. \textit{See} supra notes 121-22 and accompanying text.
difficult issues unanswered by the dissent’s opinion concerning aspects of damage recovery against states, adoption of the dissent’s reading of section 1983 would have left double uncertainty—the issues themselves and their commitment to the reluctant stewardship of state courts. At least two additional issues would remain: whether state courts might refuse jurisdiction, and whether the developing content of section 1983 would in fact lead to extensive damage recovery against states.

If states are persons under section 1983, actual damage recoveries would follow only if state courts exercised jurisdiction over section 1983 claims. Their authority to do so is settled.\(^2\) The question is whether they are obliged to exercise that authority, or are, instead, free to decline jurisdiction. The supremacy clause gives states more leeway in deciding whether to take jurisdiction over federal claims\(^2\) than in deciding how to interpret federal law once they accept jurisdiction.\(^2\) Until very recently, it was unclear when or whether state jurisdiction over section 1983 actions was obligatory.\(^2\) The Supreme Court has now shed some light on the matter, requiring a Florida state court to exercise jurisdiction over a section 1983 damage claim against a municipality in *Howlett v. Rose*.\(^2\)

That case, however, leaves doubt about results under less compelling circumstances. Even assuming *Howlett* would have been decided the same way if *Will* had read "person[s]" to include states, at least two factors limiting *Howlett* would make jurisdiction in damage suits against states somewhat uncertain. First, Florida courts had already entertained section 1983 claims against individual officials;\(^2\) therefore, the Court cast Florida in the position of having accepted jurisdiction in section 1983 cases and sidestepped the issue of whether states could decline such jurisdiction entirely.\(^2\) Second, *Howlett* placed weight on the fact that Florida courts

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242. Jurisdiction over § 1983 claims does not rest exclusively in federal courts. See supra note 3 and accompanying text.
245. S. NAHMOD, supra note 2, § 1.13; S. STEINGLASS, supra note 3, §§ 9.1, 9.3.
246. 110 S. Ct. 2430 (1990). *Howlett* involved the possible refusal of a Florida state court to take jurisdiction over a § 1983 damage case against a local school board and school officials. The Supreme Court concluded that "the Florida court's refusal to entertain one discrete category of § 1983 claims, when the court entertains similar state law actions against state defendants, violates the Supremacy Clause." *Id.* at 2442.
247. *Id.* at 2444 & n.22.
248. The Court thus identified as an issue it would not decide "whether Congress can
routinely entertained quite similar suits against municipalities based on state tort law. 249

As a more basic matter, it is misleading to assume that the plaintiff would have done as well if the reading of section 1983, available to the Howlett Court, was that states were persons within the statute. Because Will instead excluded states from section 1983 coverage, a unanimous Court in Howlett was able to use the earlier case to soft-pedal the effect of its decision, reminding readers that state sovereign immunity was built into section 1983:

The anomaly identified by the State Supreme Court, and by the various state courts which it cited, that a State might be forced to entertain in its own courts suits from which it was immune in federal court, is thus fully met by our decision in Will. Will establishes that the State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit under § 1983 in either federal court or state court. 250

It is not so much that Howlett would have been decided differently if Will had been. More likely, the Supreme Court would have denied certiorari in Howlett, giving more leeway to states forced to deal with the "anomaly." 251

require the States to create a forum with the capacity to enforce federal statutory rights." Id. at 2444. Since most state courts have recognized at least limited § 1983 jurisdiction, the question now would likely be whether a state court can change its position and refuse to recognize § 1983 jurisdiction altogether. Such a move would not be tantamount to denying state court remedies for federal rights. State courts appear competent to fashion civil remedies from their own law for this purpose. See Wolcher, supra note 8, at 234-35; cf. S. Steinlass, supra note 3, at 9-15 (footnote omitted) ("even in cases in which states cannot be named as defendants under § 1983, states may still be liable for federal constitutional violations in state-created causes of action to enforce federal claims").

Perhaps the Supreme Court would apply the "valid excuse" principle used in Howlett to prevent Florida courts from discriminating between types of § 1983 jurisdiction, Howlett, 110 S. Ct. at 2444, and to prevent courts of a state from refusing § 1983 jurisdiction altogether. Yet it is uncertain that the Court would or should do so. There is much to the argument that an obligation on state courts to hear cases involving federal law should not be implied from the mere fact of concurrent jurisdiction. Sandalow, Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine, 1965 SUP. CT. REV. 187. True, the Supreme Court has not required a clear statement from Congress before requiring state courts to exercise the jurisdiction they hold concurrently with lower federal courts. E.g., Testa v. Katt, 330 U.S. 386 (1947). But, since considerable effort was required to establish that state courts were even competent to hear such cases, see S. Steinlass, supra note 3, 9-5 to 9-9, it seems more difficult to argue that this form of concurrent jurisdiction is mandatory for them.

249. Howlett, 110 S. Ct. at 2444-45. To the extent that state law might not contain a basis for damage recovery against a state as defendant, an analog important to Howlett might be absent.

250. Howlett, 110 S. Ct. at 2437.

251. In its enormous discretion, the Supreme Court is certain to deny most certiorari petitions, usually without giving a reason. It is therefore impossible to explain particular certiorari denials. See R. Stern, E. Grossman & S. Shapiro, Supreme Court Practice §§ 5.5, 5.7 (6th ed. 1986); Linzer, The Meaning of Certiorari Denials, 79 COLUM. L. REV. 1227,
Because the actual decision in Will excluded states from section 1983 coverage, it permitted the Court to avoid another difficult issue: the immunity states would have possessed when sued for damages. This question is not whether states would have enjoyed an immunity defense in damage actions under section 1983 but how extensive that defense would have been.252 The closest model under present law is found in the immunity enjoyed by municipal governments.253 Neither could expect to enjoy absolute immunity from damage actions, for that would negate a holding that they were covered by section 1983.254 Yet, had Will designated states as persons under section 1983, states would seem at least as entitled as municipalities to have their exposure under the statute limited.255

From early developments256 until the present,257 municipal immunity from section 1983 damage liability has been a difficult and controversial issue. Recent cases suggest that matters are still in flux.258 At the same time, the

1251-55 (1979). Yet it seems clear that Justices can regard delay as a virtue. In what is perhaps the most famous opinion on certiorari policy, Justice Frankfurter wrote: "It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening." Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 918 (1950); see also R. Posner, THE FEDERAL COURTS 163 (1985).

252. Section 1983 makes no reference to government and government-official immunity; however, the Supreme Court's view has most often been that Congress intended the statute to conform around those immunities. E.g., Owen v. City of Independence, 445 U.S. 622, 638 (1980), reh'g denied, 446 U.S. 993 (1980). The result has been to entertain as federal law differing immunity defenses depending on the type of defendant, acts alleged and type of relief sought. See 13B C. WRIGHT, A. MILLER & E. COOPER, supra note 94, at § 3573.3


254. See S. NARMOD, supra note 2, § 6.17, at 379.

255. For the suggestion that states might actually be entitled to more immunity, see infra notes 265-67 and accompanying text.

256. See supra note 93.


emerging picture is not a terribly encouraging one for plaintiffs. *Monell* made clear that municipalities are not liable for the wrongs of their employees under a theory of *respondeat superior*.259 Instead, municipalities are liable only for the wrongful acts they authorize.260 No immunity exists when a municipality has officially directed challenged conduct. But formal liability is relatively unimportant in such cases, because municipalities would likely pick up the tab for damages even if not liable themselves.261 A more significant consequence of exposure under the statute occurs in some damage cases where municipalities unsuccessfully seek to distance themselves from the conduct of their employees.262 However, the prospect of recovery in such cases has been uncertain.263

The thrust of the extensive criticism of current law is that, along with the qualified immunity enjoyed by individual local and state officials, the limited exposure of municipalities to liability blocks much of what should be the effective reach of section 1983.264 This suggests that a measure of damage immunity for states accompanying an opposite result in *Will* would have made uncertain the federal law enforcement advantages sought by making states persons under section 1983. Two final points make this seem even more likely. First, state immunity doctrine under section 1983 would probably have been greater than municipal immunity. The Court has attached significance to the condition of the immunities law at the time Congress passed the Civil Rights Act of 1871,265 and one finds considerable support for the view argued by the majority in *Will* and in *Quern v.  

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259. *Monell*, 436 U.S. at 691.

260. See, e.g., City of Oklahoma City v. Tuttle, 471 U.S. 808, 817 (1985), reh'g denied, 473 U.S. 925 (1985) ("*Monell* teaches that the city may only be held accountable if the deprivation was the result of municipal 'custom or policy.'"); cf. Rudovsky, *supra* note 252, at 34-35 (*Monell* and other cases "expressly condition liability under § 1983 on the factor of governmental authorization."). Commentators have noted that this greatly limits the damage exposure of municipalities under § 1983. E.g., Mead, 42 U.S.C. § 1983 Municipal Liability: The *Monell* Sketch Becomes a Distorted Picture, 65 N.C.L. Rev. 518 (1987); Comment, Section 1983 Municipal Liability and the Doctrine of *Respondeat Superior*, 46 U. Chi. L. Rev. 935 (1979).

261. Even if municipalities were not "person[s]" under the statute, they would probably indemnify recoveries against their employees sued under § 1983 in their individual capacities, since the employees would have incurred liability merely by "implementing official policy." P. Low & J. Jeffries, *supra* note 253, at 79.


263. Frequently the problem is in finding a single actor who is both involved in the commission of the alleged wrong and in a position within the municipal structure to be regarded as a policy maker. *Tuttle*, 471 U.S. 808, provides an example. See generally Oliver, *Municipal Liability for Police Misconduct Under 42 U.S.C. Sec. 1983 After City of Oklahoma City v. Tuttle*, 64 Wash. U.L.Q. 151 (1986).

264. Kramer & Sykes, *supra* note 257; Mead, *supra* note 260; Rudovsky, *supra* note 252; Schuck, *supra* note 257; Snyder, *supra* note 257; Whitman, *supra* note 257; Comment, *supra* note 260; cf. Rudovsky, *supra* note 252, at 35-36 ("Qualified immunity has emerged as one of the most significant and problematic defenses to claims of civil rights violations.").

265. See *supra* note 252.
that state immunity at that time was a more vigorous doctrine. Second, recall that legal arguments over the reach of state immunity to damages will take place before state judges who may well be tempted to avoid the "anomaly" of rendering damage judgments against their states when federal judges would not.

3. How Much Real Difference? Pragmatism as a Form of Mediation in *Will*

This discussion opened with the assumption that either of the results prefigured by the conflicting political interpretations of section 1983 in *Will* could be achieved, and that the pragmatist concern was whether one of the results seemed more likely to promote coherence. As discussion of the results in application progressed, however, an additional possibility emerged. Uncertainty attending applications of the dissent's version of section 1983 might have led to results barely different from those likely to follow under the majority's reading. This illustrates how pragmatism may bear differently, moderating the conflict by demonstrating that strong political differences in theory fail to lead to commensurately different effects in statutory application.

A comparison of the results which might have followed the dissent's interpretation of section 1983 with those that have followed the majority's interpretation suggests far less difference than one might have expected from reading the *Will* opinions. Without suggesting that the balance between federal law enforcement and federalism (if such could be precisely measured) would rest at the same point under either approach, a fair pragmatist question would be: is the real difference between where the balance would rest worth the dissonance generated by the *Will* opinions?

True, the interpretation sought by the dissent in *Will*, that states are persons under section 1983, would encourage more claims under the statute in state courts. Yet significantly greater federal law enforcement (the dissent's objective) would depend upon a favorable resolution of two additional issues: mandatory state jurisdiction over section 1983 cases, and

268. *See supra* note 241 and accompanying text. On the other hand, states and state officers probably would have been exposed to some measure of increased damage liability had the dissent's interpretation of § 1983 prevailed. Professor Steinglass has suggested the possibility of a different result in cases like Edelman v. Jordan, 415 U.S. 651 (1974), where states act in direct and formal noncompliance with federal law. Telephone conversation with Professor Steinglass, Professor at Cleveland-Marshall College of Law, Cleveland State University (Aug. 29, 1990).
269. On the function of pragmatism in this setting, see *supra* notes 206-09 and accompanying text.
minimal immunity for states under the statute.\textsuperscript{270} It is far from certain when these points would be settled, and whether they would be settled in favor of section 1983 plaintiffs. It is therefore difficult to say that opportunities for section 1983 litigation in state courts would have been significantly greater under the dissent’s interpretation of the statute in \textit{Will} than under the majority’s interpretation.

\textbf{D. Symmetries of Access: Pragmatism Supplemen\textit{t}\textit{ing Politics} in \textit{Will}}

Influences of ordinary common sense are deeply embedded within our judicial tradition.\textsuperscript{271} The result-bound approach of pragmatist legal theory, then, does not offer entirely novel ways of considering \textit{Will} or other cases.\textsuperscript{272} A question in this Article persists: how and where does pragmatism fit? Can it claim the same stature and resonance in statutory interpretation as intentionalism, plain meaning and political interpretation? Much of the problem in aligning pragmatism with the other three perspectives is that the other three are substantively normative, while pragmatism is not.\textsuperscript{273} That is, intentionalism,\textsuperscript{274} plain meaning\textsuperscript{275} and political interpretation\textsuperscript{276} each reflect theories of value for why statutes require members of society to behave a certain way. It may seem easier to make interpretive arguments entirely within this dimension of substantive normativism. The argument, for example, could be between justice conceived by a particular group of legislators (intentionalism) or justice conceived by judges presented with the statute (political interpretation). Or the situation could be like that in \textit{Will}, where the Justices ultimately align their arguments around opposite poles of political interpretation.\textsuperscript{277}

Yet just as different substantive perspectives can interact to influence interpretation, so can pragmatism interact with substantive perspectives. The former can be illustrated by the fact that judges are more likely to read statutes in a way comporting with their own sense of justice (political interpretation) if that reading is not out of harmony with the plain meaning of the text, or with existing evidence of actual legislative intent.\textsuperscript{278} \textit{Will} offered two illustrations of the latter. The first assumed that the dissent’s

\textsuperscript{270} See supra notes 219-67 and accompanying text.
\textsuperscript{272} See supra notes 195-97 and accompanying text.
\textsuperscript{273} See supra note 200 and accompanying text.
\textsuperscript{274} See supra notes 86-88 and accompanying text.
\textsuperscript{275} See supra notes 32 & 92 and accompanying text.
\textsuperscript{276} See supra notes 37-41 and accompanying text.
\textsuperscript{277} See supra notes 102-30 and accompanying text.
\textsuperscript{278} Cf. Eskridge & Frickey, supra note 43, at 322-23 (describing how in “easy cases” support by different perspectives can be “mutually reinforcing”).
reading worked, significantly enhancing federal law enforcement opportunities in state courts. The second assumed that it did not.

First, to suggest that the pragmatist concerns raised in Part III(C)(2) above are immaterial to the dissent’s political argument in Will would be to say the degree of law’s coherence is immaterial, so long as obstacles of federalism will give way to greater federal law enforcement. Those who feel strongly about the importance of federal substantive rights and who are dissatisfied overall with opportunities for their vindication of course want change. However, such persons who act responsibly will not automatically support every proposal that facilitates greater federal law enforcement. They will be selective, weighing particular reforms against instrumental costs to the stature of the judicial process or clarity of the law. They will be most likely to act on their political impulses when they can do so in harmony with such pragmatist concerns.

Second, to suggest that the pragmatist concerns raised in Part III(C)(3) above are immaterial to the dissent’s political argument in Will would be to say that whether the opposed readings of the statute would have caused significant differences in application was immaterial, because to dissent would in any event provide the Justices an opportunity to express their distaste over what they regarded to be the exaggerated importance of federalism generally. It seems likely that, among commentators, the public at large and perhaps the Justices themselves, many are now weary of the Supreme Court’s emphasis on and dissension about politics. No one familiar with our system of government believes that politics can or should be banished from the Court. At the same time, the Supreme Court functions more awkwardly in the political spotlight than does Congress, and many rightly believe that the Court should distance itself from political controversy when possible. Pragmatism fits here by revealing that less in fact turns on which definition of “person” is accepted, and by making avoidance of political conflict for its own sake an instrumental goal. The latter helps to scale down the political side of the Court’s image and to avoid an overworked, needlessly dissonant use of political interpretation in reading section 1983.

It may be that these matters cannot be stated so openly in a judicial opinion without creating a certain awkwardness. Yet I doubt that incorporating these or other advertently pragmatist concerns would be any more

279. Apart from whatever harm Will might do to state court access for § 1983 plaintiffs, the dissent was clearly upset to see aspects of eleventh amendment doctrine which it so thoroughly disliked, see supra note 225, given additional life. See supra note 17 and accompanying text.

280. See supra notes 131-37 and accompanying text.

281. E.g., A. BICKEL, THE LEAST DANGEROUS BRANCH 113-16 (1962). But see supra note 137 (highlighting the writings of Beerman and Spann).
awkward than candid recognition of vying political arguments would have been in *Will.* It may be more difficult for the Justices to be candid when (as in *Will*) plain meaning and intentionalist approaches prove sterile. Yet it is still best for members of the Court to be honest to the public about what they want to do and why.282 I have tried to show in this Article that the Justices have *more* than political choices left to talk about in such cases, that they also have legal pragmatism to shape the content and enhance the stature of their decisions.

IV. SOME FINAL THOUGHTS ON PRAGMATISM IN STATUTORY INTERPRETATION

This Article maintains that, not only is pragmatism useful in statutory interpretation, but pragmatism’s theoretical base and means of application entitle it to a place within the jurisprudence of statutory interpretation with intentionalism (a variant of historical jurisprudence), plain meaning (a form of analytical positivism) and political interpretation (a reflection of natural law). There may be many angles from which this thesis might be attacked. Here are two.

The first criticism could be that the thesis is at best too theoretical and at worst antithetical to pragmatism—that we should keep the first three approaches to statutory interpretation off jurisprudential pedestals rather than erect a fourth for pragmatism. Some support for this criticism may be found in an interesting recent article.283 William Eskridge and Philip Frickey identified three perspectives in statutory interpretation similar overall to the three first discussed in this Article.284 At perhaps our most important point of agreement, the authors argue for a flexible, pluralist outlook in cases where approaches suggest conflicting answers, what Eskridge and Frickey call “the hard cases.”285 Here the authors decry the tendency of the Supreme Court in such cases to retreat into a single perspective, what they call a “foundationalist” approach.286

284. Two were essentially the same as two discussed here, intentionalism and textualism (textualism is the equivalent of plain meaning, see *supra* note 28). Their third, “purposivism,” is narrower than the model of political interpretation offered here. Compare Eskridge & Frickey, *supra* note 43, at 332-38 with political interpretation, *supra* notes 35-41 and accompanying text. Part of what is in my third category (but apparently not theirs) is what the authors revere as dynamic statutory interpretation. See *supra* note 35.
286. Eskridge & Frickey, *supra* note 43, at 324-25. “The demise of foundationalism, the attempt to find an indubitable ground for claims to knowledge and truths has been both charted and heralded.” Patterson, *supra* note 140, at 937. For further discussion of attacks on foundationalism, see Farber, *supra* note 140, at 1334-41.
Thereafter, however, we disagree. Eskridge and Frickey argue that the only way to avoid hard-case foundationalism is to deflate the traditional perspectives (what they call “grand theories”). Thus, my search for a theoretical justification or jurisprudential understanding of these perspectives might seem to them pointless labor. On the other hand, I have tried to suggest why a search for the full value of legal pragmatism requires an attempt to understand rather than to debunk nonpragmatist theories. The vitality of nonpragmatist theories is important to the vitality of pragmatism, since what sustains and makes important applications of pragmatism explored in this Article is interaction with nonpragmatist theories.

In contrast, Eskridge and Frickey attempt to use pragmatism to demonstrate how the legal order that gave us grand theories is becoming unstuck. This seems to be an impoverished form of pragmatism, certainly not one sustained by the optimistic view of society held by William James and John Dewey. It is difficult to accept the suggestion implicit in their article that Eskridge and Frickey have pushed pragmatism to its limits as useful legal theory. It is worth exploring whether freestanding pragmatist theory can be more than a weapon for cutting big ideas down to size, whether it might also have a more active and affirmative side. The authors are right in giving pragmatist theory at least some life of its own. Their error may be that, in using pragmatism as a leveling device, they have leveled pragmatism as well. To investigate the possibility of affirmative pragmatism, we must see if pragmatism can be understood through (or as) jurisprudence. That in turn requires some attention to nonpragmatist elements within a larger jurisprudential community in order to place pragmatism in context.

A second criticism of my thesis could be that, in the final analysis, there is just not enough system or substance to pragmatism for it to be on a

287. Eskridge & Frickey, supra note 43. Eskridge and Frickey argue that what they call grand theories (intentionalism, textualism and purposivism) may engage the interest of the Supreme Court but have little influence on how most lawyers think and what most judges do in fact. Id. at 321. The authors suggest that grand theories are for the Supreme Court a kind of attractive nuisance leading it toward foundationalism. Id. at 322 (“failure to recognize that statutory interpretation will work in different ways in different concrete cases”).

288. Perry wrote of James: “He had uncompromising convictions and an unusual power both of advocacy and of denunciation, but so strong was his humanity that nothing aroused real hostility in him—except inhumanity.” 1 R. Perry, supra note 151, at 122. “James was not given to climbing onto soapboxes, but his moral thought was activistive, as is clear from his lectures, teaching, writing, friendships, and activities supporting social change.” G. Myers, supra note 145, at 424.

289. Dewey was a strong humanist with a lifelong belief in the capacity for progress of a democratic society. “Democracy” was to him “a reflective faith in the capacity of all human beings for intelligent judgment, deliberation, and action if the proper conditions are furnished.” Bernstein, Dewey, Democracy: The Task Ahead of Us, in POST-ANALYTIC PHILOSOPHY 48, 49 (J. Rajchman & C. West eds. 1985); see also J. Habermas, TOWARD A RATIONAL SOCIETY 69 (J. Shapiro trans. 1970); S. Hook, John Dewey: An Intellectual Portrait 226-39 (1939); H. Putnam, supra note 176.
plane with the other three approaches to statutory interpretation, perhaps not even enough to consider it as independent legal theory. I have more sympathy for this criticism. Readers might find helpful the pragmatist insights attempted in this Article about Will and statutory interpretation, yet remain unconvinced that pragmatist theory offers material for a fully distinct approach to statutory interpretation. Similarly, they may see little useful difference between pragmatism as a fourth approach and pragmatism as a value built into each of the three traditional approaches to statutory interpretation. My suggestions to the contrary are merely exploratory. I do believe, however, that pragmatism offers something tangible and affirming for legal theory, something beyond ad hoc appeals to practicality. The project of building something more out of pragmatism is a useful one which undoubtedly will continue. James and Dewey might have liked that.